## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***District of Kitimat and Wozney v. Minister of Energy and Mines et al,***
2007 BCSC 429

Date: 20070328
Docket: L050918
Registry: Vancouver

Between:

**District of Kitimat and Richard W. Wozney**

Petitioners

And:

**Minister of Energy and Mines,**
**The Attorney General of British Columbia and**
**Alcan Inc.**

Respondents

And:

**Haisla Nation**

Intervenor

Before: The Honourable Chief Justice Brenner

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioners: District of Kitimat and Richard W. Wozney | J. Hunter, QC and M. Oulton |
| Counsel for the Respondents, The Minister of Energy and Mines and The Attorney General of BC: | G. Copley, QC and C. Jones |
| Counsel for the Respondent, Alcan Inc.: | D. Webster, QC, D. Bennett, and |

R. Dalziel

Counsel for the Intervenor, Haisla Nation: A. Donovan, and B. Rogachevsky

Date and Place of Hearing: October 16 - 20, 2006 Vancouver, B.C.

INTRODUCTION

[1] After the Second World War, the Government of British Columbia wanted to spur industrial development in the Province. At the same time, the Aluminum Company of Canada (Alcan) wanted to increase its aluminum production. In 1950, Alcan and BC made an agreement (the “1950 Agreement”) under which BC provided economic access to public water resources and Alcan built hydroelectric capacity and an aluminum smelter at Kitimat.

[2] Some fifty years later a dispute has arisen as to how Alcan can use the hydro power it generates. Specifically, the dispute is over whether Alcan is entitled to sell hydro power instead of operating its aluminum smelter at Kitimat.

[3] The dispute is not between BC and Alcan, the parties to the 1950 Agreement. Rather, this challenge to two Government Orders is brought by the District of Kitimat and its Mayor, Mr. Wozney (the “petitioners”). The petitioners say that Alcan’s decision to restrict its production at the smelter while at the same time selling hydro power into a frothy market in more recent years has reduced employment at the smelter and caused associated economic suffering. Kitimat says that this was never the bargain made in 1950.

[4] The two impugned Orders are:

1. The BC/Alcan 1997 Agreement Order-in-Council No. 0977 made August 4, 1997 pursuant to the ***Industrial Development Act*** S.B.C. 1949, c. 31 (the “***IDA***”) authorizing the execution of a settlement agreement between Alcan and the Province (the “1997 Order”);

2. The Order No. M-22-0205 made by the Minister of Energy and Mines on June 6, 2002 (the “2002 Order”) exempting certain power sales from the provisions of Part 3 of the ***Utilities Commission Act***, R.S.B.C. 1996, c. 473 (the “***UCA***”) .

[5] The petitioners do not seek to strike down both orders in their entirety. Rather they say that these Orders are *ultra vires* to the extent that they, either expressly or implicitly, authorize the sale of power by Alcan in circumstances that are contrary to the requirements of the ***IDA*** and the 1950 Agreement.

[6] The respondents say that:

1. The orders do not authorize the sale of Kemano power and, even if they did, they are not *ultra vires*.

2. The ***IDA***, the 1950 Agreement and subsequent agreements and licences do not restrict the sale of Kemano power.

3. The court should exercise its discretion to refuse the declaratory relief sought in any event.

[7] The underpinning of the petitioners' case is the ***IDA*** and the 1950 Agreement. If these do not restrict Alcan's right to sell Kemano power, the petitioners' other submissions become academic. Therefore, the heart of this dispute is whether the impugned Orders contravene the ***IDA*** including, in the petitioners' words, the "regulatory scheme" set up pursuant to the statute.

PARTIES

[8] The District of Kitimat is a municipality of approximately 10,000 residents incorporated pursuant to the ***Local Government Act***, R.S.B.C. 1996, c. 323. It is located in north-western British Columbia. Richard W. Wozney is the Mayor of the District of Kitimat.

[9] The respondent Attorney General of British Columbia (the "Province") is a respondent pursuant to s. 16(2) of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241.

[10] The respondent Alcan Inc. is the contracting party with the Government to the 1950 Agreement and is the beneficiary of the impugned orders. Alcan successfully applied to be added as a party to this proceeding.

[11] The Haisla Nation is a First Nation in the vicinity of Kitimat with certain land claims in the area. The Haisla Nation was granted intervenor status and supports the position of the two respondents on this application.

***THE INDUSTRIAL DEVELOPMENT ACT***

[12] In 1949, the Province enacted the ***IDA,*** which, among other things, gave the Lieutenant Governor-in-Council the authority to:

(a) sell or lease Crown land or any interest therein to any person who proposes to establish or expand an aluminium industry in British Columbia;

(b) grant a licence to any such person to store or use any unrecorded water in the Province;

(c) make such other arrangements in the best interest of the Province regarding the future operations of the aluminum industry in British Columbia;

(d) authorize the Minister to execute any agreement for these purposes; and

(e) amend or extend any such agreement provided that the subject matter of any such amendment or extension could lawfully have been incorporated into the original agreement at the time it was made.

[13] The purpose of the ***IDA*** was to promote the establishment of permanent industries, particularly an aluminum industry, in BC. This can be seen in the preamble to the Act, which read:

> Whereas the prosperity of the Province depends on the development of its water-power sites and other natural resources, the expansion of its industry, and the establishment of new centres of population within its boundaries:
>
> And whereas it is consequently in the best interest of the Province that the establishment of new industries and the expansion of existing industries that require the development of water-power sites be encouraged to the fullest possible extent:
>
> And whereas the establishment in presently undeveloped sections of the Province of any permanent industry and in particular of an aluminium industry, which requires for its operations substantial quantities of electric power, involves extensive and costly preliminary investigations and engineering studies and the expenditure on the construction of hydro-electric works and industrial plants and facilities of very large sums of money over an extended period of years:
>
> And whereas, in order to facilitate the establishment or expansion in the Province of such permanent industries, it is advisable that the Lieutenant-Governor in Council be empowered to make agreements respecting the use of natural resources: (emphasis added).

[14] At this time, Alcan was looking to expand its aluminum production to take advantage of the strong demand for aluminum in the years following the Second World War.

[15] By 1948, Alcan and the Province were focussing on the Nechako watershed which is in the vicinity of present day Kitimat. This area had significant potential for developing abundant hydroelectric power coupled with the capacity for the development and maintenance of a year-round port, both necessary ingredients for the viable production of aluminum.

## THE 1950 AGREEMENT

[16] Investigations and negotiations continued. On December 29, 1950, the province and Alcan signed the 1950 Agreement, which among other things provided the following:

> 1. The Province granted Alcan the right to store and use water from the Nechako watershed for the generation of hydroelectric power.
>
> 2. Alcan agreed to pay rental for the power generated at its hydroelectric facilities.
>
> 3. The Province agreed to incorporate into one or more city, district or village municipalities all townsites or other population centres developed by Alcan in connection with the Kitimat Works and the Kemano facilities.

