IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

In the Matter of Arbitration:
Between:
MERRILL & RING FORESTRY L.P., Investor,
and
GOVERNMENT OF CANADA, Respondent.

HEARING ON JURISDICTION AND THE MERITS

Wednesday, May 20, 2009

The World Bank
1818 H Street, N.W.
MC Building
Conference Room 13-121
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 9:00 a.m. before:
PROF. FRANCISCO ORREGO VICUÑA, President
MR. J. WILLIAM ROWLEY, QC, Arbitrator
PROF. KENNETH W. DAM, Arbitrator
Also Present:

MS. ELOÏSE OBADIA, Senior Counsel,
Secretary to the Tribunal

Court Reporter:

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On behalf of Merrill & Ring:

MR. NORM P. SCHAAF

MR. PAUL STUTESMAN
APPEARANCES: (Continued)

On behalf of the Respondent:

MS. SYLVIE TABET
MS. LORI DI PIERDOMENICO
MR. RAHAOUL WATCHMAKER
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PRESIDENT ORREGO VICUNA: Good morning.

Shall we get started and resume on the examination of Ms. Korecky.

Would you like to continue, Ms. Tabet.

MS. TABET: Yes, I would.

MR. NASH: Mr. President and Members of the Tribunal, if I may, three housekeeping matters, and I have advised my friend Ms. Tabet of them.

The first is we would like the chart that Mr. Ringma drew on the white board yesterday marked as an exhibit, Exhibit 1, and we have the original here and we'll--once it's marked, we will have copies for everyone, if that can be marked, please.

ARBITRATOR ROWLEY: Would it be sensible to have that reduced and reproduced on a single sheet of paper, if counsel can agree to that? Because we don't want--I don't want a big piece if I don't have to.

MR. NASH: Yes, I think it would. And if it's okay to have it in black and white, we will do it that way.
The second matter is that you will recall that Mr. Schaaf gave evidence with respect to a map which at the time of his giving evidence could not be located in your materials, but we proceeded ahead. We do have a copy of the map for members of the panel. I believe the Secretary has been given those copies.

SECRETARY OBADIA: We had found the document afterwards.

MR. NASH: We found the document, but I thought it would be useful for the Tribunal Members simply to have a single sheet which they can do with what they wish.

And you will recall it was over the question of the helilogging from Unwin Lake to a piece of property besides Theodosia, and it was a question of the distance and a question of whether there was road access to that piece of property, and there was a square that Mr. Schaaf identified and indicated it was owned by a company called R. D. Merrill & Company, which is a member of the Merrill & Ring Group of companies.
The third housekeeping matter is that I have advised my friend Ms. Tabet that Mr. Stutesman has to leave today, and if there is to be--she had raised the issue of perhaps some recross-examination, and if that is to occur, it will have to be today. He has to leave the building at about 3:00 this afternoon, and I think my friend is aware of that and appreciates our situation. Thank you.

PRESIDENT ORREGO VICUÑA: Fine, thank you, Mr. Nash.

Ms. Tabet.

MS. TABET: We only have one housekeeping matter, and we will distribute, as we did yesterday, copies of the transcripts with shaded portions that represent in our view new evidence that go beyond the scope of the Affidavits of the witnesses.

PRESIDENT ORREGO VICUÑA: For yesterday?

MS. TABET: For yesterday.

PRESIDENT ORREGO VICUÑA: Okay.

MR. APPLETON: Mr. President, just as a housekeeping matter, is it be possible that Canada
09:04:35 1 will be able to file these documents electronically
2 as well so to make it easier and make sure that they
3 don't get misplaced for each day, especially since
4 we now have two days, and perhaps there might be a
5 third day, so that we can all make sure that we are
6 not mistaken about exactly those paragraphs that you
7 have noted? And since we just have one binder, and
8 I don't want it to get misplaced with all the
9 volumes that will have to be sent back here, I just
10 think it's a safer archival method if we can do
11 that. Is that possible?
12 MS. TABET: I will check and let you know.
13 PRESIDENT ORREGO VICUÑA: Okay. Thank you
14 very much.
15 Please proceed, then, with the examination.
16 JUDY KORECKY, RESPONDENT'S WITNESS, CALLED
17 CONTINUED DIRECT EXAMINATION
18 BY MS. TABET:
19 Q. Good morning, Ms. Korecky.
20 A. Good morning.
21 Q. So, yesterday we talked about the Advisory
22 Committee, and the Minister, and I'm trying to
understand the relationship between the two, so I have a few questions in that respect.

