

Before the

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

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 In the Matter of Arbitration between: :
 :
 MERCER INTERNATIONAL INC., :
 :
 Claimant, :
 : ICSID Case No.
 and : ARB(AF)/12/3
 :
 GOVERNMENT OF CANADA, :
 :
 Respondent. :
 :
 - - - - - x Volume 8

HEARING ON JURISDICTION AND THE MERITS

MAY CONTAIN RESTRICTED ACCESS AND CONFIDENTIAL
INFORMATION

Friday, July 31, 2015

The World Bank Group
701 18th Street, N.W.
"J" Building
Assembly Hall B1-080
Washington, D.C.

The hearing in the above-entitled matter came
on, pursuant to notice, at 9:30 a.m. before:

- MR. V.V. VEEDER, President of the Tribunal
- PROF. FRANCISCO ORREGO VICUÑA, Co-Arbitrator
- PROF. ZACHARY DOUGLAS, Co-Arbitrator

02:17:27 1 hours, and he had no proof whatsoever that, even
2 during those <[REDACTED]>-gigawatt hours, there had been
3 burning of natural gas.

4 Mr. Merwin alleged there were hog fuel costs
5 but admitted on cross-examination that there weren't
6 any hog fuel costs. Now, he would later say there was
7 an opportunity cost, and I'll be fair to him there,
8 but he didn't talk about sales of hog fuel. He talked
9 about hog fuel costs. [REDACTED] [REDACTED]

[REDACTED] [REDACTED] that they
11 needed that thermal energy during the winter at least
12 some of the time.

13 His next theory was that they would operate
14 the Mill in thermal balance, only providing enough
15 steam for the mill to meet its thermal needs and that
16 they would do so by presumably reducing the amount of
17 steam going to the production process. But it doesn't
18 make much sense. There are two loads here. There's a
19 thermal load that they need for their pulp production
20 process, and then if they want to meet their
21 electrical load, which is higher, they need to put
22 more steam through that turbine. If they don't meet

02:18:50 1 their electrical load, if they are not putting more
2 steam through the turbine to meet their electrical
3 load of 349-gigawatt hours, they have to pay the
4 difference to FortisBC in terms of the rates. And the
5 rates at that time were a time-of-use rate. Sometimes
6 that was as much as \$150 a megawatt hour. Why would
7 they operate in thermal balance? And this is
8 something that Mr. Stockard pointed out in his Second
9 Expert Report.

10 The last theory that we heard is that
11 Mr. Merwin would have the Mill vent high-pressure
12 steam off the high-pressure header. But in reality,
13 that would have imposed additional costs, too. It
14 would have meant that essentially the pulp mill would
15 have had to spend more money taking in water to
16 replace some of that steam and treating it. That is
17 potentially more expensive.

18 BC Hydro negotiated GBL with the Claimants
19 that it could procure new or incremental electricity.
20 The Claimant's GBL and the Exclusivity Clause were
21 negotiated terms of the EPA. The Claimant could take
22 the EPA or alternatively develop another opportunity.

02:20:00 1 It talks all the time about these prices that were
2 existent for a brief period of time on Mid-C of
3 approximately < [REDACTED] > a megawatt hour from time to time.
4 And prices were high then. There is no doubt about
5 it. It could have taken that opportunity. It could
6 have made forward sales in the Mid-C market. It would
7 have been a very, very poor opportunity because the
8 Mid-C market collapsed after that, and the prices have
9 basically remained very low ever since. But it had
10 that option.

11 The Claimant's objections to the Exclusivity
12 Clause were identified early on, and they were dealt
13 with through the Side Letter Agreement. Mr. Merwin
14 admitted in cross that they were essentially leaving
15 the issue of the Side Letter Agreement to the British
16 Columbia Utilities Commission. And he conceded the
17 negotiations weren't BC Hydro strong-arming them.
18 They were very amicable. Officials were very polite.
19 They wanted to do a deal just like Celgar wanted to do
20 a deal. Celgar wanted the assurance of an EPA.
21 BC Hydro's officials wanted to secure [REDACTED] gigawatts of
22 firm electricity.

02:21:09 1 The Claimant willingly decided to leave the
2 issue to the Utilities Commission despite the
3 regulatory risk that had been identified by its
4 consultant and reiterated by FortisBC.

5 So, let's talk about comparisons to other
6 pulp mills. Let's go to Tembec first. Again, just by
7 way of background--and I'll move through this
8 quickly--in 2006, the EPA became--Tembec's existing
9 EPA, << [REDACTED]

10 [REDACTED] In late 2007, Tembec would approach
11 BC Hydro to say "Can we renegotiate this?"

12 And BC Hydro would say "No. Please try and
13 go to the Bioenergy Call for Power." And in the
14 context of the Bioenergy Call for Power, << [REDACTED]

15 [REDACTED]
16 [REDACTED] > It didn't work for
17 them. It wasn't a good process for them. They ended
18 up being unsuccessful.

19 In December 2008 as << [REDACTED] [REDACTED]
20 [REDACTED] they approached
21 BC Hydro again and asked to renegotiate the EPA. And
22 the Parties agreed on a GBL that reflected how the

02:22:20 1 Mill would operate in the absence of the 1997 EPA in
2 the spring of 2009, and the EPA was concluded later
3 that year.

4 So, three phases to this. The first phase is
5 that Tembec was operating under the 1997 EPA and it
6 << [REDACTED] [REDACTED] And then the Parties assumed that
7 Tembec << [REDACTED] >>. And
8 at Phase III they were essentially operating under the
9 2009 EPA. Now, what the Claimant really wants is a
10 comparison between Phase I and Phase III. But what
11 the Parties agreed was reasonable in this commercial
12 renegotiation was a comparison between Phase II and
13 Phase III.

14 We brought in Mr. Lague, a very honest man.
15 He's testified that the agreement's << [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [REDACTED] The statements
20 that we produced to the Claimant showed one EBITDA
21 analysis having [REDACTED] in 2008.

22 Now let's talk about some of the testimony we

02:23:39 1 had as to whether this was commercially viable.
2 Mr. Switlischoff provided testimony on behalf of
3 Claimant and said there would be a << [REDACTED]
4 [REDACTED] But he incorrectly
5 assumed that all of the electricity purchases < [REDACTED]
6 [REDACTED] He didn't account
7 for the [REDACTED]>> at all. And he incorrectly
8 attributes a benefit to the << [REDACTED] of demand
9 charge. He basically said the demand charge would
10 increase from where it actually was at around [REDACTED]
11 [REDACTED] so that there would be this
12 great change in Contract demand for Tembec.

13 Mr. Lague, however, provided you with--he
14 basically ran the numbers for us. He properly
15 accounted for avoided electricity purchases
16 << [REDACTED] >>, and he properly found
17 and explained why there would be no change in the
18 actual demand charges and that they would remain
19 substantially the same. He explained that the mill

20 << [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

02:24:46 1 We've been accused by the Claimant in its
2 opening of--they said that they would present a hog
3 and bull story. Well, we have the hog story; they
4 have the bull story. In reality, Tembec would have

5 << [REDACTED]
6 [REDACTED] Okay.

7 The Claimant has posited three reasons why it
8 would have been economic. << [REDACTED]

9 [REDACTED] > But that
10 was really the << [REDACTED] > problem. The continued

11 << [REDACTED]
12 but that--there has been no evidence to bear that out
13 that's credible. And it also suggested that
14 significant volumes of hog fuel remained economic.

15 So, again, Mr. Lague explained that the

16 << [REDACTED]
17 [REDACTED]

18 [REDACTED] And he's
19 testified that his priorities from his managers were

20 to << [REDACTED] He had
21 been following << [REDACTED]

22 [REDACTED]

02:26:00 1

[REDACTED]

[REDACTED]

3 And, finally, he explained that there were

4 [REDACTED]

[REDACTED] There was no analysis done by the Claimant

6 of the actual quality of the [REDACTED] And you heard

7 from Mr. Lague that the << [REDACTED]

8 that the Claimant placed so much stock in was actually

9 the << [REDACTED] >> that they had. They had engine

10 blocks in there, air-conditioners, and all sorts of

11 things. Its heat value wasn't good. And if you were

12 [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

15 Mr. Switlishoff admitted that he was not an

16 expert on [REDACTED] operations, and he also admitted

17 that he was not an expert on fiber supply. Mr. Lague

18 has been working at Skookumchuck since 1987. He was

19 Project Engineer and the Energy Coordinator at the

20 Mill at the relevant time, and he's been operating the

21 << [REDACTED] since 2000.

22 He's testified that << [REDACTED] [REDACTED]

02:27:07 1 [REDACTED]

2 [REDACTED] [REDACTED] Let's go to that now. This is

3 essentially what we want to explain to you and just

4 make clear in terms of the Contract. So, this is what

5 the <<[REDACTED]>> was essentially doing. It was <<[REDACTED]

6 [REDACTED]

7 [REDACTED] [REDACTED]

8 [REDACTED] [REDACTED] And then when it

9 was firing at a rate of <<[REDACTED] its efficient

10 rate, as Mr. Lague has testified, that would get it

11 <<[REDACTED]

12 [REDACTED] [REDACTED] [REDACTED] [REDACTED]

13 [REDACTED] [REDACTED]

14 [REDACTED] at the top. This is based on

15 <<[REDACTED]> data.

16 So, what would have happened without the [REDACTED]

17 [REDACTED] [REDACTED]

18 [REDACTED] [REDACTED]

19 [REDACTED] [REDACTED]

20 [REDACTED] [REDACTED]

21 [REDACTED] [REDACTED]

22 [REDACTED] [REDACTED] And there would also be <[REDACTED]>

02:28:28 1 self-generation capacity. BC Hydro's own analysis
2 from--shows that that << [REDACTED]
3 [REDACTED] a year.

4 Now, Mr. Shor is fond of saying there is no
5 analyses. At one point he was referring to R-189,
6 which is Mr. Keir's memo. And just to refresh your
7 memory, Mr. Keir works at BC Hydro. He was a former
8 key accounts manager for Tembec Skookumchuck, and he
9 produced a long analysis of what the situation was
10 there. It basically reflects these numbers that I've
11 just referred to about the << [REDACTED]

12 [REDACTED]
13 Mr. Shor has argued that the Tembec EPA let
14 Tembec sell more than double the amount of electricity
15 could sell to BC Hydro, and Tembec did so by
16 increasing its electricity purchases from BC Hydro.
17 Pure additional arbitrage according to him. But for
18 the purposes of the 2009 EPA, they were trying to
19 figure out how Tembec would have operated afterwards,
20 and that's the key critical difference. When they are
21 properly compared, there's no increase in purchases.
22 Okay. So, here you can see without an EPA what would

02:29:35 1 have happened, << [REDACTED]
2 [REDACTED] [REDACTED], and compare it now to the 2009 EPA
3 where essentially the GBL was set at [REDACTED]
4 [REDACTED]

5 Mr. Lague has testified that the Parties
6 agreed to an average hourly GBL of 14 megawatts and
7 that he believed that this was a fair compromise and
8 allowed Tembec and BC Hydro to continue negotiating
9 the rest of the EPA.

10 Howe Sound, unchallenged. Fred Fominoff, the
11 general manager of fiber and energy at Howe Sound,
12 testified about some of the << [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] This

21 Witness wasn't challenged at all by the Claimant.
22 Here are the levels for the Howe Sound EPA.

02:30:49 1 I must draw something to the Tribunal's
2 attention. For some reason in our Opening, we had
3 different megawatt hours than was reflected on this
4 chart. This chart is accurate. So, I apologize for
5 that in advance. Somehow there was a problem
6 with--when we were pulling the materials together.
7 So, this is accurate. The Opening is not.

8 PRESIDENT VEEDER: Do you recall which slide
9 that was in your Opening?

10 MR. OWEN: I do not have it off the top of my
11 head, but I will get it for you, Mr. President.

12 PRESIDENT VEEDER: Thank you.

13 MR. OWEN: BC Hydro rejected Howe Sound's
14 proposal of GBL based on <[REDACTED]>-megawatt hours.

15 Instead it decided to use <<[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] These problems aren't
18 contested by the Claimant. Mr. Switlishoff has even
19 agreed that there were problems there. And they chose
20 a period between <<[REDACTED]

21 for a few reasons. Again, there was a <<[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

02:31:53 1 [REDACTED] [REDACTED] Howe
2 Sound also << [REDACTED]
3 [REDACTED]
4 [REDACTED] [REDACTED]
5 [REDACTED] And then the data
6 was [REDACTED] So they decided to << [REDACTED] >
7 it in this manner.

8 Mr. Shor, again, wanted this to be a formula.
9 He wanted the GBL spreadsheet that you saw to be a
10 formula. And Mr. Dyck explained, no, the spreadsheet
11 was information and data relating to << [REDACTED]
12 [REDACTED] [REDACTED]

13 [REDACTED] One of the
14 things they were talking to Fred Fominoff about was
15 [REDACTED] [REDACTED]
16 [REDACTED] [REDACTED] [REDACTED] [REDACTED]

17 [REDACTED] [REDACTED] That's a key role that the
18 key account managers play.

19 So, again, the circumstances of Howe Sound's
20 [REDACTED] >>.
21 Generation--and this refers to the << [REDACTED]
22 [REDACTED] [REDACTED]

02:33:12 1 Those <[REDACTED]>, if you look, are fully explained in the
2 Witness Statement. Those type of <<[REDACTED]> are fully
3 explained in the Witness Statement of Pierre Lamarche,
4 the First and Second Witness Statements. <<[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED] Again, that evidence isn't
8 contested by the Claimant. They didn't even bother
9 cross examining Mr. Lamarche.

10 So, again, they arrived at a GBL of
11 <[REDACTED]>-gigawatt hours a year for Howe Sound. And
12 Mr. Fominoff has said that he believed the GBL was set
13 on clear principles articulated by BC Hydro and was
14 fair to both Parties. That's unchallenged.

15 Finally, I've touched briefly on--I've
16 touched briefly on the fact that the BCUC, when it's
17 dealing with procurement GBLs has--determines whether
18 or not they're in the public interest and looks at
19 that. They have the power to either accept for filing
20 the GBL or declare it unenforceable in whole or in
21 part. Celgar didn't oppose its EPA or its procurement
22 GBL, and the BCUC issued an Order accepting Celgar's

02:34:31 1 EPA along with three others under Section 71.

2 Ministry of Energy staff met with Celgar on
3 several occasions to understand their concerns. And
4 why wouldn't they? Celgar is a major employer in
5 British Columbia. Nobody wants Celgar and Mercer to
6 do better than B.C. Mercer even has its business
7 offices in Vancouver. And there's just no reason why
8 the Government would want this pulp mill to do less
9 well than other pulp mills.

10 I'll give you an example of this, a concrete
11 example. Take a look at R-389. That's a Briefing
12 Note from January 11, 2010, and in it you'll see a
13 very balanced analysis where Mercer has gone in and
14 met with two Ministers, Minister Bell and Minister
15 Lekstrom, I believe, and talked to them, explained its
16 concerns, and officials prepare, as officials do in a
17 civil service, a variety of options, considerations,
18 and offer the Minister a recommendation. And the
19 Minister ultimately concluded that the BC Hydro policy
20 was fair, that Celgar wasn't being discriminated
21 against, and that BC Hydro should only procure
22 incremental self-generated electricity.