> 4. Alcan could sell Kemano Power to others in order to promote and encourage the development of Kitimat and other industries in the vicinity of the Kitimat Works.

[17] On the subject of power sales the 1950 Agreement specifically provided:

> 9. Sale of Power by ALCAN
>
> In order that the promotion and development of the district and of other industries in the vicinity of the Works may be encouraged, ALCAN may sell to others electric energy generated at the WORKS and shall not by reason of such sales be deemed a public utility within the meaning of the "Public Utilities Act". However, the terms of sales to persons other than ALCAN'S own subsidiaries, employees and tenants shall be subject to the jurisdiction of the Public Utilities Commission, but said Commission shall have no authority to require ALCAN to furnish service other than retail distribution and small power service to any one in the absence of an undertaking so to do on the part of ALCAN or to require ALCAN to extend any service that it shall have undertaken to furnish.

[18] Clause 11 of the Agreement provided:

> 11. Dependability of Power Supply
>
> It is recognized that ALCAN is a party to this Agreement solely with the expectation that it will have the continuing use of a large quantity of low cost electric energy to be employed according to its needs for the production of aluminum, the cost of such energy being in large part predetermined by the amount of the carrying charges on its investment in the portion of the Works producing the said energy.
>
> It is, therefore, agreed that ALCAN will not be required or compelled to supply to the GOVERNMENT or to anyone else any of the power generated at the Works, except as provided in Section 9 hereof.

[19] I pause here to note that this history was earlier judicially described by Hutchison, J. of this court in litigation involving the Kemano Completion Project ("KCP"). He described this chapter in the story of our province's economic development as follows:

> In order to fully understand the issues raised here, I will briefly review the history of the development of the aluminum smelting industry in British Columbia, first conceived and mooted prior to the Second World War...
>
> The coalition government of the day, mesmerized by what it perceived as a bold and imaginative plan, executed an agreement in 1950 with Alcan whereby their dream became a reality. The Industrial Act of 1949 was quickly passed and it heralded the Cabinet's authority to proceed "notwithstanding any law to the contrary". Cabinet was empowered to enter into the agreement on behalf of the people of British Columbia, whereby the project was to proceed. The contract contemplated Alcan developing their scheme in stages over many years and did not require completion until 1999, some 50 years after its beginnings.
>
> ***United Fisherman and Allied Workers' Union v. British Columbia* (*Ministry of Energy*),** [1994] B.C.J. No. 2839 at paras. 11-12 (S.C.)(QL).

[20] Hutchison, J. went on to describe the hydro-electric generating project as then conceived at para. 11:

> …In simple terms, the project entailed the damming of the Nechako River, diverting its stored water westward, by tunnel through 10 miles of the Coast Range through turbines to generate electricity before entering the Kemano River and hence, to tide water. The total project, as envisaged from the outset, included the Nechako Reservoir created by the Kenney Dam and a number of smaller saddle dams, two tunnels from Tahtsa Lake and a duplicate system of penstocks leading to a powerhouse housing 16 generators at Kemano, and a twinned transmission line between Kemano and Kitimat. The generators were to have a total installed capacity of 2,200,000 H.P. (1641 MW) and a firm capability of producing 1,600,000 H.P. (1194 MW). The resulting power was then to be transmitted to Kitimat where Alcan planned an aluminum smelter.

[21] While it is not clear to me that the government of the day was "mesmerized" by the plan, it is clear that it was engaging in the "nation-building" exercise of using natural resources and land as incentives for infrastructure development so often used historically in our sparsely populated country to spur economic development (for example: canals and railroads in the 19$^{th}$ Century, highways in the 20$^{th}$).

[22] Concurrent with the 1950 Agreement, the Province issued Conditional Water Licence No. 19847 and Permit to Occupy Lands No. 3449 to Alcan. These authorized Alcan to store, divert and use water from the Nechako and Nanika River watersheds and to construct, maintain and operate works for the generation and supply of power at Kemano as set out in the 1950 Agreement. Both the Permit and the Water Licence incorporated the terms and conditions of the 1950 Agreement with respect to the use and storage of water on the lands.

## CONSTRUCTION OF THE KEMANO PLANT AND THE KITIMAT SMELTER

[23] The settlement of Kitimat was founded in 1950. As the Alcan project proceeded and the smelter developed, the District of Kitimat grew and was incorporated in 1953.

[24] In 1954, Alcan completed the first phase of what is now known as Kemano I, Alcan's power generation facility in Kemano, approximately 80 kilometres from Kitimat. When it started, Kemano I had an operating capacity of approximately 336 MW. This was gradually increased over time.

[25] Alcan's smelter output similarly increased over time. Smelter construction started in 1951. The smelter started producing in 1954 after potlines 1 and 2 were finished. A "pot" is a vessel in which alumina is smelted with electricity into aluminum. A "potline" is essentially a series of buildings which house a number of pots in a specific configuration. Additional potlines were later added between 1955 and 1967.

[26] Between 1954 and 1967, Alcan supplied power to industry and local communities in the Kitimat area such as Terrace. Because Alcan was still building out its smelter it was generating more power than it needed. The power that it supplied to third parties during this period was surplus to its production needs at the smelter.

[27] Under the terms of the 1950 Agreement, Alcan paid water rental rates which differed depending on the use to be made of the generated electricity. Water to be used for aluminum or secondary power was priced at a low rental rate that was related to the price of aluminum. Water used for other purposes was to be paid for at a rental rate similar to comparable hydroelectric generators.

[28] The final potlines at the smelter were completed in 1967. Also in that year BC Hydro purchased the transmission system that Alcan had built in Kitimat. As part of this purchase, Alcan agreed that BC Hydro would have the exclusive right to supply electricity in the Kitimat area with exceptions for Alcan's own use and a mill that Eurocan was proposing.

[29] In 1978, BC Hydro completed its transmission line from Prince George to Terrace. This tied the Kitimat area into the wider provincial power grid that BC Hydro operates to this day.

THE NECHAKO FISHERIES DISPUTE

[30] In 1980, the federal Minister of Fisheries directed Alcan to release additional water from its Kemano facilities into the Nechako River. This was intended to protect salmon migrating through the Fraser River system into the Nechako River to spawn. The federal government subsequently sued Alcan for non-compliance ("BC Action No. 1") and obtained a court order requiring Alcan to comply with the federal government's water flow requirements. The Province was added as a party on its own motion since it took the position that the water flow at issue belonged to the Province and could not be appropriated by the federal government.

[31] In September 1987, Alcan, the Province and the federal government settled BC Action No. 1 and signed a settlement agreement on September 14, 1987 (the "1987 Agreement").