Could you explain to us what the Federal Minister has to decide in order to grant surplus tests.

A. Effectively, the Minister has to be satisfied—the Minister has to be satisfied the logs are surplus to domestic need.

Q. And where does that come from?

A. That comes from the fact that logs have been placed on the Export Control List for purposes of ensuring adequate supply and distribution.

Q. And this term "adequate supply and distribution" comes from where?

A. It comes from Section 3(e) of the Export and Import Permits Act.

Q. Okay. And so the Minister then has to decide whether it's surplus to domestic need. How does he come to that decision?

A. The Minister will take into account the recommendation from the FTEAC Committee with respect to whether or not the offer is a fair market value.
As well, the FTEAC Committee may present a view with respect to the validity of the offer. In addition, the Minister will consider other factors such as whether or not there is a question of unfair targeting. The Minister will consider this offer within the scope of other offers that have been placed on that Federal biweekly--offers that have been placed with respect to the offering company, particularly with regards to that particular advertiser, among other things.

Q. Okay. And why does the Minister ask TEAC for recommendations?

A. The Minister asks FTEAC for recommendations because the Committee provides him with advice that is not contained in-house within DFAIT. If you look to the Terms of Reference of the FTEAC Committee, which can be found at I believe it is Tab 8 of my Affidavit.

Q. This is your first Affidavit?

A. My first Affidavit, that is correct, it states under the first--

Q. This is a document that says Memorandum of
A. It's the second document in this tab, which is entitled Terms of Reference.

Q. Okay. So, this is the one, two, three--the fourth page?

A. The fourth page.

And under Section 8 Terms of Reference, one, general, "The Minister, in consultation with BCMoF has established the Federal Timber Export Advisory Committee to provide recommendations to the Minister on exports of logs from lands outside of the scope of British Columbia's forestry legislation."

And if you go down to subitem four which speaks to the functions and responsibilities, it lists those different responsibilities of the FTEAC, the first of which is to review all referred applications to advertised logs, and what this means is that those applications which have offers to assess the validity of any offers to purchase regarding applications, and determine whether or not those offers are a fair representation of the
09:09:13 1 domestic market value. To determine--the third 2 point--"to determine whether or not the logs under 3 application are surplus to domestic needs and make 4 recommendations to their disposition."
5 And the last point is, "to submit 6 recommendations to the Director General of the 7 bureau for consideration."
8 And if you look to sub five on the next 9 page up at the top, it sets out the 10 disposal/consideration of applications by FTEAC. 11 And the FTEAC will formulate recommendations 12 concerning applications by consensus, and may 13 dispose any application of by A, recommending the 14 export be approved; B, recommending that the export 15 be refused; or, C, requesting further information. 16 Q. That's very useful. Thank you. 17 Now, you said that the department doesn't 18 have that in-house expertise, so perhaps you can 19 explain why the Committee, what kind of expertise 20 the Committee provides.
21 A. The Committee is composed of industry 22 members, both those members who buy logs and who
sell logs, so we see both sides of the spectrum.

We also have geographic representation on the committee, so we have some committee members from the Coast, some committee members from the southern Interior, some from the northern Interior.

Q. And I understand you said yesterday that this is—these types of Committees are also in place for other types of items on the Export Control List?

A. We do consult with regard to other items on the Export Control List.

And just to provide an example for context, we control the export of military and strategic goods pursuant to our international agreements under the export control and nonproliferation Regime. So with the example of cryptography, for example, with regard to applications to export cryptography from Canada, we consult with subject matter experts that would include Industry Canada and those members of certain security agencies that have a focus in this area.

Q. Is what you do with the FTEAC Committee similar, in your view?
A. Certainly. Ultimately, it is for us to
make a recommendation and a determination, and we
take on board the views of those we have canvassed
in the consultation process.
Q. Now--
A. Perhaps I should clarify that in making the
decision with regard to the export of logs we also
take into account any submissions that have been
received by the advertising company.
Q. What I'm wondering, Ms. Korecky, is in the
absence of this Committee, how would the Minister
make this decision?
A. In the absence of this Committee? With a
formalized Surplus Test in place?
Q. Yes.
A. I guess, and I hate to speculate, but
without this committee in place, it would be up to
me to make that determination.
Q. I will have a few questions for you,
Ms. Korecky, on some of the allegations that the
Investor's witnesses has referred to as blockmail,
and I will ask that the session to be closed because
09:12:45 1 I will be taking you to some of your exhibits that
2 are restricted.
3 So, if we can ask witnesses that
4 are--sorry, people who are not allowed to hear
5 restricted access to leave the room, please.
6    MR. APPLETON: Could Ms. Tabet just clarify
7 exactly who she believes would constitute that
8 group. For example, I see Mr. Cook in place, and I
9 assume he would have to leave as well.
10    MS. TABET: No--well, this is information
11 that relates to action that Ms. Korecky has taken in
12 response to complaints and that deals with third
13 party information. That's why we've designated as
14 restricted. It relates to conduct of other parties
15 and the actions that Ms. Korecky has taken in
16 response, so we would believe that for that part
17 your clients Mr. Schaaf and Mr. Stutesman then
18 should not have access to that information.
19    It's going to be fairly brief, and I don't
20 want to belabor the point, but I should be done in
21 about 10 minutes or so or 15 minutes.
22    MR. APPLETON: It seems reasonable to me.
632