02:35:55 1 The Claimant has not been denied access to
2 embedded-cost power. I'll touch on this briefly. And
3 this is the FortisBC GBL. Okay.

4 BCUC Order G-48-09, by its own terms, was
5 supposed to be short term. And it did leave the door
6 open, as both Mr. Merwin indicated at the time and as
7 Mr. Swanson has testified. It left the door open in
8 terms of the ability to set up Fortis at GBL. And
9 that Fortis GBL, it's been complicated and it's been
10 reflected in BCUC Decisions, in G-156-10, and other
11 Decisions. The idea of that FortisBC GBL is a service
12 GBL. They'd still have the procurement GBL in their
13 2009 EPA, but the BCUC is clearly contemplating
14 whether or not Celgar could have a service GBL which
15 would allow them to make sales to third parties.

16 Mr. Swanson has testified if they had been
17 able to agree on a reasonable GBL, that they could
18 reasonably demonstrate the BCUC that protected
19 ratepayers, there's a good chance they could have got
20 approval of that. Mr. Shor referred to the fact that
21 he mentioned, well, you know, 41 was a potential
22 starting point for that, but he did not discount the

02:37:05 1 fact that they could have, you know, agreed to
2 something lower than the BC Hydro GBL either.

3 Our position is potentially. It could well
4 have been possible to have a GBL below 40.

5 The problem is, the Claimant's position on
6 this is completely unreasonable. You've seen it over
7 and over again in their documents. They don't really
8 want a GBL that protects other ratepayers. They want
9 a GBL that allows themselves to sell everything or
10 almost everything. They want to reach all the way
11 back to 1993. They frequently justify that on the
12 fact that they installed the generation in 1993, but
13 they didn't. That was done by their predecessors.

14 They didn't install that turbine at all. Yet
15 they want the BCUC or FortisBC to go agree to go back
16 to that and set a GBL of zero megawatts,
17 1.5 megawatts, or 3.5 megawatts, based on data from
18 that time frame from the early 1990s. And Mr. Swanson
19 has testified, he's met with them, he's talked to them
20 over and over again. But there's never a GBL that
21 they've brought forward that Fortis thought they could
22 defend.

02:38:14 1 A lot of the problem, too, is that,
2 frequently, Celgar brought its complaints in the
3 context of other proceedings that weren't really
4 appropriate. Rate design proceedings. It started a
5 complaint about a lack of a General Service Agreement,
6 and then, eventually, on Celgar's own suggestion, the
7 BCUC started looking at a rate design as a potential
8 way of dealing with their problem.

9 It had basically seen Fortis and Celgar show
10 up over and over again and Celgar say, we want a GBL,
11 and we want a GBL about 1.5 megawatts or 3.5
12 megawatts, that I think by the time it got to
13 G-188-11--this is speculation on my part--it jumped at
14 the idea that maybe it could do something for the two
15 parties by a rate design. Because its own utility and
16 Celgar could not agree on a GBL that was reasonable,
17 mostly because the GBLs that were being proposed were
18 3 megawatts or 1.5 megawatts.

19 Mr. Swanson has made the point, though, that
20 Celgar never filed a formal Application with the BCUC
21 to set a GBL. Okay.

22 And here are some of the different proposals

02:39:16 1 over the years. We're now at a position where there's
2 a PPA, new PPA, that's been negotiated between
3 BC Hydro and FortisBC. What is Celgar doing? It's
4 challenging the fact that there should be any
5 restriction on potential sales to third parties. Why?
6 Because it wants the moon again.

7 Celgar has attended--tended, in fact, it's a
8 consistent pattern of basically trying to remove the
9 restriction as opposed to acceptance of a tool to deal
10 with restrictions. They're not willing to compromise.
11 And part of that is trying to gain that competitive
12 advantage that Mr. Merwin referred to in his briefing
13 notes back in early 2007, to the Board of Directors.
14 They want to be able to arbitrage everything, they'll
15 be able to get a leg up on their competitors.

16 Mr. Swanson has talked about some of the
17 different options that were available over the years
18 for them to secure additional power, including his
19 long chat with Mr. Merwin at Zuckerberg Island, and
20 that was the genesis of this idea of the NECP. So,
21 let's go to the NECP.

22 So, the Claimant has a right to sell up to

02:40:36 1 100 percent of its power. Mr. Switlishoff has
2 essentially agreed to this, and that came out of the
3 G-202-12 decision.

4 None of the BC Hydro customers that the
5 Claimant complained so much about, Tembec or
6 Howe Sound, have that right. It's a right that no
7 other mill in the Province holds. The Claimant can
8 stop self-supplying purchased embedded-cost power from
9 FortisBC and sell its self-generated electricity once
10 it gets a rate.

11 So, how would the NECP work? Self-generating
12 customers such as the Claimant could nominate up to
13 100 percent of their load for self-generation and sale
14 to third parties while receiving service. FortisBC
15 would source an equivalent block of power from the
16 market to basically put onto its nonembedded cost of
17 power resources, in order to prove that it wasn't
18 drawing on more PPA Power.

19 And maybe--just to discuss this for a
20 minute--there are two elements to FortisBC's sort of
21 embedded-cost power resource stack. There is the
22 energy component, and there's the capacity or demand

02:41:47 1 component. FortisBC, with Waneta, has 100 percent of
2 its capacity that it needs. So, there is really going
3 to be no change to the standard industrial rate, Rate
4 Schedule 31, from the service capacity element of the
5 charge. Okay. That's a strict sort of embedded-cost
6 element to it.

7 With respect to the energy component, what
8 would happen is, you have a resource stack with a sort
9 of ratio of resources. Part of that ratio is BC Hydro
10 PPA Power, let's say 15 percent, for the sake of
11 argument. FortisBC would go and get that 15 percent
12 and basically source it from market through a
13 long-term purchase, maybe a year or something like
14 that, and that would essentially be what they would
15 look at and compare to their existing Rate
16 Schedule 3808.

17 If that 15 percent was slightly more than
18 PPA Power, they would put on a slight Rate Rider for
19 that. But it is an embedded-cost rate, because it
20 also reflects the value of all of the other resources.

21 So, I know that's a little bit technical, but
22 there is a lot of embedded cost within this rate.

02:43:02 1 It's--the only thing that's being substituted out is
2 the proportion of BC Hydro, PPA Power that's being
3 taken from market.

4 And right now the markets have been very
5 reasonable. And the Claimant even indicated that in
6 its own submissions in G-188-11. And we took you to
7 that in our opening, where they were basically saying,
8 for the foreseeable future, there is not going to be a
9 problem buying off market. FortisBC has had the exact
10 same position.

11 The Rate Riders only applied, only applied,
12 when the NECP is greater--when the cost would be
13 greater for that market-matching block purchase of
14 power. And I think it's important to note that that
15 Rate Schedule 31 is the same Rate Schedule that almost
16 all of the transaction that the Claimant was going to
17 do in 2008 under the Power Supply Agreement, that was
18 almost all Rate Schedule 31. 36 megawatts were going
19 to be Rate Schedule and 4 megawatts were going to be
20 Rate Schedule 33, which is a time-of-use rate. It was
21 blended, but it was almost exclusively RS 31.

22 So, in terms of--this is very close to what

02:44:15 1 they had in 2008, and that's something you should take
2 note of.

3 ARBITRATOR DOUGLAS: Just on that point,
4 Claimant says that when Fortis has to go out and buy
5 the block of extra energy to supply Celgar,
6 effectively, they're going to have to pass on the cost
7 of going to the market to Celgar if they sell them
8 that block. If I understand it, you say that that's
9 not correct. The rate they'll actually come up with
10 will be blended across the different energy resources
11 that are available to Fortis, except for the PPA Power
12 with BC Hydro.

13 What's the best document to take us to, to
14 demonstrate who's correct and who's wrong?

15 MR. OWEN: There are a couple of FortisBC
16 submissions on this. One is quite confusing. And the
17 reason that is, is at the same time FortisBC was also
18 considering--I think you probably heard about the
19 stepped-rate that BC Hydro has. So, at the time, not
20 only were they working on doing the NECP Rate Rider,
21 they were also working on implementing a stepped-rate,
22 which I believe was referred to at Rate Schedule 34.

02:45:26 1 But maybe we could explain this in writing.

2 We'll dig up the references. Okay. Fine.

3 So, I think we provided an explanation.

4 Mr. Swanson has testified about this, that it is not

5 simply the market rate that the Claimant would have

6 you believe. Okay. And that it's a fair and

7 cost-effective way for the Claimant to withhold

8 electricity to replace its self-generation.

9 And I think the other thing that was

10 interesting was the emphasis on the fact that they

11 could purchase the cheapest non-firm power, and

12 essentially purchase that electricity, store it in

13 their capacity that they now have in the Waneta Dam,

14 and use that to essentially firm up the product and

15 increase its value. So, again, another way that the

16 NECP is quite economic.

17 The Claimant said it was dead. No, it isn't.

18 It's a suspended proceeding. They say the BCUC

19 suspended it, as if it would never come back, ever.

20 The BCUC suspends lots of proceedings. It starts them

21 back up again. Okay. The reason why it's suspended

22 is the Claimant wants to challenge Section 2.5, so it

02:46:47 1 can have no restrictions. Shooting the moon again.

2 The Claimant doesn't really have an incentive
3 to pursue NECP. And this is what--I think this is
4 very indicative of the situation they find themselves
5 in. They don't really have a market in which they can
6 currently get a premium power price. And while the
7 NECP would probably be--if markets rose, it would be
8 lower, probably, than markets.

9 There's no financial incentive for them to
10 push to have it right now. They're half a BCUC
11 proceeding away from having it. The BCUC has made all
12 the rulings. It's said it's entitled to this. They
13 can get 100 percent. The principles are established.
14 FortisBC has set out a lot of its methodology. Why
15 push it now? Why not try and get Section 2.5 of the
16 PPA removed? Why not do other things, take other
17 legal actions?

18 And, I think, importantly here, Mr. Friesen,
19 the Claimant's own Witness talking about their power
20 sales, didn't talk about 20-year power sales and
21 20-year power purchase agreements in the
22 United States. And if the Claimant were really able

02:47:54 1 to get a 20-year Power Purchase Agreement for
2 something equivalent to green energy prices, like its
3 chart suggested, why hasn't it gone and done it?

4 Why not go out? They'd make loads of money.
5 NECP isn't that expensive. They can go and sell their
6 electricity to Puget Sound and make a ton of cash.
7 But the reality is that Mr. Friesen was looking at
8 forward Mid-C prices, as he's testified, and that
9 isn't very economical.

10 Claimant is right. We had U.S. dollars on
11 here for Mid-C. So, we apologize for that. Always
12 good to have the same currency on the slide. They are
13 right, too, that 2008 was a completely different
14 market. But since then, of course, and we're talking
15 about the NECP and moving forward, the natural gas
16 boom has essentially lowered the Mid-C price
17 considerably. And because the electricity prices, as
18 multiple witnesses have testified, are tied heavily to
19 the natural gas market, Mid-C prices are bound to stay
20 low for the foreseeable future.

21 Load Displacement in the PPA.

22 PRESIDENT VEEDER: Stop there. Do we need a

02:49:02 1 break now? We've been going just over an hour.

2 MR. OWEN: Yes.

3 PRESIDENT VEEDER: Let's take a 10-minute
4 break and come back at 3:00.

5 (Brief recess.)

6 PRESIDENT VEEDER: Let's resume.

7 MR. OWEN: Okay. Very quickly, I'm going to
8 do my best.

9 I'm going to return to something that you
10 asked earlier, Mr. President, and that relates to two
11 Orders with respect to the two different kinds of
12 GBLs, and there was a reference to being two sides of
13 the same coin. And the first Order is G-19-14, and
14 the second Order is G-106-14.

15 Now, I'm going to have to delve briefly into
16 the murky world of rates in BC Hydro's area to explain
17 this. So I think the Panel has heard a few times that
18 BC Hydro has a stepped-rate and the first 90 percent
19 of that stepped-rate is relatively low and the last
20 10 percent is high. And that's a conservation Measure
21 designed to encourage self-generators to keep
22 within--to keep their consumption low.

03:07:57 1 As part of that process each year, BC Hydro
2 establishes a customer baseline. It is essentially a
3 consumption baseline, how much are they consuming.
4 And as part of the information filing that it made on
5 contracted GBLs, the one that we've heard about from
6 2012, there is a discussion about how, if you have a
7 plant, you have this consumption baseline, this
8 customer baseline set each year. And then if there is
9 self-generation at that plant, there must be also sort
10 of what's called either an uncontracted baseline or
11 uncontracted Generator Baseline.

12 So, again, there's these other concepts of a
13 CBL and a GBL, and that a CBL plus a GBL should equal
14 the entire plant load.

15 Now, what does that have to do with these
16 Orders? Well, CBLs are a very important part of rate
17 design within BC Hydro's service territory because
18 they relate directly to whether or not you're within
19 that Tier 1 price that's cheap or whether or not
20 you're in that Tier 2 price. And as a result, the
21 Commission was looking at a filing, a TS 74 filing, in
22 the First Order for Rate Schedule 1823 customers. So

03:09:19 1 that's large industrial B.C. customers like Howe Sound
2 and Tembec.

3 And it was looking at the concept of
4 uncontracted GBLs or the fact that you'd have this
5 other GBL concept, and it said, Well, that's very
6 similar to contracted GBLs. And they adopt a language
7 that suggested that, perhaps, contracted GBLs or
8 Procurement GBLs and EPAs would fall within the actual
9 rate structure for Hydro.

10 Hydro has asked for reconsideration. That's
11 a second Decision, G-106-14, and there are a number of
12 references that basically indicate that the Commission
13 is fairly aware that these are not necessarily the
14 same concept, that they are different concepts.

15 So, for example, in the second, in the
16 Reconsideration Decision, the Commission said, "In the
17 TS 74 Decision"--so that's a Tariff Schedule 74
18 Decision, the first one I referred you to--"the
19 Commission agreed with BC Hydro that in considering
20 when a GBL was a rate, it is necessary to look at the
21 use to which the GBL is being put and the specific
22 context for that use. The Commission acknowledges

03:10:31 1 that a GBL in the context of an EPA and/or an LDA, a
2 Load Displacement Agreement, is not a rate. However,"
3 they go on to say, "there are some interesting
4 connections between the two." So, it is currently
5 reconsidering that. The reference for that is
6 G-106-14, and it's at Pages 6 and 7. So I hope that
7 clarifies.