PRIVATE POWER SALES AND EXEMPTION ORDERS

[32] While the Nechako fisheries litigation was ongoing, the Legislature amended s. 27 of the ***Utilities Commission Act***. This statute had previously allowed an automatic exemption for sale of electricity by a corporation that generated electricity for its own industrial purposes, provided that:

> 1. Furnishing that electricity was incidental to the industrial purpose of the corporation;
>
> 2. The corporation was not a public utility subject to the jurisdiction of the Utilities Commission (the "Commission");
>
> 3. The sale did not exceed 15% of the electricity generated by the corporation.

[33] The result of the amendment was that such exemptions were no longer automatic; they could only be granted by ministerial order. This change was intended to facilitate private power sales. It was explained by the Minister on second reading in this way:

> In addition, the legislation enacts new, more flexible rules relating to the sale of surplus power services. These changes are designed to remove institutional barriers to the development of power, including electricity and heat by private surplus energy producers. Private power has an importance to the province's energy and industrial fabric which goes far beyond its relatively small – about 5 percent – proportion of British Columbia's total electrical capacity now.

[34] The Minister also described on second reading how the amendment was designed to operate:

> It states clearly, as a result of these amendments, which persons are excluded from regulation. The exclusion is now clearly limited to persons who produce power primarily for their own purposes. Otherwise, if electricity and/or gas are sold to any number of customers, the operation is automatically regulated.
>
> …
>
> Finally, it requires that anyone who is buying energy from a second party for transmission and redistribution to a number of customers in the province must not only file a copy of the purchase contract with the commission but also have that supply contract approved by the commission.

[35] Ministerial exemption orders in 1982 and 1988 were issued on the authority of this amendment. The 1982 Order was general and permitted "persons generating electricity and producing a power service to sell such power service surplus to their needs". It also exempted such persons from certain provisions of the ***UCA***.

[36] The 1988 Order was specific to Alcan and authorized the company "to sell surplus power service available to Alcan in connection with the operation of the Kemano power plant to Eurocan …". Alcan was also exempted from certain ***UCA*** provisions. A number of conditions were attached, none of which related to Kitimat smelter production levels. "Surplus power" was not defined.

[37] The ***UCA*** was further amended in 1990 to allow the Minister to exempt sales of power service without limit or conditions. Exemption orders were issued in 1991 (exempting generally all sales of power to Powerex, the power export subsidiary of BC Hydro), 1998 (continuing the general exemption for power sales to Powerex) and 2002 (generally exempting power sales to BC Hydro or Powerex). None of these were specific to Alcan; none made any reference to "surplus power".

[38] The 2002 Order is one of the two regulations alleged by the petitioners to be *ultra vires* insofar as it purports to authorize Alcan to sell hydro power contrary to the provisions of the ***IDA*** and the 1950 Agreement.

## THE KEMANO COMPLETION PROJECT AND THE LONG-TERM ELECTRICITY PURCHASE AGREEMENT

[39] The start of this dispute can likely be traced back to both the decision of the BC Government to cancel Alcan's planned expansion, the Kemano Completion Project, and to the terms of the settlement that resolved the resulting litigation.

[40] On February 27, 1990, Alcan and BC Hydro entered into a Long-Term Electricity Purchase Agreement ("LTEPA"), under which Alcan committed itself to selling Kemano power to BC Hydro. The KCP was going to precede the smelter expansion and hence excess power would have been available from the time the KCP was finished until the smelter expansion was completed. Under the LTEPA, BC Hydro agreed to purchase such surplus power for a term of approximately 20 years.

[41] The LTEPA supported Alcan's KCP investment. Once the KCP was finished, the sale of power surplus to Alcan's smelter needs could be used to pay for the expansion of the Kitimat smelter; and once the smelter expansion was complete, the additional power supply would be in place for the increased smelter operations.

[42] However, the KCP was cancelled by the Province. In the Minister's words, on second reading of an amendment to the ***IDA*** in 1997:

> Members will also know that in the latter part of the 1980s and the early 1990s Alcan's plan to generate more power from the Nechako River became, to put it mildly, the focus of considerable public attention and of a great degree of concern.
>
> As a result, this government ordered a review of the Kemano completion project by the B.C. Utilities Commission, and in 1995 it was decided that the Kemano completion project, as the new power generation facility was called, would not be built. That decision, however, left many important questions unanswered.

[43] Alcan sued the Province after the government cancelled the KCP ("BC Action No. 2"). The parties settled and on August 5, 1997 signed a settlement agreement (the "1997 Settlement Agreement"). The ***IDA*** was amended that year to support the 1997 Settlement Agreement. Among other things, it authorized the government to make arrangements for the sale of electrical power to Alcan to replace the KCP power which would not be produced.

[44] The Minister was authorized to execute the 1997 Settlement Agreement on behalf of the Province by the 1997 Order. This is the other regulation alleged by the petitioners to be *ultra vires* insofar as it authorizes the sale of electricity contrary to the provisions of the ***IDA*** and the 1950 Agreement.

REPLACEMENT ELECTRICITY SUPPLY AGREEMENT

[45] As part of the 1997 Settlement Agreement, Alcan and the Province entered into a Replacement Electricity Supply Agreement (the "RESA") designed to make up for the loss of KCP power. The Province's obligation to deliver electricity to Alcan under the RESA (at Schedule 2A to the 1997 Settlement Agreement) was expressly linked to Alcan:

> (a) building and operating a new smelter in Kitimat (s. 2.1);
>
> (b) using all available power from its Kemano generation facilities in its aluminum smelter operations in Kitimat (s. 2.6); and
>
> (c) using RESA electricity only to meet the requirements of its new and existing smelting facilities in Kitimat (s. 2.6).

[46] As part of the Settlement Agreement the Province also issued Final Water Licence No. 102324 and Amended Permit No. 3449 authorizing Alcan to store, divert and use water from the Nechako River watershed. It explicitly provided that “the purposes for which this Licence is issued are storage and power as set forth in [the 1950 Agreement as amended].

[47] Since entering into the 1997 Settlement Agreement, Alcan has not increased its smelter production at Kitimat and hence no RESA power was ever drawn down. On August 14, 2006, Alcan did announce a plan to modernize and increase the capacity of the Kitimat smelter in connection with significant amendments to the LTEPA. Those plans have yet to proceed.

## KITIMAT CLAIMS AND MORE RECENT LITIGATION

[48] In December 2000, Alcan announced that it intended to shut down 20% of its aluminum production capacity at the Kitimat Works in order to free up Kemano Power to meet Alcan’s power sales obligations to BC Hydro under the LTEPA. Alcan could have maintained its production at 100% by purchasing the additional power at market rates from BC Hydro, but it chose not to do so.

[49] On June 8, 2001, Alcan announced an agreement to sell Kemano Power to the United States through Powerex, a subsidiary of BC Hydro. At the same time Alcan announced plans for a production cut of about 50% at the Kitimat Works.