09:13:56 1 We will just watch over everything. No problem.

2 THE WITNESS: And Mr. Kurucz as well?

3 MS. TABET: Oh, sorry, Mr. Kurucz as well, thank you.

4 And Mr. Ringma I think has left? Yes.

5 (End of open session. Confidential

6 business information redacted.)

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Q. Okay, Ms. Korecky, I would like to take you
to Paragraph 132 of your first Affidavit, please. I
will give you a moment to read it.

So, you say here that Merrill & Ring--that
you're contacted by companies about the fairness of
specific offers on the Surplus Test, and--do you
receive a lot of these complaints?

A. We receive complaints on an ongoing basis
about a range of issues.

Q. And you say here Merrill & Ring is one of
the companies that often makes the most complaints?

A. That is correct.

Q. Now, apart from receiving complaints on an
ongoing basis, do you often--what's the nature of
those complaints?

A. Specifically with regards to offers that
are being placed on the Federal Bi-Weekly List, we
receive complaints that range from comments with
respect to the pricing, which we do appreciate very
much to get a broader perspective on what the actual
We receive complaints with regards to the validity of the offering company to make an offer. We receive complaints with regards to the fact that a company may believe it is being unfairly targeted by the offering company, as well as on a range of smaller procedural matters.

Q. And what do you do with these complaints? A. I look into those complaints. Depending on the nature of the complaint different things are done, but essentially I do look into those complaints. If further information is required, I seek that further information. I will go back to the advertising company for clarification and in certain instances contact the offering company for clarification as well.

And then this is taken into consideration as part of my assessment.

Q. Now, I'm trying to get a sense of these types of complaint. It seems to me that some of them are just run of the mills and providing more information. Some of them seem to relate to graver
conduct. Can you explain what you think is, you
know, an abuse of the process or some problematic
conduct versus something that's--just to help us.
A. Certainly.

Companies make offers, and they make an
assessment themselves of what value they would
subscribe to that particular boom of logs, and that
is well within their right. And sometimes their
offer is determined to be fair market value and
sometimes not. And that's part of the normal
process.

Where there is a potential abuse of the
system is, for example, what relates to what we term
the 90-day rule, and perhaps the best thing to do
would be to bring everybody to Notice 102, which is
Exhibit 9.

Q. Is that what has been referred to yesterday
as the issue relating to the penalty box?
A. Yes, that's what euphemistically referred
to by the industry.

Q. Okay, can you explain that to us, please.
A. Certainly. From our perspective, when an
offer is placed--and let me take everybody to Section 4 of Notice 102, which is on the fourth page up at the top on the left, and I will draw everyone's attention to Section 4.3. When considering offers, FTEAC proceeds as follows: "The FTEAC will not consider offers to purchase logs by any person who has exported logs directly or indirectly from Canada within the previous 90 days. The 90-day period covers the period between the day on which the export took place and the day on which the offer to purchase is made."

Sub B is the corollary of that: "Conversely, the FTEAC will not consider any application from a company or individual who has submitted a valid offer for logs being advertised during the preceding 90 days." What we refer to in that first reference to application is an application to export.