8 PRESIDENT VEEDER: Is that C-284, the
9 exhibit?

10 MR. OWEN: Yes, it is.

11 PRESIDENT VEEDER: Thanks.

12 MR. OWEN: I need to move on. I wanted to
13 touch briefly on this idea that there's load
14 displacement at no cost.

15 Celgar displaces its load in FortisBC's
16 service area and FortisBC benefits. BC Hydro has to
17 supply resources to be ready to meet its PPA
18 contractual demand. Fortis regularly nominates its
19 maximum PPA demand. So that means the capacity that
20 BC Hydro has on hand to deal--to basically provide to
21 FortisBC what it wants really doesn't change.

22 Here we have Mr. Switlishoff. I don't

03:11:50 1 believe there is any connection between the draw of
2 Celgar on Fortis and FortisBC's nomination to
3 BC Hydro. I don't think those two are connected.
4 And, again, Mr. Swanson explaining that the capacity
5 that has to be available is 200 megawatts, and that's
6 every hour of every day and every year under the
7 original PPA. Okay.

8 Now, finally, briefly, the Minister's Order.
9 There is no issue here I think as to whether the
10 Ministers' Order remains in force. The Experts
11 actually agree on that point. And the Order excepted
12 Celgar from having to obtain--and this is Celgar Pulp
13 Company back in 1993--from having to obtain an Energy
14 Project Certificate and an Energy Operating
15 Certificate for the installation of its 52-megawatt
16 turbine, as long as Celgar used it to supply its own
17 mill's own load.

18 The Ministry of Energy at the time was
19 concerned about this. And we brought multiple
20 Witnesses forward to testify who had direct knowledge
21 of how this Ministers' Order was established.

22 So, we're relying on the testimony of

03:12:59 1 Mr. Ostergaard, Dr. John O'Riordon, and Denise Mullen.
2 Neither Dr. O'Riordon nor Ms.Mullen were
3 cross-examined by the Claimant. Each was staff
4 responsible for the review of the Energy Project
5 Certificate Applications. Dr. O'Riordon even went so
6 far to talk to his colleague, Mr. Doug Dryden, about
7 ensuring that his recollection was accurate of the
8 events surrounding this particular EPC Application.
9 They had direct knowledge of Celgar's project and
10 testified that Celgar's Ministers' Order was approved
11 based on the commitment they made to use their
12 electricity for self-supply.

13 Mr. Allan had no direct knowledge of the
14 Energy Project Certificate application. He had no
15 direct involvement in analyzing such applications. He
16 didn't produce a single document, and, you know,
17 essentially indicated that his staff had done--in his
18 opinion, without really ever being involved in the
19 process--a good enough job.

20 The final thing I'll touch on is BCUC Order
21 G-15-01. We don't really think this is a particularly
22 important point. Mr. Ostergaard was the Chair of the

03:14:13 1 BCUC at the time this Order was filed, but
2 Mr. Ostergaard is the Chair of the British Columbia
3 Utilities Commission. He was not responsible at that
4 time for enforcing Ministers' Order. That
5 responsibility left away with the Environmental
6 Assessment Office.

7 The BCUC does not go around doublechecking
8 whether or not, you know, the commitments under a
9 Ministers' Order have been dealt with by a proponent
10 who has to report to the Environmental Assessment
11 Office. It is outside their jurisdiction.

12 In any event, it related to a Curtailment
13 Agreement, and the main purpose of that Curtailment
14 Agreement was to essentially reduce the load during
15 these peak periods, and there was a California energy
16 crisis on.

17 The Claimant has suggested that this is
18 sometimes done by increasing self-generation. I think
19 the key thing here is that, from the perspective of
20 the utility, they just wanted them to reduce their
21 load. And that was essentially how the Agreement was
22 structured, and that was how it was presented at that

03:15:14 1 time.

2 ARBITRATOR DOUGLAS: Just before you move on,
3 BCUC Order G-202-12, which is R-265.

4 MR. OWEN: Yes.

5 ARBITRATOR DOUGLAS: It says it reaffirmed
6 the entitlement to non-BC Hydro PPA embedded-cost
7 power by a self-generating customer may be as high as
8 100 percent of load as nominated by that customer.

9 Now, Celgar was participating in those
10 proceedings. Clearly, if you're right about the
11 Ministry Order, the BCUC is proceeding on a mistaken
12 basis. And why would they say that, if Celgar had an
13 obligation to self-supply?

14 MR. OWEN: I think that one of the problems
15 that we've had is this did come up relatively late on
16 and it would have been something relevant to raise
17 before the BCUC, and we certainly wished it had.

18 Yes, it did--it did--it was something that
19 didn't come to light for many, many years. The
20 Claimant is right about that. But it's still a valid
21 binding legal Order that gave Celgar the right to do
22 something, essentially to build a thermal electric

03:16:30 1 plant in 1993 and get exempted from more rigorous
2 review by the British Columbia Utilities Commission at
3 that time either as a--for a Certificate of
4 Convenience and Public Necessity or a full-scale BCUC
5 review. So they get the benefit of that Disposition
6 Order subject to certain conditions. And one of the
7 things they did over and over again was promise to
8 self-supply.

9 And so I think also it is important to
10 realize that--and this is referred to in the
11 contemporaneous minutes that we found concerning the
12 Energy Project Coordinating Committee. There was a
13 large review going on as part of the Major Project
14 Review Process and a federal environmental assessment
15 too. It is clear that the review of this actual
16 Ministers' Order and the thermal electric plant that
17 there was overlap between the two, and that's what the
18 minutes indicate.

19 So I think some of the technical review and
20 due diligence that Mr. Allan suggested might have been
21 lacking on the staff was actually being done by the
22 same people in the same context of a parallel

03:17:32 1 environmental review.

2 I'm cognizant of the time, and my colleague
3 Mr. Douglas is up next, so no further questions?

4 Go on?

5 PRESIDENT VEEDER: We may have some later,
6 but pass the baton, please.

7 MR. DOUGLAS: Thank you very much.

8 May I have just two minutes to set up? No
9 need to move, but just give me two minutes to--

10 PRESIDENT VEEDER: Of course, on your clock
11 there.

12 (Pause.)

13 MR. DOUGLAS: This is a very ominous first
14 slide. "The Law."

15 So let's discuss a bit about the law. There
16 are three measures at issue, the Claimant's GBL, the
17 Exclusivity Provision, and BCUC Order G-48-09. It is
18 important to keep these in mind as we progress through
19 the law because it all--Measures for which the
20 Government of Canada is liable, not claims. Why don't
21 we turn to jurisdiction and admissibility first.

22 The procurement exception, which states that

03:19:39 1 Articles 1102 and 1103 do not apply to procurement by
2 a Party or a State enterprise.

3 Both the United States and Mexico confirm in
4 their Article 1128 submissions that the procurement
5 exception is broad. And as Mr. Shor indicated in his
6 Opening, the definition is quite broad.

7 The issue is whether the GBL and Exclusivity
8 Provision in the Claimant's EPA falls within the
9 procurement exception.

10 Now, the Claimant confirmed in testimony that
11 the purpose of a BC Hydro GBL is to demark incremental
12 from existing electricity. It defines the line above
13 which BC Hydro will procure from the Claimant. If
14 they have a lower GBL, BC Hydro will procure more.
15 That is the very purpose of the GBL.

16 The Claimant's testimony confirms the
17 veracity of their submissions to the BCUC on the
18 purpose of GBL, which we highlighted in our Opening.
19 The statements the Claimant has made before the BCUC
20 also confirm that the purpose of a GBL is to demark
21 incremental from existing generation.

22 Finally, perhaps there is--sorry, not quite

03:20:50 1 finally, Canada's Witnesses and Experts also confirm
2 in testimony the purpose of a BC Hydro GBL. Again, it
3 is to define the amount of electricity above which
4 BC Hydro will procure. It does not serve another
5 purpose.

6 And, finally, there is, perhaps, no greater
7 evidence that this fact that the Claimant's entire
8 damages case is premised on a series of lower GBLs and
9 BC Hydro procuring more electricity from the Claimant.

10 The Claimant tries to confuse the purpose of
11 the BC Hydro GBL in its arguments. First, Mr. Shor
12 argues that BC Hydro was not required to procure the
13 electricity for the purpose of liability. This
14 argument, however, makes little sense. If BC Hydro
15 was required by international law to have negotiated a
16 lower GBL with the Claimant, then the lower GBL would
17 be inserted into the EPA and BC Hydro would procure as
18 incremental the energy above that amount. BC Hydro is
19 not setting a GBL for another purpose.

20 Second, the Claimant's argument that the
21 BC Hydro GBL defines the level of self-supply is
22 incorrect. The Claimant conflates the GBL with the

03:22:06 1 Exclusivity Provision in the EPA. It's the
2 Exclusivity Provision that is the restriction on
3 third-party sales, not the GBL.

4 Moreover, the EPA does not define a level of
5 self-supply. The EPA is a contract that the Claimants
6 signed. Nobody has forced them to do anything. If
7 the Claimant wants to breach that Contract, that is
8 their own prerogative. If they don't want to
9 self-supply, that is their own prerogative. Nobody is
10 forcing them to do anything.

11 Third, the Claimant argues that the BC Hydro
12 GBL defines BC Hydro's obligation to serve. This is a
13 bit of an interesting argument. I think what they're
14 actually suggesting is that somehow the BC Hydro GBL
15 defines FortisBC's obligation to serve; that somehow
16 by setting a BC Hydro GBL, FortisBC is prevented from
17 supplying electricity to the Claimant.

18 That would be a gross overstatement of
19 jurisdictional territory. BC Hydro has no authority
20 to define FortisBC's obligation to serve.

21 The Claimant also confuses the purpose of a
22 BC Hydro GBL with a GBL that, according to Mr. Owen,

03:23:11 1 discussed such as in G-38-01, which is the obligation
2 to serve. There is an obligation to serve in the
3 context in which one of your customers wants to
4 export. In the context of a BC Hydro procurement GBL,
5 the purpose is much different.

6 Finally, the Claimant's argument that the
7 BC Hydro GBL is not related to procurement because it
8 is a rate under the UCA, the Utilities Commission Act,
9 is wrong. My colleague Mr. Owen covered this point.
10 I will not go into detail except to say that that is
11 not what the BCUC has found. It has found that a
12 contracted GBL, that is, a procurement GBL, is not a
13 rate; and that the issue of whether a GBL under the
14 Utilities Commission Act--one of those service GBLs,
15 one of those G-38-01 GBLs--falls within the rate
16 scheme is currently the subject of reconsideration
17 before the BCUC. It is the subject matter of ongoing
18 proceedings.

19 The next issue is whether the Claimant's
20 Exclusivity Provision falls within the procurement
21 exception. As the United States and Mexico confirm in
22 their 1128 submissions, procurement includes all terms

03:24:17 1 in a Procurement Contract that are integral to the
2 procurement project. Those are the words of the
3 United States.

4 The Claimant's Exclusivity Clause is an
5 integral part of BC Hydro's procurement of
6 electricity. As Mr. Scouras confirms in his Witness
7 Statement, the main purpose of the Exclusivity
8 Provision is to provide certainty to BC Hydro that it
9 will have the security of supply that it has
10 contracted for with project proponents. The Claimants
11 asked Mr. Scouras no questions about the purpose of
12 the Exclusivity Provision. This testimony goes
13 unchallenged.

14 Mr. Scouras was the head of procurement at
15 BC Hydro and should know what the Exclusivity Clause
16 is for. The Claimant's exclusivity clause, thus,
17 falls within the procurement exception and any Claims
18 regarding it are inadmissible under Article 1102 or
19 1103.

20 Turning next to delegated Governmental
21 authority. The next bar to the Claimant's Claim is
22 Article 1503 of the NAFTA. Under this provision,

03:25:25 1 Canada is only liable for the Measures of its State
2 enterprises when they exercise delegated Governmental
3 authority. To pass this test, the Claimants must show
4 that the Claimant was delegated Governmental authority
5 when it signed procurement contracts with various
6 mills.

7 The first question to ask is, Was there
8 delegation? In order for there to be delegation,
9 there must be an affirmative transfer of authorization
10 of Governmental authority. The Claimant alleges that
11 the BCUC directed BC Hydro to procure energy in Order
12 G-38-01.

13 As the testimony confirmed, however, Order
14 G-38-01 did no such thing. 38-01 deals with
15 BC Hydro's obligation to serve its customers who want
16 to sell its electricity to third parties. It directed
17 BC Hydro to establish a program for that purpose. It
18 did not direct BC Hydro to procure electricity. The
19 Claimant is, therefore, wrong.

20 The next question to ask is whether procuring
21 electricity was governmental authority. It is not,
22 however, the business of the Government to procure

03:26:32 1 energy. It is the business of BC Hydro to do so. The
2 Claimants' GBL and Exclusivity Clause are contractual
3 terms as part OF a procurement contract. They are
4 commercial terms. They are not governmental
5 authority. BC Hydro's procurement of electricity does
6 not fall within Article 1503 of the NAFTA.

7 ARBITRATOR DOUGLAS: I'll ask you the same
8 question.

9 MR. DOUGLAS: I was waiting.

10 ARBITRATOR DOUGLAS: Good. Could a private
11 entity sign up to the Exclusivity and GBL Provisions,
12 or is there any reason, in principle, that that would
13 be impossible?

14 MR. DOUGLAS: I'm sorry; I just couldn't hear
15 you.

16 ARBITRATOR DOUGLAS: Sorry, I'm too far away
17 from the microphone.

18 Is there any reason why a private entity
19 could not have signed up to the GBL and Exclusivity
20 Provisions and performed those provisions? In other
21 words, is there anything about the performance of
22 those provisions which requires sovereign authority?

03:27:30 1 MR. DOUGLAS: In our view, no.

2 ARBITRATOR DOUGLAS: Is there any--on the
3 record, is there any example of a nongovernmental
4 utility that signs up to similar provisions?

5 MR. DOUGLAS: Well, FortisBC.

6 ARBITRATOR DOUGLAS: I had a feeling you
7 might say that. We'll see what the Claimant says
8 about it.

9 MR. DOUGLAS: I had a little help.

10 The final jurisdictional bar to the
11 Claimant's claims is time bar under the NAFTA.
12 Pursuant to Article 1116(2), a Claimant must file a
13 claim within three years of first acquiring knowledge
14 of breach and loss. Under the time bar, knowledge
15 does not have to be actual. It can be constructive,
16 as Mr. Shor stated in his Opening, and the period
17 starts to run on the date the Claimant first acquired
18 actual or constructive knowledge. The time bar date
19 is April 30, 2009, and the Claimant must, thus, first
20 have acquired knowledge sometime after this date. The
21 Claimant alleges that date is July 31, 2009, when the
22 BCUC reviewed its EPA under Section 71 of the

03:28:46 1 Utilities Commission Act.

2 PRESIDENT VEEDER: I'm sorry, I had the 6th
3 of May. Is it July?

4 MR. DOUGLAS: Did I misspeak? I said
5 July 31, 2009, for the BCUC acceptance.

6 PRESIDENT VEEDER: I have that down as 6th of
7 May, but maybe you're right. It doesn't matter for
8 present purposes. It's July.

9 MR. DOUGLAS: Oh. It's G-48-09 that's the
10 6th of May.

11 PRESIDENT VEEDER: Okay. Thank you.

12 MR. DOUGLAS: The acceptance for filing by
13 the BCUC, under Section 71 of the Utilities
14 Commissions Act, that's the acceptance of the EPA.
15 That transpired on July 31, 2009.