[50] Alcan ultimately shutdown approximately 40% of its production in June of 2001. The two production lines that were closed down remain out of production.

[51] Since December 2000, Alcan has sold Kemano Power to BC Hydro and/or Powerex while at the same time operating the Kitimat smelter at reduced capacity. This has assisted its LTEPA sales of Kemano Power to BC Hydro and Powerex. Given the fungible nature of electricity, it can be difficult to identify the end user of hydro power; however, with its transmission into the provincial grid Kemano power has likely been used well beyond the vicinity of the Kitimat Works.

[52] Prior to this proceeding, the District of Kitimat sought an injunction to enjoin Alcan from selling hydroelectric power to the U.S. and to require it to expand its aluminum smelter in Kitimat. Kitimat argued that it had standing as a third party beneficiary under the agreement between Alcan and the province, that it was specifically affected by Alcan's actions and, in the alternative, it had public interest standing in the name of Kitimat residents.

[53] On January 14, 2005, Ehrcke J. rejected Kitimat's claim for standing and his decision to dismiss the petition was upheld by the Court of Appeal.

[54] Kitimat and Mr. Wozney then filed this proceeding against the Province advancing a virtually identical claim. As noted above, Alcan successfully applied for standing as a party and the Haisla Nation was granted intervenor status.

## ISSUES:

[55] The substantive issue in this case is whether the 1997 Order-in-Council and the 2002 Order are *ultra vires* to the extent that they permit or otherwise authorize power

sales by Alcan which are contrary to the applicable legislative authority pursuant to which they were issued.

[56] This requires an analysis of the following questions:

> 1. What limitations are imposed by the ***IDA***, the 1950 Agreement and other related agreements and instruments on the sale of Kemano power by Alcan?
>
> 2. What obligation is there on Alcan to use Kemano power to develop its smelting operations?
>
> 3. To what extent does the 1997 Order-in-Council contravene these limitations or permit Alcan to circumvent its obligations?
>
> 4. To what extent does the 2002 Order do the same?

[57] The petitioners take no issue with the general validity of the two impugned regulations. The petitioners contend that they are only *ultra vires* to the extent that they authorize conduct that is contrary to the ***IDA*** as well as the 1950 Agreement and other related agreements and instruments.

[58] Alcan says that its Kemano power is private property and hence it has the unfettered right to use it or sell it. However, while the power once generated is clearly the property of Alcan, the water resource used to create that power is publicly owned. That publicly owned resource has been provided to Alcan on favourable terms as part of the bargain made between Alcan and the Province in 1950. Hence, in my view, any power so generated from those public resources must be subject to the terms of that bargain.

[59] The petitioners say: "Alcan's ability to generate power is critically dependent upon two interrelated rights:

> (1) its right to store, divert and use water; and
>
> (2) its right to occupy land for the purposes of storing such water.
>
> These rights flow directly from the Water Licence and the Permit to Occupy Lands which were granted to Alcan pursuant to s. 3 of the ***IDA*** and under the terms and conditions of the 1950 Agreement. The starting point for any analysis of the extent of Alcan's rights to generate, use and sell power is with these two instruments".

[60] I agree but would go further; in my view, this case turns on the terms of that bargain as set out in those two instruments.

## ***THE INDUSTRIAL DEVELOPMENT ACT***

[61] The modern approach to statutory interpretation was summarized by Iacobucci J. in ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27 at paras. 21 and 22:

> Although much has been written about the interpretation of legislation, … Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

> … I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit .

[62] This approach is also consistent with s. 8 of the BC ***Interpretation Act***, R.S.B.C. 1996, c. 238, which provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects (emphasis added).

[63] The salient passages of the preamble to the ***IDA*** are:

> … it is consequently in the best interest of the Province that the establishment of new industries and the expansion of existing industries that require the development of water-power sites be encouraged to the fullest possible extent:

> And whereas the establishment in presently undeveloped sections of the Province of any permanent industry and in particular of an aluminium industry, which requires for its operations substantial quantities of electric power, involves extensive and costly preliminary investigations and engineering studies and the expenditure on the construction of hydro-electric works and industrial plants and facilities of very large sums of money over an extended period of years:

> And whereas, in order to facilitate the establishment or expansion in the Province of such permanent industries, it is advisable that the Lieutenant-Governor in Council be empowered to make agreements respecting the use of natural resources: … (emphasis added)

[64] I take from this language that the principal aim or object of the ***IDA*** was to encourage the establishment and development of new industries, and particularly the aluminum industry, within the Province.

[65] The means by which this was to be achieved is found within the provisions of the ***IDA*** itself. At the time of its original enactment, the relevant portions of s. 3 of the ***IDA*** provided:

> 3.(1) Notwithstanding any law to the contrary, the Lieutenant-Governor in Council may do any of the following things:
>
> > (a) Sell or lease on such terms and for such price or rental as he deems advisable to any person who proposes to establish or expand an aluminium industry in the Province any Crown land or interest therein, and also on such terms and for such price or rental as he deems advisable grant a licence to any such person to store or use any unrecorded water in the Province;

> (b) Make such other arrangements regarding the future operations of such industry as he may deem to be in the best interest of the Province;
>
> …
>
> (d) Authorize the Minister to execute any agreement for the above purposes. (emphasis added)

[66] Section 3 is the empowering section of the ***IDA***. It confers a broad power and discretion on the Executive to enter into agreements with a "person who proposes to establish or expand an aluminum industry in British Columbia". The power in s. 3 is conferred on the government or, more accurately, the Lieutenant Governor-in-Council ("LGIC").

[67] The section grants no authority, nor places any obligation on the "person" (in this case Alcan). In particular, none of the provisions of the ***IDA*** purport to restrict the substantive rights of the "person who proposes to establish or expand an aluminum industry". The ***IDA*** is simply a grant of a very broad power (e.g. "sell or lease on such terms and for such price or rental as he deems advisable" and "Make such other arrangements … as he may deem to be in the best interest of the Province") to the Executive to enter into agreements and arrangements with "such a person". Clearly a restriction on "such a person" in respect of power sales is not to be found in the language of s. 3 of the ***IDA***.

THE 1950 AGREEMENT

[68] The only provision of the 1950 Agreement that speaks to power sales is clause 9. It states:

> 9. Sale of Power by Alcan
>
> In order that the promotion and development of the district and of other industries in the vicinity of the Works may be encouraged, ALCAN may sell to others electric energy generated at the WORKS and shall not by reason of such sales be deemed a public utility within the meaning of the "Public Utilities Act". However, the terms of sales to persons other than ALCAN'S own subsidiaries, employees and tenants shall be subject to the jurisdiction of the Public Utilities Commission, but said Commission shall have no authority to require ALCAN to furnish service other than retail distribution and small power service to any one in the absence of an undertaking so to do on the part of ALCAN or to require ALCAN to extend any service that it shall have undertaken to furnish.