Q. I'm not sure I understand. What's the purpose of this?

A. The purpose of this is to ensure that a company does not within the same 90-day period
export a boom of logs and then make an offer on
somebody else's logs or the reverse.
Q. Why is that?
A. Essentially it's to ensure that they are
not taking advantage of both sides of the system.
Q. I see. So, it's to have some fairness in
the process.
A. Exactly.
Q. Okay. So, you're explaining this is the
90-day rule, and these kinds of abuses have been
brought to your attention, then?
A. Since I've come on board, there have only
been a handful of instances where we have looked
into the 90-day rule. And I make reference to this
in my Affidavit.
Q. Would you take us to that, please.
A. Certainly. Let me just look for
the--paragraph 138, which is located on Page 35 of
my Affidavit, it's on the right side about halfway
down. We refer to an example where it came to our
attention that Interfor was--had placed some offers,
and in the proceeding 90 days, another company named
Timberwolf had exported a boom of logs. This was a particularly complex issue for us, and I would go back to the words of Section 4.3 of Notice 102, where it refers to export directly or indirectly. Certainly, it is much easier if there is a direct relationship between the two companies in question. In this particular instance, Interfor and Timberwolf are not the same company. There is no corporate relationship. However, they do have some common business dealings.

Interfor has no control over the actions of Timberwolf that I'm aware of with regard to what happened to this boom of logs. However, the boom of logs was exported, and because of the nature of the relationship, we determined there was an indirect relationship, and therefore advised Interfor that we would be watching very closely for any offers that they would make in 90 days from the date of export of that boom of logs by Timberwolf.

Q. Yes, I believe we've heard about this instance from Mr. Ringma and Mr. Stutesman yesterday.
Can you explain how this came to your
attention.

A. It came to my attention through information
from industry.

Q. You didn't investigate this yourself?

A. I investigated into the matter once we
received letters. You will see in my Affidavit I
indicate that Merrill & Ring had first contacted me
on this matter in October of 2005. However, no
specific details were provided. When I received
further information from Tony Kurucz as well as an
E-mail from Richard Ringma on the same matter which
provided enough information which was the impetus to
look further into the matter, we certainly did look
into it because this is a matter that FTEAC looks
at.

It was discussed at the FTEAC meeting, and
further information was sought from Interfor. With
that information, a determination was made, and a
memorandum was--I can't recall if this was one of
those instances where we went to the Minister with a
memorandum, I believe it was, but a decision was
made to inform Interfor that they would for this 90-day period not be able to make offers on the Federal Bi-Weekly List.

Interfor subsequently contacted us and asked us to explain to them very carefully the terms of Notice 102 and assured us they would set in place a regime to ensure that Timberwolf was aware of this rule and that they would not be able to export logs in the future.

Q. Okay. Yesterday--I believe it was yesterday--one of the examples that Mr. Stutesman gave of what he called blockmail was an issue that arose with Doman, and I believe you referred to this in your Affidavit at Paragraph 134. Can you explain what happened in that case. I believe this was from the transcript yesterday from Mr. Stutesman. I have references to Page 326, Line 13 of the transcript.

A. If you give me a second, I'm going to go to Exhibit 45 of my Affidavit.

Q. Exhibit 45 of your first Affidavit.

A. Of my first Affidavit.

Q. All right.
A. This letter is actually a wonderful example of how Merrill & Ring understands what is the nature of the information that we are seeking with regards to other factors, so you will notice at the bottom of paragraph--of Page 1, Mr. Stutesman writes me with regards to shortage of supply.

Q. He writes Mr. Jones--

A. Sorry, he wrote to Mr. Jones--this is 1998--and he indicates that this particular mill had shut down, and they did have an inventory of logs.

He then writes in Paragraph 2 on the next page with respect to the level of the offer.

Q. So, what did you do with this?

A. Well, what Tom Jones did with this was that he wrote a memorandum to the Minister on this issue--

Q. Just before--why was this a problem? I mean why in this particular case was there a problem with what Doman did?

A. With regards to 4.3 of Notice 102, there was no relationship. However, Mr. Jones, with the evidence before him, believed that there really was
no supply need on the part of Doman and so wrote a memo to the Minister, asking that the FTEAC recommendation with respect to the fact that the logs would be--should be declared nonsurplus based on the narrow element of the fair market value, that that recommendation, when you look at that with other factors, specifically with respect to the supply needs of this mill, that the recommendation really ought to be that these booms of logs are surplus to domestic need.

Q. Now, what's the difference between this case where you came to the conclusion that the offer didn't really represent a need versus other cases where offers are made and are declared valid?

A. Can you reframe that, please.

Q. Yes, I'm sorry.

I'm trying to understand why in this case there was a recommendation that the offer not be declared valid or, sorry, or be rejected as opposed to other cases where offer is put and is valid.

A. And that goes to the level of information that we have before us when the decision is made.
There are many letters that come to us that are letters that contain vague allegations. There are other letters that do not speak to the points that come within the scope of the other factors that we consider. And each particular issue is assessed on a case-by-case basis. The fact that a company writes us a letter does not necessarily guarantee that that boom will be declared surplus to domestic needs. We have to make an assessment on the factors placed before us.