16 PRESIDENT VEEDER: Thank you.

17 MR. DOUGLAS: But in Canada's view, that is
18 not a credible date to suggest that that is when the
19 Claimant first acquired knowledge of breach and loss
20 of the GBL and Exclusivity Provision. The GBL was set
21 on May 30, 2008, almost a year before the time bar
22 date. The Claimant used that GBL to make a bid into

03:29:52 1 the Bioenergy Call for Power on June 10, 2008.

2 Now, Mr. Shor suggested that, for the purpose
3 of time bar, the limitation period does not begin to
4 run until Tembec signed its EPA or until Howe Sound
5 signed its EPA because they didn't know that they got
6 a raw deal on their GBL.

7 This is a memorandum from Brian Merwin to
8 Jimmy Lee. It's an internal memorandum, and you can
9 see down at the very bottom, and on the next page.
10 This is the 7th of June 2008. This is before they
11 made their bid. They stated, "We are currently
12 debating our GBL with Hydro as we believe they have
13 not treated assignment of this number the same as they
14 have done for other pulp and paper mills." This is
15 clear evidence of knowledge well before the time bar
16 date of January 27, 2009.

17 Mr. Shor glosses over the Tembec 1997 EPA to
18 which they also compare themselves to. He also
19 glosses over the Canfor, which was an agreement signed
20 in 2004, which would also put them outside the time
21 bar date. What he suggests for time bar is that a new
22 limitation period happens with every single

03:31:35 1 comparator. This has serious policy implications from
2 a legal standpoint for the NAFTA Parties.

3 The United States, in its 1128 submission,
4 has said that that cannot be the case. That would
5 toll the limitation period into infinity. What if an
6 agreement was signed tomorrow? Two years from now?
7 Three years from now? Could the Claimants bring a
8 NAFTA claim then, based on their EPA signed in 2007?
9 That would put a huge burden on the Government.

10 Moreover, there has been jurisprudence on
11 this issue. In the Grand River Jurisdictional Award,
12 they found that, when you have a series of related
13 Measures, you cannot split them into splinters in
14 several different pieces. If they are related
15 Measures, the limitation period begins to run at the
16 very first instance. The Claimant here has elected to
17 choose Canfor and the '97 EPA as the comparators. It
18 must have had knowledge, and by that memorandum of
19 June 8, 2008, it's clear that they did.

20 Now, we've had--

21 ARBITRATOR DOUGLAS: Sorry. Isn't it
22 possible, though, that if we are looking at a claim

03:32:41 1 for discrimination, that you're only going to get to
2 the threshold that makes it actionable if there's a
3 patent of discrimination. And so suppose in a
4 hypothetical back to our students who are receiving
5 student loans or something of that nature, suppose one
6 student from a particular nationality is denied and
7 then a year later another one and then a year later
8 another one. Surely, the time bar wouldn't have
9 started to run at the first denial because at that
10 point you haven't got the pattern of discrimination
11 that would give rise to an actionable claim.

12 MR. DOUGLAS: I might--we'll get into this
13 when we get to nationality, but when we talk about a
14 pattern of discrimination, a usual 1102, 1103 claim
15 involves--de facto claim--involves a law that applies
16 on a uniform basis that applies across board to
17 everybody. But in its effect, it will have a
18 discriminatory treatment in comparison to some as
19 comparison to others.

20 The type of example that you're providing,
21 which is analogous to the Claimant's Claim, is
22 exercises of discretion. It's not a pattern of

03:33:50 1 discrimination or a series of discretionary decisions.
2 It has fewer greater linkages to intentionality, which
3 has far greater linkages to a claim for de jure
4 discrimination, a de facto discrimination.

5 ARBITRATOR DOUGLAS: Well, if I understand
6 it--I don't think anyone is suggesting that the GBL
7 documents that establish the principles of the GBL on
8 its face purport to discriminate against a particular
9 nationality. I think what the Claimant is saying is
10 that their Application discriminates.

11 Don't we need to see certain incidences of
12 this Application before you rise to the threshold of a
13 breach of NAFTA? And if that's the case, can we
14 really start the time running at the first instance?

15 MR. DOUGLAS: Well, and then I guess it
16 depends on how broad you want to have a pattern of
17 behavior. The Claimant compares itself against
18 individual mills, although there were 20 bids into the
19 Bioenergy Call for Phase I in which the Claimant
20 participated in. Four contracts were ultimately
21 accepted; two of them were American. The remaining
22 were rejected Canadian investors.

03:35:01 1 So, do you start there? Or, there was a
2 different call, the IPO call. Do you wait until that
3 happens in 2010? What about the next Call for Power
4 that happens? I mean, how far of a pattern do you
5 need to develop? I mean, I think the act of
6 comparison for the Claimant is in the 2007 area amidst
7 those other mills that invested.

8 Moreover--may I finish, just on that one
9 point? Because there is three years from the date of
10 first acquiring knowledge and breach and loss, and I
11 think three years would be sufficient for whatever
12 pattern needs to play out to prove a case. But you
13 have that first instance of acquiring knowledge of
14 breach and loss, and that's what's important.

15 My apologies, Professor Vicuña.

16 ARBITRATOR ORREGO VICUÑA: No. I was asking
17 whether you had finished.

18 Let me ask you about something that has not
19 been discussed in a direct manner, but which I think
20 might be relevant and not necessarily for you to
21 answer right away, perhaps at a later point. But you
22 are certainly familiar with a question that is much

03:36:25 1 debated about wrongful acts under international law,
2 and particularly about those acts that are other
3 either continuing--they repeat and they repeat
4 themselves--or even that are cumulative, that they
5 begin with one that might not look quite clearly
6 wrongful, but then another, another, another, until
7 you get to the--and the view that those kinds of acts
8 would really come to be assessed at the end, not at
9 the beginning. Because you don't know. On the way,
10 you are not certain whether that is a wrongful act
11 yet. How would you envisage that in the context of
12 this discussion? Will it be a fair question? Or, as
13 we didn't discuss it, maybe it's not fair.

14 MR. DOUGLAS: So, with respect, I think it
15 would be an unfair question because I don't think
16 there is a continuing act here. There was--what is at
17 issue is an Electricity Purchase Agreement that was
18 signed between BC Hydro and the Claimant on a very
19 specific date, and I think it was that date, and that
20 date was the Measure.

21 So, first of all, I think you have to get
22 into the world of continuing Measures, but even once

03:37:45 1 you're there, and I think there is some jurisprudence
2 outside of the NAFTA that discusses continuing acts,
3 but the NAFTA has *lex specialis*. It has very specific
4 language when it comes to limitations period, and the
5 key word in 1116 is "first." You cannot first acquire
6 knowledge every single day. That is not what the
7 limitation period is for. It would erode the
8 limitation period. It would write it out of the
9 NAFTA. You first acquire knowledge on one date, and
10 you have three years, then, to bring your claim.

11 And all three NAFTA parties have held this
12 consistent view. I know you are familiar with it from
13 Merrill, have held it in other cases as well, and it
14 will be Canada's view that that is, you know, a
15 subsequent agreement under the Vienna Convention that
16 this Tribunal must take into account should it find
17 that any of these Measures are, in fact, continuing.

18 ARBITRATOR ORREGO VICUÑA: Let me make an
19 additional aspect of the question. I will agree with
20 you that normally first is first, but what happens if
21 you have a series of acts, one after the other, months
22 or weeks or whatever intervening, and you cannot with

03:39:13 1 any of those individually come to realize that they
2 are really wrongful and that are causing a damage to
3 yourself, to the Claimant or whatever? Would it not
4 be the first moment, the first moment in which you
5 come to realize that that is what has happened? That
6 would meet the definition you mentioned about NAFTA.
7 The first would be not the first date, but would be
8 the first instance in which you get the certainty that
9 something wrong went about, and you are damaged.

10 Would that make any difference to the
11 fairness of the question?

12 MR. DOUGLAS: Well, so a couple points on
13 that: The knowledge is actual or constructive. So,
14 when you talk about constructive, it's what can be
15 imputed to a Claimant bringing a claim. So, whether
16 it's--there is proof or actual or not, there is a
17 reasonableness. When should they have first acquired
18 knowledge? What's the reasonable date? And the test
19 is the knowledge, absolutely. And it's from the
20 knowledge that that limitation period would start to
21 run.

22 But in terms of loss--this is my second

03:40:30 1 point. In terms of loss, it is not a high threshold.
2 There has been jurisprudence, I think, in both Grand
3 River and the Mobil Case about this very point, that
4 knowledge does not have to be your full knowledge, or
5 you do not have to know the full extent of your
6 damages. You need to know only that there is some,
7 even if that amount is undefined. And the only
8 evidence that I've seen so record is the memorandum
9 that I've just shown you.

10 Do you guys know the exhibit number?

11 I think it was R-559 which shows that
12 Mr. Merwin believed well before the time-bar date that
13 his GBL was set too high. That's knowledge of loss.
14 If your GBL, you believe, is too high and it should be
15 lower, you've lost the ability to sell that
16 electricity to BC Hydro. So, that knowledge
17 crystallizes on that date. And that's sufficient to
18 start the limitation period running.

19 ARBITRATOR ORREGO VICUÑA: Thank you.

20 MR. DOUGLAS: You're welcome.

21 PRESIDENT VEEDER: You cited to us
22 Paragraph 59 of the Grand River Decision. There's

03:41:42 1 another paragraph, Paragraph 81.

2 MR. DOUGLAS: 81.

3 PRESIDENT VEEDER: Is that helpful to the
4 questions you've been receiving?

5 MR. DOUGLAS: It is. Paragraph 81 deals with
6 this idea that, when you have a series of related
7 measures, the Government commits--the term "Measure"
8 is very broadly defined in the NAFTA. So, it's almost
9 as if, whenever the Government breathes or does
10 something, it could be a Measure. But if there's a
11 series of related Measures, the limitation period does
12 not start to run at the final instance. It starts to
13 run at the first because that is precisely the word
14 that exists in 1116(2).

15 PRESIDENT VEEDER: If we look back to the
16 wording of Article 1116(2) there, we don't see
17 knowledge of the Measure. We see knowledge of the
18 alleged breach.

19 MR. DOUGLAS: Correct.

20 PRESIDENT VEEDER: So, it would have to be a
21 Measure in circumstances where they gave rise to an
22 allegation or could give rise to an allegation of

03:42:38 1 breach.

2 MR. DOUGLAS: Correct.

3 PRESIDENT VEEDER: You accept that?

4 MR. DOUGLAS: I do.

5 PRESIDENT VEEDER: Thank you.

6 MR. DOUGLAS: There has been some talk about
7 the legal effect or the effective date of the
8 Agreement, which I think is uncontroversial. The
9 Agreement, by its very term, discusses or defines
10 precisely when its effective date is, which is
11 January 27, 2009.

12 Mr. Shor, in his Opening, suggested that
13 Section 71 was a condition precedent to the EPA taking
14 effect. That is not correct. There is no wording in
15 the EPA that conditions acceptance by the BCUC, and if
16 you look at Section 71(4), the language actually
17 refers to the fact that there are agreements existing
18 at one point in time and are submitted to the BCUC as
19 acceptance for filing at another point in time. It's
20 what's called a negative disallowance scheme.

21 The BCUC does not approve Contracts. It only
22 has the authority to review them and to--and to accept

03:44:01 1 for filing or not. It only has the negative power to
2 disallow them. It does not have the power to approve
3 them. For these reasons, the Claimant's EPA with
4 BC Hydro, including its GBL and Exclusivity Clause, in
5 Canada's view, are time-barred under the NAFTA, and
6 this Tribunal has no jurisdiction to hear claims
7 relating to these two Measures.

8 Now, assuming the Tribunal does have
9 jurisdiction, I'd now like to discuss national
10 treatment and Most-Favored-Nation treatment. In order
11 to find a breach of NAFTA Articles 1102 or 1103, the
12 Claimant must show three elements: that it was
13 accorded treatment, that treatment was less favorable,
14 that the treatment was accorded in like circumstances
15 to a domestic or a third-party investor.

16 Now, the Claimant, in its Opening, posited
17 its theory of Articles 1102 or 1103; that nationality
18 is irrelevant, that the treatment to other investors
19 is irrelevant, that it can selectively choose its only
20 comparators, and that it need only establish a prima
21 facie breach before the burden shifts to Canada to
22 justify that prima facie breach.

03:45:24 1 I'd like to review each one of these, in
2 turn. All three NAFTA Parties have repeatedly
3 confirmed that Articles 1102 and 1103 protect against
4 discrimination on the basis of nationality. This has
5 been the consistent view of the NAFTA Parties
6 for years. It is Canada's view that this constitutes
7 an authentic interpretation of the provisions that
8 this Tribunal must take into account under the Vienna
9 Convention. The Claimant is wrong in law when it
10 asserts that nationality plays no role.

11 The Claimant also alleges that other U.S.
12 investors are irrelevant to the analysis. Again, this
13 is not correct. The treatment accorded to other U.S.
14 investors is relevant to determining the existence of
15 the nationality-based discrimination. In this case,
16 there is another U.S. investor, Domtar, which Canada
17 discusses in his Counter-Memorial at Paragraph 375 and
18 at Paragraph 245 of its Rejoinder.

19 The Claimant does not contest that Domtar was
20 given the same treatment as Howe Sound and Tembec and
21 every other mill. This is not an irrelevant fact as
22 the Claimant supposes, but is evidence that there was

03:46:33 1 no nationality-based discrimination.

2 The next element is the Claimant's selection
3 of comparators. The Claimant has identified primarily
4 two comparators in this case, Tembec and Howe Sound.
5 It should be noted, however, that there are several
6 other pulp mills in British Columbia who each have an
7 EPA with BC Hydro as well as a GBL. Canada produced
8 thousands of documents relating to the setting of
9 these GBLs.

10 To get to just Tembec and Howe Sound, the
11 Claimant's Expert created a list of factors to reach
12 an assessment of what he considers to be fair
13 comparators, but he crops out all of the other mills
14 with EPAs and GBLs by having as a factor only mills
15 who invested in generation equipment 10 years prior to
16 G-38-01. But this factor is irrelevant for the
17 purpose of assessing the consistent Application of
18 BC Hydro GBL methodology. All mills have invested in
19 generation prior to the 1990s, and some have invested
20 in the 2000s.

21 By cropping the picture using irrelevant
22 factors, Claimant is able to focus on the peculiar

03:47:42 1 circumstances of Howe Sound and Tembec to fabricate a
2 narrative that BC Hydro's GBL methodology was not
3 transparent, not well understood, and not well
4 defined. However, no one else made these complaints.
5 In fact, Canada's Witness, Mr. Fominoff, of Howe
6 Sound, testifies contrary to the Claimants in his
7 Witness Statement. It is easy to understand why the
8 Claimant did not call him to testify.