[69] Drawing on the opening words of clause 9, the petitioners say that this clause limits Alcan's right to sell Kemano power to sales that:

> encourage the promotion and development of the District of Kitimat ("Kitimat") and other industries in the vicinity of Alcan's smelter and associated works located at 1 Smelter Site Road in Kitimat, British Columbia (the "Kitimat Works").

But this restrictive and rights-granting interpretation of clause 9 rests on the strictures that the petitioners say are found in the ***IDA***.

[70] During the hearing, counsel for the petitioners submitted that in s. 3(1)(d) of the 1949 **IDA** (the Lieutenant Governor in Council may "[a]uthorize the Minister to execute any agreement for the above purposes"), the words "the above purposes" refer to the purposes described in the ***IDA***'s preamble. Counsel also said that the 1950 Agreement had to be consistent with or had to be interpreted in a manner that was consistent with that preamble.

[71] This interpretation would require the ***IDA*** and the 1950 Agreement to be read together in a manner that imports the petitioners' interpretation of the ***IDA***'s preamble directly into the 1950 Agreement. The obstacle to this is what I consider to be the clear meaning of s. 3 of the ***IDA***.

[72] In my view, the words "the above purposes" in s. 3(1)(d) of the ***IDA*** were intended to refer not to the preamble but rather to the three subsections preceding it: s. 3(1)(a),(b), and (c).

[73] The petitioners say that the ***IDA*** and the 1950 Agreement on their face restrict the ability of Alcan to sell power surplus to its requirements to operate the smelter at Kitimat. They also contend that a number of subsequent documents or instruments support that interpretation.

[74] However, the only references to surplus based restrictions are found in some of the early exemption orders (1982, 1988, 1989). Only two of these (1988 and 1989) are specific to Alcan and neither contain any definition of surplus power or any linkage between surplus power and smelting. What each of the two specific orders do contain is a reference to the 1950 Agreement and hence, once again, the case turns on the meaning of the 1950 Agreement (as well as the ***IDA***).

[75] The lack of any production restrictions was commented on by the Court of Appeal in ***Kitimat (District) v. Alcan Inc.,*** [2006] 5 W.W.R. 157, 2006 BCCA 75 at para. 55 (and subject to the observation of Finch, CJBC that "nothing in this judgment is to be taken as determining the issues in [this] petition"):

> It is not unlawful for Alcan to reduce its aluminium production, because nothing in the legislation nor in the agreements requires Alcan to maintain aluminium production at full capacity or any other level.

Contrary to the petitioners' assertion, if the 1950 Agreement does not restrict power sales, then just how should it to be interpreted?

[76] Clause 13 of the 1950 Agreement provides:

> Nothing in this Agreement shall be deemed to restrict or impair the right of ALCAN to sell, mortgage, convey, lease or otherwise dispose of or transfer, in whole or in part, the Works, any associated property owned by ALCAN or the rights and privileges that ALCAN has under this Agreement ….

[77] The Works are defined very broadly in clause 3, as:

> (A)ll dams, canals, tunnels, aqueducts, penstocks, raceways, protection works, powerhouses, spillways, wharfs, docks, townsites, hydraulic structures, roadways, railways, cableways, pipe lines, flumes, transmission lines and all other structures, waste dumps and other facilities capable of or useful in connection with diverting, storing, measuring, conserving, conveying or using the water of the Eutsuk and

> Tahtsa water power and producing, measuring, transmitting or using the power to be generated thereby and plant sites, wharfs, docks, townsites, roadways, railways, conveyors and all other structures, waste dumps and other facilities capable of or useful in connection with producing aluminum and other materials by using power generated by the said water power. (emphasis added)

[78] In accordance with clause 13, nothing in the 1950 Agreement is to be interpreted as limiting the ability of Alcan to sell the Works, which include facilities used to "produc[e], measur[e], transmi[t], or us[e] the power to be generated" from the diversion of the Eutsuk and Tahtsa rivers. Clause 13 also provides that Alcan will remain entitled to sell "any associated property owned by ALCAN".

[79] Since the definition of "Works" includes all of Alcan's Kitimat and Kemano facilities, it is necessary to look beyond those facilities to identify what was intended to be captured by the addition of the "associated property" language. The Works include power generation facilities, which are "associated" with the power that is generated.

[80] In my view this clause contains a very broad reservation to Alcan to freely use and dispose of its property, which in clause 3 is defined to include water power. If the government intended that use of such power by Alcan was to be constrained in some way, I would expect there to be some restrictive language in these parts of the 1950 Agreement. No such language is to be found.

[81] Even if I were to conclude that clause 13 does not expressly protect Alcan's right to sell Kemano power, the language used by the parties in clause 13 is nevertheless important evidence of an intention by the parties that Alcan's rights in its property would not be limited by the 1950 Agreement. At the very least, clause 13 illustrates that the 1950 Agreement was not intended to be comprehensive or exhaustive of Alcan's property rights with respect to the matters that were the subject of the agreement.

[82] However, the petitioners say that such a restriction on Alcan's right to sell power is to be found in the phrase in clause 9: "Alcan may sell…". The petitioners say this permissive language shows an intention that Alcan's right to sell power could be constrained.

[83] As defined in *Black's Law Dictionary,* 8th ed. (2004), "may" can have either of two meanings:

> 1. To be permitted to […]
> 2. To be a possibility.

[84] Accordingly, were the words "ALCAN may sell [power]" intended by the parties to be permissive or descriptive of a possibility? In my view they describe a future possibility: that Alcan "may sell power", with the potentially applicable qualifications described in the remainder of the clause.

[85] The words "ALCAN may sell to others electric energy generated at the Works" were a description of a future event that would trigger the following language: "and shall not by reason of such sales be deemed a public utility within the meaning of the ***Public Utilities Act***".

[86] In my view, clause 9, properly interpreted, does not purport to confer (or restrain) Alcan's right to sell Kemano power, and therefore it cannot support the restriction on Alcan's right to sell Kemano power that the petitioners allege.

[87] I interpret clause 9 as intending to confer on Alcan an exemption from utilities regulation. What is seen in clause 9 is an exercise of the authority given to the Lieutenant Governor in Council by the ***IDA*** to exempt a "person who proposes to establish or expand an aluminum industry" from otherwise applicable regulation.

[88] Since the time of the 1950 Agreement (and indeed before) a comprehensive regulatory regime has governed the generation and sale of electricity within the Province. Alcan, like all other power producers in the Province, has been and continues to be subject to that general regulatory regime.

[89] Alcan did not want to become a public utility and to be subject thereby to regulation under the ***Public Utilities Act***, R.S.B.C. 1948, c. 277 (the "***PUA***"*)*. While the **PUA** contained exclusions, these exclusions were too narrow since Alcan wanted to be able to use Kemano power as it saw fit. As the petitioners acknowledge at para. 199 of their submissions, "the regulatory manoeuvring that is required to engage in power sales would act as a strong disincentive for any power sales".