Q. So, again, and the factor here, was it--
A. In this particular issue?
Q. Yes.
A. It was a question of the mill not really having a supply need for this particular boom of logs at this particular point in time.
Q. And you had evidence to that?
A. And there was evidence to that effect.
Q. All right. The other example that Mr. Stutesman raised was about the fact that CIPA--we heard about CIPA--can make an offer while a
related company, Itochu, I'm not exactly sure exactly what the relationship is--exports, and that was at Page 321 and 322 of the transcripts yesterday.

And I believe you have dealt with this at Paragraph 141 of your first Affidavit, so can you explain what happened there.

A. Certainly. I would draw everyone's attention to Paragraph 141 and 142 on Page 36. This was an issue which was brought to my attention by Merrill & Ring and relates back to Section 4.3 of Notice 102, which is the 90-day rule.

I think that one has to understand with respect to the 90-day rule that it really falls into place when there is both an offer and an export within the same 90-day period. If you don't have those two elements and then the linkage between the two companies, then the 90-day rule does not apply. And at the time that I was contacted by Merrill & Ring, I did the research, I went into our records and found that Itochu Canada Limited had not exported in that time frame, and I believe in
Paragraph 142 I indicate that—and let me go back to the dates on this—so Mr. Stutesman wrote me in March of 2006 and May 2006 on the same issue, and I looked into the matter and determined that no Federal surplus permits had been issued to Itochu since March 2005.

And I believe at that point in time that there was no live offer on the table as well, so I had no live issue before me, but I did the due diligence to ensure that there was no live issue, and that was as much as I could do at that point in time.

Now, I note as well that Mr. Stutesman contacted Lynn Sabatino in July of 2007—

Q. And this again is who?

A. Lynn Sabatino was the Acting Deputy Director while I was on leave. And at that point in time there had been no offer that was considered by FTEAC from CIPA. So, again, not a live issue at that point in time.

Q. And then later what happened? Did this issue get resolved?
That's not in my--
Oh, okay.
A. I write nothing more about CIPA in my Affidavit, so I wouldn't feel comfortable speaking about that matter.
Q. Ms. Korecky--
A. But let me frame that from the perspective of Merrill & Ring, that is the extent of our discussions with regards to CIPA and Itochu.
Q. Ms. Korecky, could I take you to Tab 48 of your first Affidavit, please. I believe this is a case dealing with targeting of Merrill & Ring's logs, so can you explain this to us, please, what happened there.
A. Certainly.
I will draw everyone's attention to Page 3 of this memorandum, Paragraph 6. It really is the operative paragraph, 6 and 7.
Essentially what had happened was, and I made reference earlier to the fact that one of the factors we look at is the pattern of offers that have been made to determine whether or not there has
been unfair targeting of a company. And in this particular instance, you will note halfway down through the paragraph, and this would be Line 1, 2, 3, about Line 7, I would say, starts on the right side, at the time Merrill & Ring applied to export the logs, a total of 16 packages of cedar logs were seeking export approval. However, it was noticed that DCP placed offers on only the M&R packages and placed no offers on 10 other proposals." TimberWest and Weyerhaeuser, which had four and six booms that were advertised at that time--"As a result those latter 10 packages were deemed to be surplus to domestic need and approved for export. The six packages proposed for export by Merrill & Ring were deemed to be not surplus by FTEAC. There was no justification to consider the six Merrill & Ring packages as not surplus while at the same time consider the other 10 packages as surplus. On the basis of our assessment, therefore, it was agreed to approve the export of the Merrill & Ring logs because the recommendations by FTEAC"--and again, the recommendation by FTEAC is solely with respect
to the fair market value nature of the offer, "and
the objections raised by DCP were not sustainable."
In this particular instance it was another
case where we believed there was unfair targeting,
and the Department of Foreign Affairs acted and
declared those booms of logs to be surplus to
domestic need.
Q. Can you read the first line of Paragraph 7, please.
A. Certainly.
Q. "As has been our practice, we have
determined that logs are surplus when offers appear
to be targeted at one company (in this case, clearly
Merrill & Ring) by another company (consistently
DCP)."
Does, this, in your view, represent your
practice?
A. Yes, it does.
Q. Okay, Mr. Korecky. Now, I understand that
for these cases that we've discussed you have taken
action.
A. Um-hmm.
Q. Have other cases been brought to your attention?

A. Other cases of unfair targeting?

Q. Yes, or abuses of the process. It's a bit of a vague terminology, but I'm trying to get a sense of how many valid complaints about the process have been brought to your attention.