9 Moreover, for his First Expert Report,
10 Dr. Rosenzweig analyzed the same thousands of
11 documents that Canada produced to the Claimant and
12 testified that a consistent GBL methodology was
13 applied to each mill. The Claimant did not rebut his
14 analysis in their Reply Memorial. In Canada's view,
15 it is not credible to attack a procurement system like
16 the one employed by BC Hydro without doing the full
17 analysis.

18 The Claimants allege there is no--pardon
19 me--the Claimant alleges there was no GBL standard,
20 that BC Hydro did what it wanted and had complete
21 discretion. But you cannot credibly make out this
22 argument by analyzing only two mills.

03:48:51 1 Finally, the Claimant argues that it need
2 only show a prima facie or first impression breach of
3 NAFTA Articles 1102 or 1103, and then the burden
4 shifts to Canada to justify itself.

5 However, Article 1102 and 1103 do not say
6 anything about shifting burdens, and all three NAFTA
7 Parties agree that a burden shift would be contrary to
8 the ordinary terms of those provisions.

9 Now, let's look to the treatment itself.
10 Let's discuss the Claimant's GBL. First, what is the
11 treatment we are assessing? The treatment is
12 assessing the GBL methodology, which we discussed in
13 the facts was fully transparent and well understood.

14 Mr. Douglas, you asked--Professor Douglas,
15 pardon me. My dad's name is Mr. Douglas. He asked a
16 question in terms of the scope of the treatment, and
17 I'm assuming-- actually, I'm not going to assume.
18 Let's assume, for the sake of argument, the Claimant
19 received a \$58 million subsidy from the Federal
20 Government so that it could maximize the use of its
21 EPA and have the full benefit of the revenue stream
22 from that EPA. And let's assume that's not a

03:50:21 1 hypothetical because that's exactly what happened. Is
2 that a relevant consideration? I think it is.

3 Now, we usually define treatments in 1102 and
4 1103 to focus more on the Measures, but in light of
5 the nationality considerations or the lack of
6 nationality considerations at play, if we really had
7 it out for foreign investors in this particular
8 instance, why would we dole out such a large sum of
9 money so that it could have such significant benefits
10 and reap significant rewards? It is not an irrelevant
11 consideration. But when it came to the GBL
12 methodology, the GBL methodology came first. And so
13 we're going to discuss the GBL methodology and how it
14 was applied on a consistent basis to each of the
15 mills.

16 ARBITRATOR DOUGLAS: Are you aware of any
17 authority that has discussed this point, the scope of
18 treatment in that context?

19 MR. DOUGLAS: Off the top of my head, I'm
20 not.

21 ARBITRATOR DOUGLAS: That's okay.

22 MR. DOUGLAS: But I have faith my colleagues

03:51:13 1 are furiously researching as we discuss.

2 But in addition to the GBL methodology, the
3 Claimant alleges that the treatment at issue is the
4 below-load access percentage. Its Expert,
5 Dr. Fox-Penner, argues that BC Hydro was in the
6 business of allocating arbitrage profits between
7 mills, and Mr. Switlishoff argues that the Claimant
8 was given less of a percentage than other mills. The
9 BLAP metric, however, is the not the treatment at
10 issue. It is something of the Claimant's own
11 creation. Not only does it conflict with the
12 2007 Energy Plan concerning the procurement of
13 incremental generation only, but by Mr. Switlishoff's
14 own admission, it conflicts with the principles of
15 G-38-01, which is the very basis on which he assesses
16 treatment between mills. The BLAP metric is, thus,
17 highly flawed, and it's not the treatment at issue.
18 The question is whether BC Hydro applied the GBL
19 methodology in a way that was less favorable to the
20 Claimant.

21 Now let's look at what Claimant alleges. The
22 Claimant argues that BC Hydro had total discretion

03:52:24 1 when setting GBLs and that it simply chose to exercise
2 that discretion in a way that was less favorable to
3 the Claimant. But this argument make no sense when
4 you consider the facts. The Bioenergy Call for Power,
5 as I said in my Opening, had a goal of procuring a
6 1,000-gigawatt hours of incremental electricity per
7 year. The Call received 20 bids and resulted in only
8 four contracts.

9 The four contracts totaled 579-gigawatt hours
10 of electricity, and BC Hydro did not meet its target.
11 In fact, it met only 58 percent of its procurement
12 goal. I asked Mr. Switlishoff about this in
13 testimony. And his answer at the bottom was that,
14 fair, BC Hydro did not meet its procurement objective,
15 but it set the Claimant's GBL where it did so that it
16 could force it to displace its load. There was no
17 evidence of this. There is no evidence on record that
18 BC Hydro did anything but apply the GBL methodology.

19 In this context, why would BC Hydro
20 arbitrarily choose to procure less electricity from
21 the Claimant? If the Claimant actually had more
22 incremental electricity to sell, what possible reason

03:53:52 1 could BC Hydro have not to procure it? Sorry. On the
2 graph there are supposed to be some lines, I think. I
3 think actually there are some faint lines.

4 You have heard the Claimant advance a number
5 of arguments this past week. For example, the
6 Claimant argues that BC Hydro should have paid
7 incentivized prices for generation out of the
8 unincentivized Blue Goose project. You have heard
9 that Mr. Dyck failed to properly account for the
10 Claimant's sales to NorthPoint. But these arguments
11 don't make any sense in light of their context.
12 BC Hydro not only wants to procure electricity, it
13 needs to procure electricity. It needs to add to its
14 energy resources. Why? So that it can meet the
15 policy objective of becoming self-sufficient.
16 BC Hydro had no incentive to give the Claimant a raw
17 deal. To the contrary, it had every incentive to
18 procure as much incremental generation as it could.

19 What is this NAFTA claim about? It is about
20 the Claimant's quest to have BC Hydro procure all of
21 the Claimant's existing generation at high incentive
22 prices. The Claimant's existing generation wouldn't,

03:55:04 1 however, have had added anything to the Province's
2 resource portfolio, and it would run counter to the
3 policy objective of becoming self-sufficient.
4 BC Hydro is not in the business of giving out
5 subsidies or transferring wealth.

6 Now, the Claimant has dedicated over
7 three years in this arbitration to putting a
8 magnifying glass over Howe Sound and Tembec and the
9 way the GBLs were set for those mills. But let us not
10 lose sight from the forest, from the trees. None of
11 these mills got what they wanted. They all wanted
12 better deals. They all wanted lower GBLs. But at the
13 end of the day, the same methodology was applied to
14 each. And BC Hydro had the same objective each time,
15 to procure incremental generation only.

16 Canada has serious concerns with a case like
17 this from both a legal and policy standpoint. Canada
18 does not share the Claimant's view that Articles 1102
19 and 1103 open the door to NAFTA Tribunals to
20 scrutinize specific technical terms of large
21 procurement contracts signed by State-owned
22 enterprises. A complex case like this, if not

03:56:22 1 properly defended, has the potential of causing a
2 commercial chill from coast to coast.

3 Moreover, where is nationality in the
4 Claimant's analysis? Canada produced tens of
5 thousands of documents to the Claimant from all levels
6 of B.C. Government, and not a single document has
7 arisen regarding the nationality of the Claimant. And
8 the Claimant presented no evidence to this Tribunal of
9 any nationality-based discrimination these past two
10 weeks.

11 The Claimant argues that nationality is
12 irrelevant. It argues that it need not prove an
13 intent to discriminate. However, it is the Claimant
14 who argues that BC Hydro intentionally treated them
15 differently. The Claimant's argument is that BC Hydro
16 intentionally set the GBL to force them to
17 self-supply, that BC Hydro had an incredible amount of
18 discretion, and chose to exercise it in a way less
19 favorable for the Claimant. These are allegations of
20 intent for which there is no evidentiary basis. If
21 they allege, they must prove.

22 According to the Claimant's theory of

03:57:31 1 Article 1102 and 1103, it is sufficient to scrutinize
2 and compare the negotiated contracts and find
3 differences. And if it finds any differences, that is
4 sufficient to find a breach of 1102 and 1103. But as
5 I said in my Opening, this is not the forest, this is
6 not the trees. This is granular moss that sits on the
7 ground. And while Mr. Shor may characterize this as a
8 mythical forest, it's a forest with real consequences
9 for the State of Canada. The types of allegations the
10 Claimant makes are not the place for a NAFTA
11 Article 1102 or 1103 claim.

12 Now, to the extent that this Tribunal finds
13 any differences between Tembec's GBL or Howe Sound's
14 GBL, that does not have anything to do with
15 nationality or Most-Favored-Nation treatment. It has
16 to do with the unique circumstances of each mill. I
17 won't review the key differences in the mills.
18 There's a table--a couple of tables. We've tried to
19 summarize some of the key points for you.

20 I think just as a final point on this, BC
21 Hydro's goal when procuring electricity has always
22 been the same. It is to demark incremental from

03:58:45 1 existing electricity for the purpose of procurement.
2 It wants to increase its energy resources. The GBL
3 methodology was employed on a consistent basis to meet
4 this objective.

5 Now, the Claimant has a few comparators,
6 which I'll review quite quickly, which, in Canada's
7 view, are not relevant. The first is Tembec's '97
8 EPA, which is the basis for the Claimant's allegation
9 that BC Hydro ought to have given them a zero GBL. As
10 Mr. Switlishoff confirms, however, the concept of GBLs
11 was not even invented at the time the 1997 EPA was
12 signed. So, of course, it didn't have a GBL. That
13 agreement came under a completely different policy
14 regime.

15 The Claimant also compares itself to Tolko;
16 however, even Mr. Switlishoff and the Claimants in
17 their Opening confirmed that Tolko does not meet the
18 test of the Claimant's like circumstances and is,
19 therefore, not irrelevant.

20 The Claimant brings up the fact that it's
21 Canada who raised Tolko. Canada raised Tolko--and
22 maybe we'll get to this in just a moment--for the

03:59:52 1 context of G-48-09 because Tolko is in FortisBC
2 territory and is subject to the same Orders as the
3 Claimant. It is for that purpose that Tolko is more
4 like the Claimant. The Claimant, of course, uses
5 Tolko to compare itself to Howe Sound and the BC Hydro
6 GBLs, which is not like at all, and they admit the
7 same.

8 Turning to the Exclusivity Clause, every mill
9 that has an EPA with BC Hydro has an Exclusivity
10 Provision, including both Tembec and Howe Sound. The
11 Claimant has been treated no different. The Claimant
12 has, in fact, received more favorable treatment than
13 any other mill through its Side Letter Agreement.
14 Finally--sorry. I misspoke. For this reason, on the
15 Side Letter issue, there can be no less favorable
16 treatment. No other mill has the right to two GBLs,
17 which is precisely what the Side Letter Agreement has
18 allowed the Claimant to achieve.

19 Finally, the final measure is G-48-09, which
20 the Claimant mischaracterizes. First, the Order did
21 not restrict their access to PPA Power. Mr. Swanson
22 testifies a FortisBC GBL using PPA Power was available

04:01:11 1 to the Claimant. However, it was the Claimant who
2 refused to take a reasonable position on its FortisBC
3 GBL. Canada is not liable under the NAFTA for the
4 Claimant's aggressive stance on its GBL and failure to
5 negotiate with its own private utility.

6 Second, G-48-09 had no effect on FortisBC's
7 ability to draw on its other resources to supply
8 electricity to its self-generating customers. In
9 fact, through the NECP, the Claimant had 100 percent
10 access to power for the purpose of arbitrage, a right
11 that no other mill holds including Tembec and Howe
12 Sound. So, when it comes to access to power for the
13 purpose of arbitrage, the Claimant has received
14 greater access than any other mill, not less favorable
15 treatment.

16 I would now like to touch on Article 1105,
17 which protects against violations of the customary
18 international law Minimum Standard of Treatment. Now,
19 the Parties agree that the FTC note is binding on this
20 Tribunal, and that is the customary international law
21 Minimum Standard of Treatment that must apply. A high
22 level of deference must be accorded to domestic

04:02:31 1 authorities under Article 1105. It is precisely for
2 this reason why the threshold is high.

3 Under Article 1105, the Claimant bears the
4 burden of proving a customary norm. The Claimant
5 alleges that this burden rests on the Tribunal, which
6 is not the case. It is the Claimant's burden to prove
7 both opinio juris and State practice, and the Claimant
8 has provided neither. Instead, the Claimant has
9 elected to take isolated words from various arbitral
10 decisions to establish new customary norms at
11 international law. That, however, is not a valid
12 basis to prove custom. Arbitral awards are not,
13 however, evidence of State practice.

14 For example, the Claimant takes the word
15 "discrimination" from the Waste Management decision
16 and argues that the differential treatment between
17 nationals and aliens is prohibited at customary
18 international law. When it comes to this point in its
19 pleadings, to establish discrimination under 1105, the
20 Claimant merely says CR1102 and 1103 claim. This is
21 not the correct approach to 1105. They have proffered
22 no evidence of State practice or opinio juris. The

04:03:45 1 type of discrimination the Claimant alleges is not a
2 customary norm.

3 Turning to the Claimant's second pillar,
4 again, they have failed to show that Canada owes a
5 duty of transparency in this context. They have
6 provided no evidence of State practice or opinio
7 juris. In any event, BC Hydro was transparent when
8 setting GBLs. It held numerous information sessions,
9 assigned individual employees to be responsive to the
10 needs of bidders, and had countless meetings and phone
11 calls regarding the bid and the GBL process. This can
12 hardly be said to be untransparent.

13 Turning to the third pillar, Canada does
14 agree that it owes a customary international law, a
15 duty, not to treat the Claimant in a manner that is
16 manifestly arbitrary. But it is very important to
17 understand what this term means. As the International
18 Court of Justice held in the ELSI Case, arbitrariness
19 is not so much something opposed to a rule of law, it
20 is opposed the rule of law itself.

21 In some of Canada's recent experience,
22 Tribunals have interpreted "arbitrariness" to mean

04:05:02 1 "reasonableness." That, in our view, is not correct.
2 To be manifestly arbitrary, the conduct must have
3 willful disregard. It must shock and surprise. In
4 our view, none of the conduct at issue here comes
5 remotely close to meeting this standard. Whatever the
6 Claimant may feel with respect to its BC Hydro
7 procurement GBL, the way it was negotiated was hardly
8 manifestly arbitrary. Neither was the treatment
9 grossly unfair, unjust, or idiosyncratic. In its
10 pleadings, the Claimant suggests that BC Hydro gave
11 favorable deals to those with political connections.
12 There is, however, no evidence to support this claim.
13 And the way the GBL was set was not grossly unfair.
14 Finally, the Claimant's argument that the
15 BCUC violated the Minimum Standard of Treatment in
16 G-48-09 must be dismissed. This has some important
17 policy implications for Canada because only a
18 claim--and for the NAFTA Parties, I should say--only a
19 claim for a denial of justice can be made against the
20 BCUC as an adjudicative body. The Claimant did not
21 appeal the decision, nor did it properly ask the BCUC
22 to reconsider the decision. In fact, at times it

04:06:27 1 expressly told the BCUC not to reconsider the
2 decision. The Claimant thus, did not exhaust its
3 local remedies, and a denial of justice claim in that
4 context is not credible.