[90] Clause 9 was therefore the solution; it exempted Alcan from regulation by the Public Utilities Commission, subject only to the exceptions expressly set out in the clause.

[91] The effect of clause 9 is that if Alcan sells electric energy generated at the WORKS to others, it is not, as a result of such sales deemed a public utility within the meaning of the ***PUA,*** and apart from the very limited exceptions it could not be forced to provide hydro service.

[92] The petitioners say that the opening words of clause 9 ("In order that the promotion and development of the district and of other industries in the vicinity of the Works may be encouraged") limit the operative words that follow. However, in my view these are words of purpose, not words of limitation. In particular, they set out the purpose for which the Province conferred on Alcan the exemption from utilities regulation that clause 9 effects.

[93] Alcan wanted not only control over the use of Kemano power, but also, as the January 31, 1948 letter written by Alcan's Vice-President Mr. McNeely DuBose indicates, to be able to promote or otherwise assist other industries to obtain a diversification of interests in the new community.

[94] Clause 9 served the mutual interests of the Province and Alcan by protecting both Alcan's autonomy from regulation, including its control over the use of Kemano power, and the public interest in the development and diversification of the Kitimat community. The latter interest was shared by Alcan to a significant degree. In Mr. DuBose's words: "in that rather remote area… a diversification of interests is helpful".

[95] These complementary interests are reflected in clause 9, which first exempts Alcan from being deemed to be a public utility, while also permitting the Public Utilities Commission to regulate rates and require Alcan to supply retail distribution and small power service. The former would, by permitting Alcan to sell Kemano power without being deemed to be a "public utility", encourage power sales to industrial enterprises, leading inevitably to the "promotion and development … of other industries in the vicinity". The latter ensured that small businesses and residences – the building blocks of a community – were guaranteed access to electricity, notwithstanding the free hand that Alcan was otherwise given with respect to Kemano power. With equal inevitability, this guarantee would aid the promotion and development of the district itself. These are the purposes that the parties summarized with the words, "[i]n order that the promotion

and development of the district and of other industries in the vicinity of the Works may be encouraged".

[96] Other parts of the 1950 Agreement also support the proposition that the 1950 Agreement was not intended to impose limitations on the uses to which Alcan's Kemano power could be put. Clause 11 reads:

> 11. Dependability of Power Supply
>
> It is recognized that ALCAN is a party to this Agreement solely with the expectation that it will have the continuing use of a large quantity of low cost electric energy to be employed according to its needs for the production of aluminum, the cost of such energy being in large part predetermined by the amount of the carrying charges on its investment in the portion of the Works producing the said energy.
>
> It is, therefore, agreed that ALCAN will not be required or compelled to supply to the GOVERNMENT or to anyone else any of the power generated at the Works, except as provided in Section 9 hereof. (emphasis added)

[97] As noted above, the second sentence of clause 9 provides that Alcan may be obliged by the Commission to provide retail distribution and small power service. Apart from that express limitation, clause 11 shows an intention that Alcan would be given control over its Kemano power to use as it saw fit, and it could not be "required or compelled" to do otherwise.

[98] Clause 2 of the 1950 Agreement shows that it was designed to provide incentives for, but not to compel, Alcan to establish an aluminum industry in BC. It encouraged Alcan to create substantial power generation capacity at Kemano by fixing Alcan's water licence rights with reference to its generation capacity. It also encouraged the construction of an aluminum smelter by providing that if Alcan began construction of a comparable aluminum plant elsewhere, before Alcan had installed generating equipment of a certain capacity in BC, then Alcan would lose its rights under the 1950 Agreement to install further generating equipment.

[99] However, clause 2 is notable for the following:

> 1. Nothing in clause 2 requires Alcan to use the generated electricity for aluminum smelting;
>
> 2. It focuses on the development of power generation capacity, not aluminum smelting; and
>
> 3.. While it contains the only reference in the 1950 Agreement to smelter capacity, it does not commit Alcan to develop any smelter capacity. Instead, the reference provides an incentive for Alcan to install power generating capacity at Kemano before it develops a smelter elsewhere.

[100] The 1950 Agreement's preamble also echoes this theme of encouraging aluminum production and additionally indicates that the construction of an aluminum smelter would accomplish the Province's interest in the establishment of a permanent industry.

[101] In my view, what is seen in the 1950 Agreement is the implementation of the tools given to the Executive under the ***IDA*** to attract the aluminum industry to BC and to thereby achieve the "establishment or expansion in the Province of… permanent industries".

[102] In the preamble to the 1950 Agreement, the Province and Alcan declared that:

> WHEREAS the GOVERNMENT is unwilling to provide and risk the very large sums of money required to develop [the Eutsuk and Tahtsa water power] to produce power for which no market now exists, or can be foreseen except through the construction of facilities for the production of aluminum in the vicinity, and
>
> WHEREAS the GOVERNMENT desires ALCAN to investigate the possibilities of the said water powers for aluminum production …, and
>
> WHEREAS ALCAN is willing to consider the construction of a large aluminum plant …, and
>
> …
>
> WHEREAS the construction of such an aluminum plant at or near the site of the said water power would accomplish, without investment by or risk to the GOVERNMENT, the development of power, the establishment of a permanent industry, and the beginning of a new centre of population … (emphasis added)

[103] Two points should be noted in these recitals. First, the parties were clear that the Province's objective was to encourage but not compel Alcan's aluminum investment. Hence the use of words such as "investigate" and "consider". Second, the parties recognized and accepted that the objectives set out in the preamble to the ***IDA*** – namely, "the development of its water-power sites and other natural resources, the expansion of its industry, and the establishment of new centres of population within its boundaries" – would be accomplished if an aluminum plant were constructed.

[104] The Kitimat smelter was, indeed, constructed. The expressed goal was met. The argument that the parties intended to require Alcan to use its power to expand only industries in the district is not supported by the fact that the parties agreed that the "expansion of… industry" and the "establishment of new centres of population" would be achieved by the construction of the Kitimat Smelter alone.

[105] This agreement had a 50 year time horizon; yet Alcan's right to the public water resources was linked to its construction of the Kitimat smelter (as well as to not building other smelters elsewhere ahead of Kitimat). The Province did not choose to require Alcan to maintain any production levels at the smelter.

[106] In my view, the foregoing clauses and the preamble in the 1950 Agreement reveal a general and consistent intention on the part of the parties to avoid restricting Alcan as argued by the petitioners. The objective of the 1950 Agreement was to encourage Alcan's investment, while leaving Alcan free to sell and use the property it built and generated, including Kemano power, as it saw fit.

HISTORICAL CONTEXT

[107] The historical context surrounding the 1950 Agreement, including its commercial and public purposes, can assist in discerning the parties' intentions.