A. Certainly.

Since I came on board in January/February of 2005, so we are talking almost four-and-a-half years and being aware of what transpired during my leave, with regards to unfair targeting I can remember now one issue that came to our attention.

Q. And circumvention of the 90-day rule?

A. Circumvention of the 90-day rule, we looked into this matter twice.

Q. And to the best of your knowledge, has this arisen much in the period before you were in your position?

A. To my knowledge, there were very few instances where an abuse was looked into, a
potential abuse was looked into, or an abuse of the system was found.

Q. And to the best of your knowledge, what was done about those abuses?

A. In those instances where we had sufficient information to act, we would declare the booms of logs to be surplus to domestic need; or if a company was found to be in--under the 90-day rule, the offer that they placed would be determined to be invalid, and the boom of log in question would be declared surplus to domestic need.

Q. Now, Ms. Korecky, what we'd heard from Investor's witnesses yesterday and the day before was that there is a lot that goes on in the market, negotiations and deals that are made and that you don't do anything about them. Why don't you do anything about them?

A. My mandate relates to the Surplus Test. My mandate relates to determining whether logs are surplus to domestic need or not.

And I think one thing that the Tribunal certainly needs to understand is that the Vancouver
Log Market is an immense market, and in Tab 4 of the exhibits to my Affidavit on Page 99, which is the second last page--

Q. Just give us a moment to get there, please.

A. Certainly. I would draw your attention to the figure at the bottom right corner of this table, which is 5.7. It's Page 99. It's the second last page.

Q. It's on the screen?

A. And it's on the screen as well.

Q. So, what are we looking at here?

A. Well, first I'm going to read the number to you, which is 5.7, and then the title of this chart is "Volumes of Logs Exported from British Columbia by Forest Region Jurisdiction Destination for the Fiscal Year April 1st, 2005 to March 31, 2006." The far right column relates to the percentage of volume that is exported to the percentage of volume that is harvested in the Province of British Columbia.

Q. So, between 5 and 6 percent of the total harvest in British Columbia is exported?

A. That is correct.
I would also draw everyone's attention to the first section in this chart which refers specifically to the Coastal region. And if again you look to the far right column, the percentage of booms of logs that are—a volume of logs that are exported from the Coast is 21.2 percent. What that essentially means is that 80 percent of the harvest remains in the pure domestic market.

Q. I don't want to interrupt your train of thought, but perhaps you can explain of that percentage, that 5 or 6 percent of the total B.C. harvest that is exported, how many of those logs are advertised?

A. If those logs are being exported, they have been advertised.

Q. I see.

A. So, they have gone through the Surplus Test and been granted surplus status.

Q. And how many of the advertised logs receive offers?

A. A very small percentage, somewhere around—I believe it's around 2 or 3 percent.
Q. I see.

A. And at the end of the day, over the industry, I believe that about 2 percent are granted not surplus status, but the other 98 percent are granted surplus status.

Q. And of those, you were saying earlier that complaints--

A. Complaints--

Q. That how many complaints of abuses do you see?

A. Complaints of abuses that we see, we see several actual instances of abuses that we have been able to identify and have taken action on. A handful, perhaps.

Q. Sorry. I didn't mean to interrupt you. You were talking about the negotiations and why you weren't--

A. So, going back and the reason I wanted to show this chart to everyone is because really the Vancouver Log Market is an immense market, and Mr. Ringma yesterday drew us a picture of an iceberg, and the reality is is that is how I view it
as well. We see what is at the tip of the iceberg. We are only aware of those offers that are placed before us, the offers that are adjudicated by FTEAC, and that is the scope of what we are aware of. There is a whole host of negotiations, of relationships that exist.

Q. But you're aware of these negotiations, are you?

A. As a general concept, certainly, but the specifics of the negotiations, that's proprietary business confidential information, which is not shared with us, and nor should it be because those are sales that take place and transactions that take place on the purely domestic market.

Q. Do you have reason to be concerned about those negotiations?

A. I have no reason to be concerned about those negotiations. I can't speculate as to the history between the two companies. I can't speculate with regards to what those companies have said to each other, what they've promised to each other. I have none of that knowledge.
Q. I'm trying to get a sense of what's happening because we heard a lot of allegations that, you know, the Investor's witnesses were saying that they felt they were held hostage by the system. What would happen if Merrill & Ring decided to advertise all their logs and not do any negotiations?