5 With that, I will turn over my remaining time
6 to my wonderful colleague, Mr. Kurelek, who will
7 discuss the issue of damages unless the Tribunal has
8 any questions, of course.

9 PRESIDENT VEEDER: We may have later, but
10 we'll hear your colleague on damages.

11 MR. DOUGLAS: Okay. Thank you very much.

12 MR. KURELEK: Could I just ask the Tribunal
13 Secretary how much time exactly is left?

14 PRESIDENT VEEDER: I can tell you the answer
15 is 15 minutes.

16 MR. KURELEK: On to damages.

17 Canada's position today is that regardless of
18 what the Tribunal's finding is with respect to
19 liability, Mercer has failed to make out its damages
20 claim against Canada. Claimant's counsel was correct,
21 I believe, when she said today that we agree on the
22 legal framework here. I would say that's true with

04:08:14 1 one exception, and the only exception is the one that
2 Mr. Douglas brought up, my colleague, Mr. Douglas,
3 about the procurement Article of NAFTA.

4 I won't be dealing with that, because he
5 already has, so what I'm going to be dealing with
6 instead are six evidentiary themes that relate to
7 Navigant's damages model.

8 And in terms of what we've got here are,
9 Number 1, Celgar could not have sold its below-GBL
10 electricity to third parties in an economically viable
11 manner.

12 Second theme, BC Hydro would not have bought
13 Celgar's below-GBL electricity.

14 Three, it's highly speculative to assume that
15 BC Hydro will renew Celgar's EPA in 2020 at the same
16 price and with the same GBL.

17 Four, a valid 1991 B.C. Ministers' Order
18 regarding Celgar's self-supply obligations either
19 erases entirely, in Canada's view, or at the very last
20 caps, in Mercer's view, Mercer's damages claim.

21 Five, many of Mercer's damages calculations
22 rely on a metric, the BLAP, that is arbitrary,

04:09:29 1 unrelated, and contrary to B.C.'s resource acquisition
2 policies and is not causally connected to Mercer's
3 liability claim.

4 Sixth and finally, Navigant's damages
5 calculations are replete with errors, all of which, as
6 Mr. Rosenzweig pointed out, served to overstate
7 Mercer's damages, thus rendering its quantum
8 calculations unreliable.

9 So, if we could turn now, Chris, to the six
10 evidentiary themes, starting with the first one, and
11 our little diagram there.

12 This is a metaphorical bridge, which is the
13 Claimant's damages model. We have released Celgar
14 from its cage or box, or what I would call a prison,
15 and now they're driving a truck. Mercer's truck is
16 empty. It's looking to be filled with the money that
17 is on the other side of the bridge. All it needs to
18 do is cross that bridge, and if it makes it over that
19 bridge successfully, then it will fill its truck with
20 the necessary Damages Award--or the requested Damages
21 Award.

22 Now, these six themes are represented by the

04:10:42 1 six pillars that hold up the bridge. So, stay tuned
2 in the brief time I have left. Let's see how they do.

3 First theme, Celgar could not--Canada's
4 position is that Celgar could not have sold its
5 below-GBL electricity to third parties in an
6 economically viable manner.

7 There are three subthemes to this issue.
8 Canada's position is that during the relevant period,
9 the selling price for Celgar's energy was too low.
10 The price of its remaining--replacement energy was too
11 high for Celgar to have arbitrated below-GBL energy at
12 Mid-C prices.

13 Second point, Celgar could not access
14 sufficient long-term firm transmission, the type that
15 was required to secure a long-term, multiyear energy
16 sales contract, nor has it offered any evidence that
17 it would have been able to secure even generic
18 long-term energy sales agreements.

19 Third, Celgar's energy was not eligible as
20 renewable energy in various Canadian and U.S. markets.

21 So, quickly, turning to selling versus
22 purchase price. I don't think there is too much

04:11:52 1 dispute anymore about Mid-C prices. Mr. Krauss,
2 Mr. MacDougall, even Mr. Kaczmarek, when I
3 cross-examined him the other day, all agreed that in
4 2008, Mid-C prices took a precipitous and sustained
5 decline in 2008.

6 Mr. Friesen, in his statement, noted that he
7 was looking to make energy sales for Celgar on
8 Celgar's behalf based on Mid-C prices. So, there's
9 our link to Mid-C. Mr. Kaczmarek also agreed that he
10 calculated Mercer's damages based on a replacement
11 power cost of Rate Schedule 31 and 33.

12 So, Chris, if we could go to figures--NERA
13 Figures 3 and 4 from the second NERA Report, I brought
14 this up, I think, in cross-examination. And these two
15 are the spot prices and the forward prices for Mid-C
16 at the relevant time, versus the Rate Schedule 31 and
17 33 prices, which show that, in this time period, based
18 on these figures, Celgar could not have arbitrated its
19 power successfully in the Mid-C market.

20 So, let me return briefly to what Claimant's
21 counsel said today about, well, we're not looking for
22 green energy prices--which I'm getting to--what we're

04:13:08 1 talking about here is that green energy is similar in
2 price to long-run marginal cost. What's the answer to
3 that? Our answer to that is the following:

4 First of the all, Mercer has provided no
5 proof that it was even engaged in discussions with the
6 Party for such a long-term energy contract. More
7 importantly, though, even if it was, which we haven't
8 seen evidence of, the problem with such a contract
9 would be finding a utility that would be interested in
10 such an arrangement.

11 And we're talking here about risk. A number
12 of Witnesses, including Mr. MacDougall, Mr. Krauss,
13 and Mr. Rosenzweig, all talked about the various risks
14 that would be associated with trying to wheel a
15 long-term energy contract with only short-term firm
16 transmission.

17 In this case, it would be particularly risky,
18 considering that the energy generation is ancillary to
19 the pulp mill's production capability. So, if there's
20 an issue with pulp mill prices or the market costs
21 that go into creating the pulp, then that could affect
22 the reliability of the power generation.

04:14:24 1 Secondly, we've got the transmission issue.
2 As the various Witnesses pointed out this week--thank
3 you Chris--there are real concerns regarding risk
4 associated with getting bumped or curtailed by
5 higher-level priority transmission.

6 And, thirdly, Mr. Krauss brought up the idea
7 that--and Mr. Rosenzweig, as well, in their testimony,
8 that the regulators of these utilities would also have
9 a concern about wheeling this type of power, the
10 long-term energy Contract power over the short-term
11 transmission because, again, of the reliability. It
12 wouldn't necessarily meet the reliability standard.

13 Turning to insufficient transmission space, I
14 think we've dealt with that extensively this week.
15 I'll just summarize it by saying it seems the
16 Claimant's position here is both confused and
17 desperate. It is confused in the sense Mr. Friesen
18 said he could get firm energy for Celgar.
19 Mr. Kaczmarek, in his Report, said, I think we could
20 get long-term transmission. When I pressed him on
21 whatever we could get both, he said, I'm not an
22 expert, and I didn't really draw a distinction between

04:15:39 1 those technical terms.

2 So, then, finally, the Claimant's landed on
3 what they say is the short-term firm and non-firm
4 transmission that they use for a variable--sorry, for
5 a viable long-term energy sales Contract. But, again,
6 Mr. Krauss, Mr. MacDougall, and Mr. Rosenzweig all
7 indicated that such an arrangement--such a wheeling
8 arrangement with that little amount of transmission
9 was not viable.

10 Renewable markets, quickly. Mr. MacDougall's
11 evidence regarding the ineligibility of Celgar's
12 renewable energy in the Pacific Northwest and Alberta
13 has been uncontradicted regarding Ontario and Quebec.
14 It is just not economic. It is too far to wheel to do
15 it on an economic basis. Mr. Garrett from Puget Sound
16 wasn't even called here as a witness. He couldn't
17 even remember meeting with Mr. Merwin, if you recall.

18 So, turning the second theme of the six
19 themes, BC Hydro, in Canada's view, would not have
20 bought Celgar's below-GBL electricity. We've rehashed
21 this theme again and again and again. Mr. MacLaren,
22 in particular, and Jim Scouras, all of them say

04:16:51 1 BC Hydro would not buy Celgar's below-GBL power.

2 One thing we didn't raise in the slides here,
3 but one of the claims that Mercer has made is that
4 B.C. didn't want the power to leave B.C. Les
5 MacLaren, in his second statement in Paragraph 16
6 said, we didn't care where it went. We're fine with
7 it leaving the Province. That's not our priority
8 here.

9 And this brings to us a key problem for
10 Mercer, which is that Mr. Kaczmarek's damages
11 calculations are based entirely on sales to BC Hydro.
12 It's as though they've abandoned this notion of trying
13 to sell to third parties. It is just not realistic.
14 And he provides no alternative or additional
15 calculations based on potential sales to third
16 parties.

17 Now, in his defense, Mr. Kaczmarek had a bit
18 of a robotic remit in that he said, I'm not here to
19 test or even decide on some sort of summary judgment,
20 the way the Claimant--in the Claimant's case. I
21 accept the case of what they're pleading, and I
22 calculate the damages from that.

04:17:49 1 So, very quickly, as I'm running out of time,
2 Number 3, it's highly speculative to assume that
3 BC Hydro will renew Celgar's EPA in 2020 at the same
4 price and with the same GBL.

5 Here, Mr. Kaczmarek, in his direct
6 presentation, brought up "The sky is falling" 2008
7 LTAP quotations about BC Hydro needing all this
8 resource power. That was then; this is now. The 2013
9 IRP indicated, as I pointed out to Mr. Kaczmarek, that
10 BC Hydro is in a surplus situation. They have
11 adequate energy supply until 2028, adequate capacity
12 to 2019. And in terms of new price, the SEEGEN EPA
13 managed--BC Hydro managed to obtain a lower EPA price
14 of \$43 in 2014, compared to the \$60 they negotiated in
15 2003.

16 A valid Ministers' Order, Mr. Owen dealt with
17 that. Claimants' counsel has admitted that at least
18 there's a cap on damage for that. Although in their
19 slide, it said 75 million. I think in Mr. Kaczmarek's
20 Table 15, it says 73. I'm not sure why there's a
21 difference there. And both, I think, include
22 tax--sorry, interest.

04:19:09 1 So--but at least there's a cap, in
2 Mr. Rosenzweig's view, the Ministerial Order, if it's
3 valid, damages go to zero. There's no artificial
4 limit from 1994 to 2006.

5 Regarding the fifth theme, BLAP, if this
6 Tribunal agrees with Canada and finds it's an
7 inappropriate metric on which to calculate damages,
8 then that obviates a number of Navigant's numbers
9 because the damages model relies on BLAP.

10 And then, finally, regarding the errors,
11 again, we can spend a whole boring day going through
12 all of the detailed errors that NERA has alleged that
13 Navigant has committed. I raised three or four of
14 them the other day under the Footnote 899, "Agreed-to
15 Errors," there are a number of others that are in
16 Footnote 900 of Canada's Rejoinder, and then there are
17 the new errors that are in Footnote 9--sorry 901 of
18 Canada's Rejoinder. In all cases, every time there
19 was an error, it always artificially inflated or
20 magnified Mercer's damages, which leads us to conclude
21 that Mr. Kaczmarek's damages calculations are not to
22 be relied upon.

04:20:26 1 And so, as you might expect, all themes are
2 destroyed, and Mercer's truck doesn't get to go across
3 the bridge.

4 Thank you. Those are my submissions,
5 hopefully on time.

6 PRESIDENT VEEDER: Right on time. Thank you
7 very much, indeed.

8 MR. SHOR: Mr. President, could I just note
9 for the record that we think the truck is too small.

10 PRESIDENT VEEDER: It's noted. Maybe you
11 should have more than one truck.

12 Let's take a 10-minute break now, and then
13 we'll hear the Reply.

14 MR. SHOR: Can we ask for 20 minutes. We
15 haven't had any time to prepare our rebuttal.

16 PRESIDENT VEEDER: That's true. Let's make
17 it a bit longer. We'll give the Respondent 20 minutes
18 to.

19 MR. SHOR: But they had lunch. They had
20 lunch to prepare their rebuttal.

21 PRESIDENT VEEDER: But they didn't have
22 lunch, actually.

04:21:17 1 MR. SHOR: Well, they were doing their
2 rebuttal.

3 PRESIDENT VEEDER: We'll break for 20
4 minutes. We'll start at 20 to 5:00.

5 (Brief recess.)

6 PRESIDENT VEEDER: Let's resume.

7 CLOSING REPLY BY COUNSEL FOR CLAIMANT

8 Claimant has the floor.

9 MR. SHOR: Mr. President, Members of the
10 Tribunal, our rebuttal is going to have three themes.
11 The first theme is I'm probably going to have trouble
12 reading my own handwriting; the second theme is Canada
13 must have been at a different Hearing than the one we
14 attended; and the third theme is that Canada has no
15 shame. I hate to say it, but it's true. Canada must
16 have been in a different Hearing because their
17 presentation of the facts seemed oddly divorced from
18 what witnesses actually said in this proceeding.

19 Let's start first with Mr. Owen's discussion
20 of service GBLs versus procurement GBLs. That was
21 introduced by Canada for the first time in their
22 Closing Statement. No Witness ever raised that

04:48:45 1 distinction. As far as we can tell, they are an
2 invention purely of Mr. Owen's mind.

3 He draws that distinction because he has to
4 separate G-38-01 from the GBLs that were actually set
5 and make the argument that G-38-01 is not applicable
6 to contracted GBLs. In making that argument, he
7 resorts to partial quotations--and this is the
8 Canada-has-no-shame part--partial quotations from BCUC
9 Decisions. Let me read to you what the BCUC actually
10 said. I'll point out where Mr. Owen stops reading,
11 and then I'll continue.

12 In Order G-106-14, which is Exhibit C-284, on
13 Page 6 of 8, the Commission notes that "Because
14 self-generators are selling to BC Hydro"--exactly our
15 context--"a GBL in this context has a dual purpose.
16 On the one hand, it is used to establish BC Hydro's
17 obligation to serve under RS 1823"--Mr. Owen omits
18 that portion--"and the other hand, it identifies how
19 much idle generation is available for BC Hydro to
20 purchase under an EPA. As pointed out by Celgar in
21 its Submission, these two amounts are aligned, and
22 there is, in fact, only one GBL. The issue is

04:50:08 1 analogous to two sides of the same coin."

2 And then in the bottom paragraph--and this is
3 where he stops reading because it's not convenient for
4 him to continue reading. In the last paragraph, in
5 the TS 74 Decision, the Commission agreed with
6 BC Hydro that: "In considering, one, GBL as a rate,
7 it is necessary to look at the use to which a GBL is
8 being put and a specific context for that use. The
9 Commission acknowledged that a GBL in the context of
10 an EPA and LDA is not a rate." That's where Mr. Owen
11 stopped reading. But the Decision goes on, and this
12 is the critical language. "However"--he left out the
13 "however" part--"However, when establishing this GBL,
14 BC Hydro is simultaneously determining the GBL
15 Baseline that would apply to RS 1823 under TS 74 used
16 in the GBL mechanism, which is a rate." The
17 Commission never determined that a GBL is not a rate.
18 The Commission determined that it is a rate but that
19 it should be filed in a different proceeding rather
20 than a TS 74 proceeding because of this dual purpose.