[108] Sigurdson J. of this Court discussed the admissibility of contextual evidence of this kind recently, in ***Giles v. Westminster Savings Credit Union,*** 2006 BCSC 141 at para. 136:

> The court must interpret and consider the formation of a contract on its factual matrix. In *Chitty on Contracts*, 29th ed. (London: Sweet & Maxwell, 2004) at p. 764-765, the learned authors suggest the modern law allows the court a broad scope of inquiry:
>
> > Since the purpose of the inquiry is to ascertain the meaning which the words would convey to a reasonable man against the background of the transaction in question, the court is free (subject to certain exceptions) to look to all the relevant circumstances surrounding the transaction, not merely in order to choose between the possible meanings of words that are ambiguous but even to conclude that the parties must, for whatever reason, have used the wrong words or syntax…The court must place itself in the same "factual matrix" as that in which the parties were.
>
> The authors then quote Lord Wilberforce's decision in ***Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen***, [1976] 1 W.L.R. 989 (H.L.) at 995-996:
>
> > No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the "surrounding circumstances" but this phrase is imprecise; it can be illustrated but hardly defined. In a commercial contract is it certainly right that <u>the court should know the commercial purpose of the contract and this in turn presupposed knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating</u>. (emphasis added)

[109] Accordingly, Minister Kenney's address to the Legislature and Alcan's memoranda assist in understanding the "factual matrix" in which the 1950 Agreement was formed.

[110] Certainly, Alcan always intended to retain control over the use of its Kemano power. As President Powell, of Alcan, stated in a letter of August 9, 1949 to Vice-President DuBose:

> May I suggest that discussions shouldn't lead anyone to believe that we would be willing to develop power with any obligation to use it only for the production of aluminum and for related uses? If we risk such large sums of money, <u>we ought to be able to use the power for anything</u>. (emphasis added)

[111] It seems the Province agreed. Minister Kenney said this in the Legislature:

> Clause 9 – Sale of Power by Alcan
>
> The meaning of this clause is that <u>Alcan wants to control the use and sale of its own power</u>. It hopes to get other industries into the area and sell them power, but will do so under contract. If these industries are not subsidiaries, employees or tenants of Alcan, the Public Utilities Commission will have jurisdiction over the terms of the sales. It will also

have authority to require supply of retail power and small service, but not otherwise unless Alcan has agreed to do so. Nor can Alcan be required to extend a service it may have undertaken to supply. This is fair enough as they are building the entire development. (emphasis added)

> *Verbatim Transcript of Discussion on Aluminum Company of Canada, Limited Project in British Columbia*, in the 1951 Spring session of the British Columbia Legislature, p. 20.

[112] Given the large capital investment committed by Alcan to build both the hydro electric and smelter facilities ($450 million in 1950 dollars), the 50 year time horizon of this agreement and the clearly expressed intentions of its senior management, I consider it highly unlikely that Alcan would ever have agreed to have its future operating decisions fettered as contended by the petitioners.

[113] Accordingly, in my view, the meaning of the 1950 Agreement is clear, both on the face of the document and when placed in its historical, statutory, and commercial context.

[114] The petitioners contend that:

> Alcan's use of Kemano Power is expressly constrained to aluminum production or sales which promote industrial development or the District [and that use] is the only one that is consistent with the ***IDA*** and its underlying economic model.

[115] Leaving to one side considerations of admissibility where a document is clear on its face, I do not believe that post-contractual conduct evidence offers much assistance to the petitioners.

[116] Alcan did supply power to the Kitimat residents from the beginning and between 1954 and 1967 also supplied power to industries and communities in the Kitimat area such as Terrace. It is also true that at the time Alcan was building out its smelter and hence needed less power. It is also likely all power so supplied was in excess of its production requirements.

[117] But the important fact is that before 1978 no power could leave the local area because there was no link to the provincial grid. So the fact that power was being supplied only to the area in this time period cannot be used to support the proposition that Alcan's power sales were geographically limited by the ***IDA*** and the 1950 Agreement. Prior to 1978, there was no choice.

[118] In 1978, Alcan agreed to supply BC Hydro with 137 MW during the period from January 1, 1979 to December 31, 1983. From that point, Kemano power started to enter the provincial grid and was likely no longer being used "exclusively for the promotion and development of the vicinity". The petitioners say that while the power sold by Alcan to BC Hydro under this agreement may not have been in strict compliance with the 1950 Agreement, aluminum production was not being compromised to meet these sales commitments.

[119] But the alternative explanation is that these sales were in fact compliant and that the petitioners' interpretation is simply wrong.

[120] The petitioners say that the 1987 Agreement (related to the settlement of BC action No. 1) evidences the understanding of Alcan and the Province that Alcan's water rights were intrinsically linked to its industrial activity and development. As stated in the preamble to the 1987 Agreement:

> WHEREAS:
>
> A. Pursuant to the 1950 Agreement, the Provincial Crown granted Alcan rights to use certain water resources in British Columbia, including water from the Nechako River, <u>to produce hydroelectric power for industrial purposes</u>;
>
> ….
>
> C. Alcan's ability to generate hydroelectric power <u>for its smelter and other industrial purposes</u> depends upon the continuation of its rights to use such water resources;
>
> ….
>
> G. The Parties, in order (a) to achieve an acceptable level of certainty that such water resources will be managed so as to conserve and protect the chinook and sockeye salmon resources of the Nechako River; and (b) <u>to ensure Alcan's continuing ability to generate hydroelectric power for industrial purposes</u>, wish to enter into this Agreement;

[121] However, the 1987 Agreement's preamble is clearly underinclusive, in light of the fact that the parties to the 1950 Agreement contemplated that Alcan's power would be used for small commercial and residential purposes. This is the subject of the second half of clause 9, under which Alcan was made subject to the jurisdiction of the Commission if Alcan made such sales.

[122] The Long Term Electricity Purchase Agreement of 1990 is heavily relied on by the petitioners. They say the LTEPA supports their case by way of its preamble, which makes reference to "permi[tting] future expansion of [Alcan's] aluminum manufacturing facilities in British Columbia." However, the power sale under the LTEPA was not contingent on the expansion of Alcan's aluminum smelter; there was no commitment made by Alcan to "expand the smelter (by 2015)", as asserted by the petitioners. What this did provide for Alcan was an interim market for electricity until such time as its proposed smelter expansion was completed.

[123] However, there is nothing in the LTEPA that obligated Alcan to complete this plan. The terms of this power sale had nothing to do with the expansion of the smelter; it had everything to do with providing a guaranteed take-up of power that at the time was thought would be surplus to Alcan's requirements. There was nothing to "de-link" in 1997, because, on its terms, the LTEPA was never "linked" to the expansion of the smelter in the first place.