A. If they were to advertise all their logs, they would likely receive some offers, and then it would be up to them to determine how they would like to address those offers. They can choose to go through the Surplus Test, at which point in time they can choose to then write a letter if they feel that the offer is not a fair market value offer, or if they believed there were other factors of which we should be aware, and we take that information into consideration.

In the instance that we believe and make a determination that the offer is a valid, fair market offer and declare the boom of logs to be not surplus to domestic need, Merrill & Ring is in a position with a couple of options. One option is to accept
the offer. That offer is binding on the offeror but not on Merrill & Ring. The other option they have is to go into the domestic marketplace and find another buyer.

So, their worst case scenario on that is that they have a fair market value offer on the table. That doesn't necessarily mean it's the best offer that they can get, but it certainly is a fair market value offer.

MR. APPLETON: Ms. Tabet, just talking about Merrill & Ring, do you think we could let them back in the room at this point?

MS. TABET: I believe I'm finished with my questions, thank you.

MR. APPLETON: Well, I guess that means yes.

PRESIDENT ORREGO VICUÑA: Yes.

MS. TABET: Yes. If you want to conduct your cross-examination without referring to any restricted documents, then...

(End of confidential session.)
OPEN SESSION

PRESIDENT ORREGO VICUNA: Yes, thank you, Ms. Tabet.

We will have now the cross by Mr. Nash.

MR. NASH: Thank you, Mr. President.

CROSS-EXAMINATION

BY MR. NASH:

Q. Good morning, Ms. Korecky.

A. Good morning, Mr. Nash.

Q. As I've told you with my friend present, if at any point you need a break this morning--

A. Thank you.

Q. --please signal so and we will arrange for that.

SECRETARY OBADIA: Can you excuse me one second. Can I just for the technician, I specify that it's reopened to the public. Thank you.

BY MR. NASH:

Q. Ms. Korecky, you were appointed to your current position as Deputy Director in 2005; correct?

A. That is correct.
Q. As I understand it, in the fall of 2005?
A. That is correct.

ARBITRATOR ROWLEY: Mr. Nash, you were concerned about your voice dropping at the end of the day. I'm concerned about it dropping at the beginning of the day today.

MR. NASH: It's a continuing concern, then. Seamless.

BY MR. NASH:
Q. And you were appointed in an acting position in September of 2005?
A. No, I was appointed Deputy Director in September 2005.

Q. In September 2005.
A. Yes. He was appointed.

I would point out, though, that Mr. Jones, who's my predecessor, did retire in December 2004.

Q. Yes.
A. And that I acted as his delegate in the interim time from when he retired to the point where
I was appointed Deputy Director.

Q. So, he retired in December, end of December 2004.

A. That's correct.

Q. And you were appointed in September of 2005?

A. That is correct.

Q. And Mr. Jones was gone; right?

A. Yes.

Q. And you were new to the position?

A. That is correct.

Q. And did you train with Mr. Jones for three or four or five months before you took over in his place?

A. Mr. Jones and I had had some discussions about the Log Expert Control Regime. I had done some work on log export controls prior to that time. I did go out to British Columbia in I believe it was 2002 or 2003, with Mr. Jones, where we met with several industry members as well as attended an FTEAC meeting.

Q. A few years before?
That was a few years before.

When I took over the role, I called Don Ruhl, who was then the BCMoF representative responsible for Log Export Controls.

Q. Mr. Ruhl?
A. R-U-H-L.

Q. Okay.
A. That is correct.

And we had a fulsome discussion on Log Expert Controls.

Q. He gave you an orientation?
A. He and I spoke, and he provided me with his perspective as well.

Q. Just to go a little bit back to your background, you've got a few university degrees, I believe?
A. Yes, I do.

Q. You have a degree?
A. Is that in my Affidavit.

Q. You have a degree in law?
A. Yes, I do.

Q. You don't have a degree in forestry, I take
it?

A. No, I don't.

Q. A BA majoring in history?

A. In history?

Q. Yes.

A. No.

Q. Geography?

A. No.

Q. Economics?

A. No.

Q. Ecology?

A. Not at all, although I do have an undergrad in biology, so there were some ecology courses.

Q. Right. So you have an undergrad degree in biology and I think a graduate degree in French; is that right?

A. I have a combined sort BA/BS/BSC, and then I have my L.L.B. and my L.L.L.

Q. And no training of in nature in business administration?

A. No.

Q. Or in marketing and sales?
A. No.

Q. And you completed your law degree in 1998?

A. 1997.

Q. '97?

A. My L.L.B. and in '98 my L.L.L.

Q. And you article ed as a lawyer?

A. Articles, yes. Iarticled with Stikeman Elliott, which is a law firm in Ottawa. I specifically chose to article with Stikeman because they did have a regulatory practice, and I really at that point in time had a sense that I did want to go work with Government and work in the regulatory sphere.