21 So, they continue. "Therefore, when
22 establishing a GBL in the context of an EPA or LDA,

04:51:25 1 the GBL Guidelines attached to that customer's Rate
2 Schedule would apply." And the GBL Guidelines are the
3 very guidelines we're talking about here. So, the
4 Commission is saying here undeniably that G-38-01 and
5 the GBL Guidelines BC Hydro is filing are a rate and
6 have to be filed with the Commission.

7 Also, some of this text is repeated in our
8 Slide 57, which talks about the dual purpose. Canada
9 ignores the dual purpose and focuses exclusively on
10 one.

11 The third point I'd like to touch on is the
12 setting of Celgar's GBL that Mr. Owen described as
13 being set perfectly in accordance with the GBL
14 methodology. Now, if you remember the slide I had
15 with all the testimony of the different BC Hydro
16 Witnesses on how GBLs are set starting with math, not
17 math, squiggly lines, whatever, we've been calling
18 that GBL Bingo because you can pick a number and get a
19 different GBL methodology each time. Mr. Owen gave us
20 a new number. He said Celgar's GBL was justified
21 being set at load because "they were attempting to
22 meet their load. They were trying to meet their

04:52:50 1 load." It reflected what generation, what Celgar's
2 generation was going to look like, not what it
3 actually looked like; what it was going to look like.
4 And he referred to "the generation pattern the Mill
5 would have."

6 Now, the interesting thing about that GBL
7 methodology is it's not supported by the testimony of
8 any Witness in this proceeding. The Witnesses that
9 had actually presented who calculated the GBLs all
10 have different theories. None of them worked. So,
11 Mr. Owen in Closing comes up with a completely new
12 theory.

13 Moreover, to make his theory, he has to
14 misconstrue the facts as well. And, again, this is
15 another element of Canada has no shame. He says that
16 the factual basis for that, he said, is that--oh,
17 before I get to the factual basis. Not only didn't
18 any Witness testify that that was the basis of the
19 GBL, but if you read carefully, what he's saying is we
20 didn't rely on the actual data, we relied on our
21 assessment of how the Mill would perform in the
22 future. Mr. Dyck, who actually set the GBL, testified

04:53:54 1 to the opposite. He said he relied on actual 2007
2 data. So that's just utter nonsense, Mike. Thank you
3 for inventing it for us for Closing.

4 Moreover, Mr. Merwin didn't support the
5 argument he made. Mr. Owen tried when he was
6 cross-examining Mr. Merwin to establish that point,
7 but it didn't work. Let me read from the transcript,
8 Paragraph 391, Line 17 to 22.

9 Okay. Mr. Owen, asking the questions.
10 "Okay. So, in 2007, you were generally--you were
11 aiming to sort of meet your load, and you were
12 generating to essentially offset your electricity
13 load; is that right?"

14 Answer from Mr. Merwin: "No, we were
15 generating to maximize our power generation."

16 Page 392, Lines 1-12, "Okay. But let's put
17 it this way. I'll rephrase my question so you can
18 agree with me and we'll get on. Your overall
19 generation levels were a little bit above your load.
20 You generated 350,000 gigawatts, and your load was
21 349. And sometimes you were above, and sometimes you
22 were below."

04:55:03 1 Answer: "Sometimes we were above and
2 sometimes we were below, but our focus was to maximize
3 our generator output that year. And in that year and
4 some days, we were above; and the days we couldn't
5 maximize, we were below."

6 So not only isn't the methodology the
7 methodology that's articulated by any Witness in the
8 proceeding, but the factual predicate for it that
9 Celgar was attempting to meet its load all the time
10 isn't even established in the proceeding as well.

11 Another fact on the they must have been at a
12 different hearing theme, the Tembec Skookumchuck GBL.
13 As Canada presented it, it made it sound like BC Hydro
14 had actually bothered to substantiate Mr. Lague's tale
15 about the << [REDACTED] It's uncontested in this
16 proceeding, however, that he didn't do so. Apparently
17 Canada believes that, if they repeat something enough
18 times that Tembec's << [REDACTED] we
19 might actually believe it. But there was no
20 substantiation, no evidence of it. The only evidence
21 they referred to in the presentation was that the
22 documents and the analyses that were presented in the

04:56:18 1 first time during the Hearing in 2015. This was
2 nothing that was available to BC Hydro in 2009 and
3 nothing they relied upon.

4 Next, we still have repetition of the fiction
5 that G-48-09 did not restrict Celgar because there are
6 alternatives available. We heard about the FortisBC
7 GBL and the NECP Rate Rider again. I want to
8 emphasize under the Exclusivity Provisions of Celgar's
9 GBL, none of those alternatives is available until
10 BC Hydro activates the Side Letter, which they haven't
11 done yet. So none of those alternatives are
12 available. Celgar has no access to embedded-cost
13 power while selling power because it is restricted in
14 the EPA from selling any of its below-GBL energy.

15 Finally, before I turn to my colleague, we
16 have the argument that the NECP Rate Rider is in
17 effect because it is Celgar's fault that they
18 suspended the proceeding because they're fighting on
19 certain issues. Another untruth. Canada has no
20 shame.

21 The truth, which we established through
22 Mr. Swanson, is as follows: When BC Hydro filed the

04:57:34 1 2013 PPA, Celgar objected to the restrictions because
2 they were the same restrictions that were in the 1993
3 PPA. Celgar succeeded on several points and the
4 provision was modified, but it wasn't satisfied
5 enough, so it appealed to the B.C. Court of Appeals.
6 That appeal remains pending, but it had no effect
7 whatsoever on anything that followed afterwards in the
8 BCUC.

9 The BCUC proceeding continued. They approved
10 the EPA, the 2013 EPA, and it went into effect. Now,
11 that EPA had several provisions governing GBLs. And
12 it had a provision for BC Hydro GBLs and it had a
13 provision for FortisBC GBLs. And the Commission
14 directed FortisBC to file, since it was not at far
15 along as BC Hydro in the GBL-setting process, it
16 directed FortisBC to file GBL Guidelines, file general
17 principles governing--I think they call it
18 general--high-level self-generator principles for
19 FortisBC service territory.

20 Because of that, since it was back at square
21 one deciding what the principles were, the Commission
22 approached the Parties and said, it doesn't make sense

04:58:49 1 for us to go forward on the NECP Rate Rider, which is
2 the end of the process, while we're still discussing
3 principles. Let's set the principles first. And it
4 said--and it asked the Parties, should we suspend the
5 proceeding while we decide on the principles?

6 This has nothing whatsoever to do with
7 Canada's fantastic tale that Celgar somehow obstructed
8 the NECP Rate Rider from going into effect because it
9 challenged the very concept of a restriction. That
10 appeal is pending, but it has nothing to do with
11 what's going on in the BCUC.

12 I turn to Gaela.

13 MS. GEHRING FLORES: I think, continuing on
14 the theme of not the same hearing, with respect to the
15 NECP Rate Rider, we heard Canada state repeatedly that
16 this is a blended rate, that it really is just
17 excluding the 15 percent of PPA Power. That is not
18 true, and that's in accordance with Mr. Swanson
19 himself.

20 This is not a blended rate, and Mr. Swanson
21 quite clearly confirmed that. If we can go to
22 transcript 1708, and et seq., there's a very long

05:00:03 1 discussion from 1708, at least to 1711, where we begin

2 "Right."

3 "I believe in Paragraph 29 of your Statement,
4 you state that FortisBC will have to make a matching
5 purchase for the entire amount; is that correct?

6 "I believe so," his answer is, "but let me
7 just double-check. Yes, I do say that."

8 "And in your example, the cost of that
9 matching block--is the cost of that matching block, is
10 somehow 15 percent of that taken out to represent PPA
11 Power?

12 "I'm not sure I understand the question. I
13 guess.

14 "So it's been represented that about
15 15 percent of FortisBC's resources comes from
16 BC Hydro's PPA Power.

17 "I understand what you're asking me.

18 "Okay. So, I'm just trying to make sure
19 here. FortisBC, as you say in your Statement, would
20 have you buy the entire amount nominated by, in this
21 hypothetical, Celgar. They would have to go out and
22 purchase 349-gigawatt hours, is that right, or is

05:01:08 1 there some sort of accommodation for the 15 percent of
2 PPA Power?

3 Answer: "There's really no accommodation,
4 per se, of the 15 percent of PPA Power, and here is
5 why. It is because although PPA Power, on an actual
6 basis, only represents about 15 percent of FortisBC's
7 load, a lot of FortisBC resources are already used up,
8 so we can't go and get more power from them."

9 The transcript goes on, and he talks about
10 how they can only shift the incremental cost or the
11 marginal cost of going out and buying this matching
12 block of electricity all at once to Celgar,
13 everything. It is not a blended rate. It is
14 not--they are not just exposed to 15 percent of the
15 market; they're exposed to 100 percent of the market.
16 So we don't just lose the 15 percent PPA Power; we
17 lose, actually, 100 percent of our access to
18 FortisBC's true embedded-cost power.

19 With respect to the Ministers' Order, again,
20 not sure what proceeding we're in. They say that
21 they've presented Witnesses who have direct knowledge
22 of the Energy Project Certificate or the project, and

05:02:23 1 I think if you go to Ms. Mullen's Statements,
2 Mr. O'Riordan's Statement, you will find that
3 Ms. Mullen distances herself and her experience from
4 the EPC and from the Ministers' Order. And
5 Mr. O'Riordan's firsthand knowledge of the Ministers'
6 Order and the EPC is not particularly firsthand
7 either. Their most important Witness on the subject
8 was the first Witness they presented on the subject,
9 and that is Peter Ostergaard, and Peter Ostergaard
10 signed Order 15-01.

11 In his Witness Statement, he makes relatively
12 clear that this supposed self-sufficiency
13 requirement--or at least what then was being labeled
14 as a self-sufficiency requirement--now it's a
15 restriction on electricity sales, but in his First
16 Statement he said that the supposed 100 percent
17 self-sufficiency requirement was pretty important to
18 the Ministry.

19 Now Canada would have you believe that when
20 he was at the BCUC, and he signed Order G-15-01, he
21 forgot about it. Forgot. And Canada says that
22 Mr. Swanson says that the Curtailment Agreement just

05:03:45 1 was about curtailment.

2 This kind of sounds like preexisting is
3 preexisting. Curtailment is curtailment, but the fact
4 of the matter is, the Order had the Brokerage
5 Agreement attached, the Order was approving not only
6 the Brokerage Agreement but the Curtailment Agreement.
7 The Brokerage Agreement had an actual example of how
8 the Curtailment Agreement worked in real life, from
9 November--from November 2000, and it showed all the
10 metering numbers, and it showed when Celgar was buying
11 electricity and when it was selling electricity to
12 West Kootenay Power.

13 Again, in the face of those numbers,
14 Mr. Swanson said, I don't know what that means. He
15 was the Director of Regulatory Affairs at FortisBC.

16 PRESIDENT VEEDER: You have three minutes.

17 MS. GEHRING FLORES: Thank you.

18 Just scrolling down. With respect to the UPS
19 Decision, I believe Canada showed you a rather
20 excerpted quotation from the UPS Decision. You can
21 find it at CA-016. This is with respect to proving
22 national treatment and the elements of national

05:05:19 1 treatment. You will note that the Tribunal in UPS is
2 talking about the three elements of proving a prima
3 facie case of national treatment. They are not
4 talking about the burden shifting to the State when
5 the State might elect to come up with a justification
6 for the discriminatory act or for the different
7 treatment. That's different. And, in fact, pretty
8 shameless.

9 I think my last point would be on the
10 damages, that Celgar could not have sold its
11 electricity to third parties. I think we've already
12 addressed the fact that, in accordance with
13 Mr. Friesen, they certainly could have. They decided
14 not to cross Mr. Friesen on these issues. He's the
15 Expert. He actually saw the reservation system.
16 Instead, they crossed Mr. Kaczmarek on these issues.
17 One wonders why.

18 In any event, putting all that aside, the
19 Parties contemporaneously acted as if Celgar could
20 sell its electricity to third parties. Everyone was
21 acting like that. Why did BC Hydro start the G-48-09
22 proceeding? Because--and they argued very

05:06:45 1 vociferously before the BCUC--they were certainly of
2 the opinion that Celgar was going to export its
3 electricity to third parties from the Province, and
4 they wanted to stop it. They said it was going to
5 cause an inordinate amount of harm through their
6 sales.

7 And at transcript Page 2026, Mr. Rosenzweig
8 states, "The whole purpose of the GBL process is to
9 identify resources for BC Hydro to add to B.C.'s
10 resource stack on a firm basis. It is our position
11 that when BC Hydro contemplated the notion that
12 Celgar's resource would no longer be considered or be
13 able to be BC Hydro's resource, that is when BC Hydro
14 went into action."

15 This is what Dr. Rosenzweig says drives
16 BC Hydro's procurement decisions. If that is what
17 drives BC Hydro's procurement decision, then BC Hydro
18 would have purchased Celgar's electricity.

19 And I'm afraid I can't read my colleague's
20 writing, so I'll have him make that note.

21 MR. SHOR: It was just one follow-up point.

22 The notion that Celgar couldn't sell its

05:08:14 1 electricity into other markets is belied by the
2 conduct of all the Parties at the time. Celgar signed
3 an agreement with FortisBC to buy replacement power.
4 FortisBC designed the Agreement for Celgar. BC Hydro
5 went in and tried to stop it. The City of Nelson
6 signed an agreement with FortisBC. That was also
7 something BC Hydro tried to stop.

8 In fact, what happened at the time was the
9 City of Nelson had begun selling its electricity. So
10 the notion there weren't markets available for this is
11 something that is belied by the conduct of all the
12 Parties at the time.

13 PRESIDENT VEEDER: Thank you. We're going to
14 have to shop you there. You've come to the end your
15 20 minutes.

16 We now have the Respondent. Do you need or
17 want to break before you start? If so, how long?

18 MR. OWEN: Yes, absolutely. Just 20 minutes,
19 please.

20 PRESIDENT VEEDER: 20 minutes. We'll come
21 back at half past 5:00.

22 (Brief recess.)

05:32:24 1 PRESIDENT VEEDER: Let's resume. We now have
2 Respondent's Closing Reply.

3 CLOSING REPLY BY COUNSEL FOR RESPONDENT

4 MR. DOUGLAS: Thank you very much,
5 Mr. President. Just a few remarks.

6 First, the Claimants in their Rebuttal have
7 raised some surprise about the existence of two GBLs:
8 Service GBLs and procurement GBLs. There is a
9 plethora of discussion in Canada's materials about the
10 difference between G-38-01 and procurement GBLs.
11 Canada's Rejoinder Paragraphs 217 and 273 are just but
12 two.