[124] But the petitioners say that the sale of this excess power into the provincial grid by Alcan under the LTEPA was acceptable so long as Alcan intended to proceed with KCP. In their words:

> The sale to B.C. Hydro would not by itself have been permitted under the IDA or the 1950 Agreement – under section 9 of the 1950 Agreement, only sales that encourage "the promotion and development of the district and of other industries in the vicinity of the Works" were permitted – but this was a sale to facilitate "the expansion of Alcan's aluminum manufacturing facilities in British Columbia." As such, LTEPA in 1990 may be seen as consistent with and referable to the restrictions on Alcan's use of power in the IDA and the 1950 Agreement.

[125] It is not clear to me how sales that could be made for years because Alcan intended to expand its smelter suddenly became illegal when the expansion was delayed. Perhaps this is why the petitioners' submission speaks of being "consistent with" and "referable to" the restrictions in the IDA and the 1950 Agreement. In my view, such conduct is more consistent with there being no such restrictions in the ***IDA*** or the 1950 Agreement. If anything, the LTEPA confirms that both the Province and Alcan understood that it was permissible for Alcan to sell Kemano power, for distribution through the provincial grid.

[126] Of note is the fact that in 1994 Alcan shut down potline 7 because of unfavourable market conditions. While it remained out of production until 1998, power deliveries pursuant to the LTEPA continued into the provincial grid. Thus, far from the impugned 1997 order being the lead event (as part of the KCP settlement agreement in 1997) in the "weakening of the legal regime created by the IDA and the 1950 Agreement", as described by the petitioners, it was entirely consistent with the proposition that the Province and Alcan, as parties to the 1950 Agreement, did not intend clause 9 to limit Alcan's right to sell Kemano power.

[127] As far as the parties' subsequent conduct is material, it is significant that Alcan has sold Kemano power to whom it saw fit for more than 40 years, and "into the grid" since 1978.

[128] When the Province and Alcan negotiated the 1997 Settlement Agreement the Province knew that Alcan had reduced its production in 1994 and had been selling power into the grid. Yet, they did not address Alcan's right to sell power; they only linked Kitimat smelter production to Alcan's right to call on additional electricity from the Province under the Replacement Electricity Supply Agreement.

[129] The LTEPA "Memorandum of Consent and Agreement" was the second of the agreements described as a "Power Agreement" in the 1997 Settlement Agreement. Once again the petitioners say that this was yet another instrument that was intended to restrict Alcan to surplus power sales. They say:

> It ought to have been made clear, as it had been in the earlier exemption orders, that what was being permitted to be sold was *surplus* power, that is, power that was surplus to the needs of the smelter and other industrial requirements. The failure to restrict the LTEPA power sales to surplus power meant that the Order-in-Council authorizing the sale was inconsistent with and not supportable by, the *IDA* and the 1950 Agreement.

[130] The petitioners say that this failure appears to have been inadvertent. Mr. McArthur has made clear that he understood, as one of the members of the Government's negotiating team, that:

> … Alcan's access to the water resource was intended to be conditional upon it using the power it generated for the development of the aluminum and other industries in the Kitimat area … At no time during the negotiation of LTEPA did the Province move away from its position that Alcan's primary obligation was to use the power generated at Kemano for its smelting operations.

[131] But it is difficult to reconcile this view with the clear language used by Minister Kenney who was the Minister responsible for the ***IDA*** and for negotiating the 1950

Agreement. His 1951 remarks (see para. 114) are unequivocal and unambiguous: he understood that Alcan wanted “to control the use and sale of its own power”.

[132] If the government of the day, when the 1997 Settlement Agreement was concluded, wanted to achieve what Mr. McArthur says they intended, why did they not say so explicitly as part of the agreement? The petitioners say it was because they thought the ***IDA*** and the 1950 Agreement had always incorporated such a restriction. However, in my view, the clear language of both instruments supports not Mr. McArthur’s interpretation but rather the contemporaneous one of Minister Kenney.

[133] The second of the impugned Orders, the 2002 Order is an order of general application. It applies to any person who sells power to BC Hydro or to Powerex and exempts such persons from being regulated under Part III of the ***UCA***. Such Orders are permitted by s. 22 of the ***UCA*** which provides:

> 22 (1) For the purpose of this section, a person sells, purchases or produces a power service if the person
>
> > (a) generates electricity,
> >
> > (b) for the purpose of heating or cooling any building, structure or equipment or for any industrial purpose, heats, cools or refrigerates water, air or any heating medium or coolant, using for that purpose equipment powered by a fuel or a geothermal resource or solar energy, or
> >
> > (c) enters into an energy supply contract, within the meaning of section 68, for the provision of electricity.
>
> (2) The minister may
>
> > (a) exempt, by order, from any or all of section 71 and the provisions of this Part, in respect of the sale, purchase or production of a power service,
> >
> > > (i) a person who sells, purchases or produces a power service,
> > >
> > > (ii) a class of persons who sell, purchase or produce a power service, and
> > >
> > > (iii) any equipment, facility, plant, project or system of a person or class of persons referred to in subparagraph (i) or (ii), and
> >
> > (b) if the minister makes an order under paragraph (a), impose, in the order, terms and conditions respecting the extent or quantity of the power service to be sold, purchased or produced, the price to be charged for it and any other conditions the minister considers to be in the public interest.
>
> (3) The minister may
>
> > (a) before making an order under subsection (2), refer the matter to the commission for a review, or
> >
> > (b) authorize the commission to make an order under subsection (2). (emphasis added)

***Utilities Commission Act***, R.S.B.C. 1996, c.473, s.22.

[134] On its face, the 2002 Order is valid. It simply exempts any person in the Province who sells power to BC Hydro or Powerex from the provisions of Part III of the Act. Alcan is just such a person as it presently sells power to BC Hydro under the LTEPA and to Powerex pursuant to transaction letters exchanged under the Framework Agreement between the parties.

[135] The petitioners say that in the case of Alcan the 2002 Order exceeds the jurisdiction conferred upon the Minister because of its failure to impose "terms and conditions respecting the extent or quantity of the power service to be sold".

[136] This can only be so if power sales under the 1950 Agreement were limited to only those sales that encourage "the promotion and development of the District and other industries in the vicinity" of the Kemano Works. Since I have concluded that there is no such restriction, the 2002 Order is not *ultra vires* and will not be set aside.

CONCLUSION

[137] I conclude that neither the ***Industrial Development Act*** nor the 1950 Agreement contain language that would restrict Alcan in the decisions it chooses to make with respect to the sale of hydro-electric power generated at Kemano. Specifically, there is nothing in either instrument that would require Alcan to maintain any specific production level at the Kitimat smelter. Alcan is not restricted by either instrument from selling its Kemano power or using it for the Kitimat smelter as it considers appropriate. It follows that I do not consider either impugned Order to be *ultra vires* in their effect. This proceeding will be dismissed with costs.

"D. Brenner, C.J.S.C."
The Honourable Chief Justice D. Brenner