13 Just to clear up this issue, G-38-01 was a
14 program established by BC Hydro to allow its customers
15 to export to market. It has been used since 2001 only
16 once and it has not been used since. So it is
17 complete sort of a red herring. It established
18 principles that were used in the procurement process.
19 You heard countless testimony from Lester Dyck, Les
20 MacLaren, Jim Scouras on this very point.

21 The third as well. We have the FortisBC GBL
22 which cannot possibly come as a surprise to the

05:33:47 1 Claimant. They have made countless submissions to the
2 BCUC asking for GBLs of various sizes, 1.5, 0, 11.
3 I'm trying to get a FortisBC GBL. So these are
4 different concepts that apply in different
5 circumstances and should not come as any surprise.

6 We're trying to clear up this matter of the
7 Claimant has sort of hung its hat on this one Decision
8 that says that a GBL is a rate. I want to put this on
9 record: there is G-19-14, which is R-204; and then
10 there's G-106-14, which is C-284.

11 The Claimant takes a complicated issue well
12 out of context, arguing somehow that a contracted GBL,
13 a procurement GBL, is a rate under the Utilities
14 Commission Act. That is not the case and that takes
15 these proceedings out context.

16 The proceedings relate to BC Hydro Industrial
17 Customer Tariff Rate Schedule 1823. The BCUC
18 explicitly confined its findings in that context,
19 i.e., to BC Hydro serving its customers. This is at
20 G-19-14 at Page 25. That is R-204.

21 BCUC decided that setting a GBL for service
22 under Rate Schedule 1823 related to the 1823 rate. It

05:35:06 1 also decided that setting a GBL under an EPA and LDA
2 also has implications for Rate Schedule 1823 customers
3 who have EPAs and LDAs. This is its reference to the
4 two sides of the same coin.

5 Thus, the BCUC directed BC Hydro to file the
6 contracted GBL Guidelines as part of Rate Schedule
7 1823. But the BCUC has agreed that a GBL in an EPA or
8 an LDA is not a rate. That is at G-106-14, Pages 6
9 and 7. It is Claimant's Exhibit 284.

10 The connection of the contracted GBL to Rate
11 Schedule 18--the connection of a contracted GBL to
12 Rate Schedule 1823 is under connection, but it is not
13 a rate.

14 Next, the Claimants make in this
15 allegation -- oh, I said "under reconsideration," not
16 "under construction," apparently. I had little sleep
17 last night.

18 The NECP suspension, the Claimants allege, if
19 I heard him correctly, that the 2014 PPA is the same
20 as the 1993 PPA. That is absolutely not true. The
21 2014 PPA makes explicit what is already implicit in
22 the 1993 PPA. Section 2.5(ii) provides for a GBL

05:36:32 1 mechanism to be set. It is precisely this mechanism
2 that is being challenged at the B.C. Court of Appeals.

3 This is what the Claimants are seeking in
4 this arbitration is the GBL methodology. And yet,
5 they are challenging it in the B.C. Court of Appeals
6 because they want everything. This is what
7 Mr. Swanson testified was "the moon." They want no
8 restrictions.

9 And it is because of that challenge that the
10 NECP proceedings have not suspended. If they can have
11 the moon, then the NECP is irrelevant and they have
12 consented to that suspension, the NECP not dead.

13 (Comment off microphone.)

14 Next, the Claimants argued about Order 15-01,
15 G-15-01. Mr. Swanson testified that all sales to
16 Celgar would be surplus. Celgar in that context is
17 supplying the Mill first. There is no conflict with
18 the self-supply obligation in the Ministers' Order.

19 Regarding third-party sales, there are no
20 facts to support the existence of third-party sales.
21 The Claimant has provided none. It has provided no
22 damages assessment based on the existence of

05:37:52 1 third-party sales. It alleges that submissions in
2 G-48-09 are somehow proof that those sales existed.

3 The hypotheticals--the amounts put at issue
4 in G-48-09 are hypothetical amounts whereby FortisBC
5 would take all PPA Power to supply both the City of
6 Nelson and the Claimant in a situation where they
7 would become what's called a "full load customer" that
8 take and buy all the electricity. So it would be
9 entirely PPA electricity, and they were completely
10 hypothetical amounts and they were not assessed on the
11 basis of the possibility of any existence of
12 third-party sales whatsoever.

13 And with that, I will turn it over to my
14 colleague, Mr. Owen. A little bit jittery.

15 MR. OWEN: Too much coffee, I think. I'm
16 guilty of that myself.

17 I'm going to try to add clarity to the murky
18 world of the NECP rate.

19 Can we bring that up transcript, please. If
20 we could just bring it up.

21 So here we have Mr. Swanson's testimony on
22 Day 6 and he's being asked, Is it embedded-cost power?

05:39:10 1 "Yes.

2 "How much can they nominate?

3 "100 percent."

4 And it's compared by calculating the cost of
5 embedded-cost power including the PPA to the cost of
6 embedded-cost power excluding the PPA.

7 Now I want to--

8 PRESIDENT VEEDER: Just give us the reference
9 to the transcript.

10 MR. OWEN: I'm sorry. Thank you,
11 Mr. President. This is Page 1644, Lines 7-15. I
12 think conceptually maybe a good place to start with
13 this is there are two elements to Rate Schedule 31,
14 which is a standard industrial rate in the FortisBC
15 service area. And one is an energy charge, so how
16 many megawatt hours are they getting?

17 And the other is a demand charge, essentially
18 the size of the pipe they're going through.

19 Celgar is familiar with this because it
20 complained a lot about having a demand charge. It got
21 moved from the time of the use rate RS 33 on to RS 31
22 where there is a demand charge.

05:40:07 1 Fortis has 100 percent capacity right now.
2 It has all the capacity it can handle, including the
3 Waneta Dam expansion which is coming on line. That
4 element, the demand element, is fully an embedded-cost
5 resource and part of the embedded-cost rate. So for
6 the demand charge side of the rate, that is fully
7 embedded cost and the Claimants have the benefit of
8 that.

9 What we are talking about with the NECP is a
10 Rate Rider. So you're talking about an embedded-cost
11 rate, RS 31, and there's potential for a rider to be
12 added on in certain circumstances. Now, my
13 understanding is that essentially there is a matching
14 purchase--maybe we could go to Lines 16-22 here. Here
15 Mr. Swanson is being asked, Is the NECP a market
16 purchases?

17 "No, it can include some portion of market,
18 but the NECP is really all of FortisBC's resources
19 excluding the PPA."

20 Could we go to 1645, Lines 10-19, please.

21 Here we have Mr. Swanson talking about
22 capacity and the fact that the Waneta Expansion is

05:41:24 1 coming on and that they have lots the capacity and all
2 of that is an embedded-cost resource. I think the
3 Tribunal may recall Mr. Swanson talking about how they
4 could make purchases of non-firm power on the market,
5 essentially on the spot market, very cheap, and they
6 could firm up that resource for the Claimant by
7 essentially using--storing the water behind the dam
8 and then using it to firm up the power source for the
9 Claimant.

10 Could we go to 1645, Lines 20-22? And 1646
11 Lines 1-10. Can you get that for me, Chris.

12 So, again, yes, I think in different
13 iterations FortisBC has contemplated that it would
14 make a matching block market purchase potentially
15 under a long-term contract, potentially on the spot
16 market. You know, there are different options open
17 for it, and that would essentially, my understanding
18 is, offset the fact that there is no PPA Power on the
19 energy side of RS 31. If there was any increment in
20 cost, that small increment in cost would be passed on
21 to the Claimant.

22 On the demand side, there is no change

05:42:45 1 whatsoever. So it is an embedded-cost rate. It is
2 based on FortisBC's embedded-cost rate, RS 31, with an
3 adder or a rider on top of it. And FortisBC has said
4 to the BCUC--and you can look at different exhibits,
5 R-462, R-501. There they're saying that essentially
6 there will would be no additional cost for the
7 foreseeable future. And, indeed, the Claimants took
8 the position in G-188-11 that this would be a good
9 thing; Fortis could source from market because for the
10 foreseeable future there would not be additional costs
11 if they were managed properly.

12 So I think that's--I hope that's add some
13 clarity to this. I don't think I have anything else.
14 Oh, actually one thing. Just one moment.

15 The Claimant suggested that our Witnesses do
16 not have direct firsthand knowledge of the Ministers'
17 Order, and they did acknowledge that Peter Ostergaard
18 did, of course, because he handled it directly.
19 Dr. O'Riordan indicates, however, in Paragraphs 73-76
20 of his Witness Statement that he actually does have
21 firsthand knowledge. And Ms. Mullen has testified
22 that, although she does not have a current

05:44:08 1 recollection of it, she was present at an Energy
2 Project Coordinating Committee meeting where she was
3 responsible for taking the notes, and if you look at
4 her Witness Statement, there's an excerpt from there
5 about the Celgar project where the Energy Project
6 Coordinating Committee, including Ms. Mullen were
7 discussing that, and she was, indeed, the author of
8 those minutes.

9 So, I don't have anything further. Thank
10 you.

11 PRESIDENT VEEDER: Well, thank you for that.
12 We've come to the end of the Parties' submissions at
13 this hearing. We've now come to the end of the
14 hearing. There were certain housekeeping matters we
15 raised yesterday and others we need to raise now.
16 First of all, a very minor one, but we understood that
17 the Respondent's wish to correct one of the slides
18 that was given to us in Opening Oral Submissions, and
19 we'd just like to confirm that it is Slide Number 53,
20 which is now corrected by the Closing Submission
21 Slide 62.

22 MR. OWEN: We apologize for that. It

05:45:16 1 Slide 53. Thank you, Mr. President.

2 PRESIDENT VEEDER: We raised last night the
3 possibility of some form of written submissions.
4 We've had a very full day, which we have found
5 extremely useful, and we appreciate the amount of work
6 that has gone into preparing both the written
7 form--that is, the slides--but also the oral
8 submissions. And for our part, for the time being,
9 we're not minded to require post-hearing written
10 submissions, but you may have formed different views.

11 We ask the Claimant first?

12 MR. SHOR: I think we're too tired to come to
13 a conclusion right now.

14 PRESIDENT VEEDER: I can understand that.

15 MR. SHOR: Can we think about it?

16 PRESIDENT VEEDER: Can we leave it there?

17 Unless the Respondent has a strong feeling
18 about this.

19 Do you want to think about it? When you see
20 the transcript of today, you may have a better way of
21 judging whether you think it is important.

22 MR. OWEN: You know, I certainly am not going

05:46:32 1 to rush and encourage you to give us a bunch of
2 Post-Hearing Briefs that we have to do over August,
3 but, you know, if there are specific issues that you
4 are concerned about or have additional concerns about,
5 narrow issues, we're happy to provide you with
6 something further.

7 PRESIDENT VEEDER: I wasn't including the
8 possibility that, if we thought later on we needed
9 help on a particular issue or particular topic, of
10 course, we reserve the right to ask you to assist us
11 with that by way of further written submissions, but
12 we're not in the position to say that tonight.

13 Do you want to think about it? I think we're
14 all a little bit concerned that, although we had very
15 full Opening, Closing Submissions, so to speak, you've
16 had a very truncated time to reply, and if you thought
17 there was something which you needed to rebut, which
18 you haven't done, given the shortage of preparation
19 time or the shortage of time, think about that, and
20 then apply to us for permission to do so.

21 You were about to say something.

22 (Comment off microphone.)

05:47:37 1 (Laughter.)

2 PRESIDENT VEEDER: Okay. So no Order for the
3 time being for post-hearing written submissions, but
4 we reserve the right to ask for some help if we need
5 to.

6 The other technical matter is the transcript.
7 It is obviously in full form before the Tribunal. It
8 is being copied to the United States and Mexico. The
9 first thing I think we'd ask you to do is go through
10 the transcript to see if there are any corrections
11 that you need to make. And if you could do that
12 fairly promptly; not obviously minor matters, but if a
13 negative is missing or something, we need to know that
14 within two or three weeks.

15 Is that possible? Or, that will be August.

16 MR. SHOR: Yeah. I think the problem is that
17 everyone is getting out of dodge as soon as this
18 Hearing is over.

19 PRESIDENT VEEDER: How long do you need?
20 Actually, I've just been handed the Order. It's funny
21 how you forget things. We agreed that it would be
22 done by the 25th of September. The Parties are to

05:48:45 1 submit to the Tribunal the agreed, corrected, and
2 redacted versions of the transcripts on the 9th of
3 October in PDF version. It is Paragraph 14 of
4 Procedural Order Number 9.

5 MR. SHOR: We were very foresightful. Is
6 that a word?

7 PRESIDENT VEEDER: Shall we leave it like
8 that?

9 MR. SHOR: That's fine with Claimant.

10 PRESIDENT VEEDER: Respondent?

11 MR. DOUGLAS: That works for us,
12 Mr. President.

13 PRESIDENT VEEDER: Sorry, we mentioned last
14 night whether you wanted to make any submissions on
15 costs and whether you discussed that between
16 yourselves as regards to form and date.

17 MR. SHOR: We have not discussed it. I think
18 we'd prefer that to be due sometime after the
19 transcript corrections get done. I don't think there
20 is any urgency on that, maybe November sometime. Is
21 that...

22 MR. OWEN: Let's touch base after we're done

05:49:58 1 with the transcripts, and we'll figure it out.

2 PRESIDENT VEEDER: Just as regards to the
3 form, we don't need an audit, but we do need a little
4 bit of detail simply to allow the other party, if they
5 think they have queries about the assessment to
6 actually ask for explanations as to what the
7 assessment should be. But that means that you one
8 exchange, it should be simultaneous, and then after a
9 certain period of time, you could do a response.

10 MR. SHOR: Why don't we discuss with Canada
11 what the form might take and see if we can reach
12 agreement. If not, we'll apply to the Tribunal.

13 PRESIDENT VEEDER: Well, we're happy with
14 that. If you come up with an agreement, you can
15 assume it will work with us.

16 Anything else?

17 We ask the Claimants first.

18 MR. SHOR: Nothing on our end.

19 PRESIDENT VEEDER: And on the Respondent's
20 side?

21 MR. OWEN: Nothing further, Mr. President.

22 PRESIDENT VEEDER: Well, I think two things

05:50:51 1 from us. I'm sure I speak for all of us in thanking
2 Dawn Larson and David Kasdan for their extreme
3 patience. Don't forget that it was in this
4 arbitration that we launched the "no" button, and it
5 may become a feature of ICSID Arbitration. But thank
6 you for the transcript.

7 But also on our part, we'd like to thank the
8 Parties and counsel. It's been a very efficient and
9 productive hearing. We've covered an enormous amount
10 of ground. We know it's much harder for you than for
11 us, and I suspect the last few days have been
12 extremely difficult in terms of no lunch and lack of
13 sleep. So, we appreciate it. And we thank you all,
14 not only those that we hear and see, but we know at
15 the end of the table and behind the walls, there are a
16 lot of other people working very hard to keep this
17 arbitration working, so thank you to them too.

18 And with that, we close the Hearing. So,
19 thank you all very much, and bon voyage.

20 (Whereupon, at 5:52 p.m., the Hearing was
21 concluded.)

22

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAWN K. LARSON