Q. So, you went straight from articles to the Department of Foreign Affairs?

A. That is--I did a contract for the Center for Trade Policy and Law, and then I went to Foreign Affairs.

Q. You went to Foreign Affairs in 2000, I think?

A. That is correct.

Q. And you went there as a Policy Analyst?
A. That is correct.

Q. So, essentially through, if I can it take you through the nineties, you were in education and then essentially you went to Foreign Affairs for the beginning of your career; is that fair?

A. That's correct.

Q. And you were a Policy Analyst for the five-year period from the time of your appointment until you were appointed to this position?

A. I started as a Policy Analyst, then I became a Senior Policy Adviser, and then I became a Deputy Director.

Q. And did you study constitutional law?

A. That was my worst course in law school.

Q. And did you only take one of them?

A. I believe that we had to take constitutional one and constitutional two in first year.

Q. And then you never looked back and went straight ahead and never looked at constitutional law again; is that right?

A. It was not my favorite topic.
Q. And I take it in your career you have not had any actual hands-on experience in the forestry industry?

A. That is correct.

Q. You're not an expert on forestry issues or on forestry policy in Canada?

A. That is correct.

Q. And I take it you would agree with me that you would not claim to have the knowledge of the industry and the expertise, the information regarding the industry that people who had been working in the industry, including in British Columbia for 20 or 30 years?

A. That is correct.

Q. Now, Exhibit 2 to your Affidavit, which we don't have to go to right now, but we can if you wish, is the Export Control List; is that right?

A. That is correct. That is regulation under the Export and Import Permits Act.

Q. And that contains a list of all of the goods that are controlled for export?

A. It contains--it is the regulation that sets
09:49:10 1 out the types of goods that are controlled. There
2 is an incorporation by reference to what we term our
3 guide to export controls, and that sets out by line
4 item all the items that are controlled under the
5 Export Control List.
6 Q. And how many items are there that are
7 involved in your responsibilities?
8 A. We have--our list is some 200 pages.
9 Q. 200 pages. And how many items would be on
10 each page?
11 A. Oh, I would have no idea.
12 Q. Thousands?
13 A. Certainly.
14 Q. And logs is one of those items; is that
15 right?
16 A. Yeah, certainly logs is one item.
17 I would point out that we issue the
18 equivalent number of permits for logs that we do for
19 all other items under the Export Control List that
20 are the purview of our division.
21 Q. But you deal as the Deputy Director of the
22 division, you deal with--you're responsible for
dealing along with the Director, for all of the
items; is that right?

A. That is correct.

Q. And so logs is a portion of your dossier,
if you will, but not the entire--

A. On paper, logs is a portion of the dossier.

With respect to the amount of time that I spend with
regards to logs, it can vary between 50 to 75
percent of the time I spend on substantive issues.

I also have with me a Senior Policy Adviser
who probably in the last year has spent about the
same amount of time on log-related issues.

Q. And I gather you're not an expert on the
economy of British Columbia?

A. That is correct.

Q. Or the history of the economy of British
Columbia? Fair enough?

A. That is correct.

Q. Or the ecosystems in British Columbia?

A. Not an expert, certainly, no.

Q. No? Or the geography or topography of
British Columbia?
A. An expert, no.

Q. Or in timber harvesting methods in British Columbia you're not an expert?

A. That is correct.

Q. Or in transportation issues involving British Columbia?

A. An expert? No.

Do I have some knowledge of all of these issue, do I know who to go to to get the information that is required if one of these elements that you have raised becomes part of a consideration I have, certainly I do.

Q. You can go to someone to be advised about that, but you don't have the actual knowledge yourself?

A. That is correct. And there is no expectation that I would have that knowledge. That is why I you have a Consultative Committee. That is why we have a cooperative relationship with the British Columbia Ministry of Forests, which is set out in our MOU.

Q. So, I think you used--I can't recall the
expression you used yesterday--you're a nonsubject expert? Is that the phraseology you used?

A. The term we use in the Department of Foreign Affairs is nonsubject matter expert.

Q. Nonsubject matter expert. So, you're in that category. You don't have a specific expertise in any one subject matter; is that right?

A. Well, I think I have developed over the last 10 years a certain expertise in regulatory matters.

Q. But your classification, if you will, is nonsubject matter expert?

A. Well, as a Deputy Director I'm a manager at this point in time.

Q. Okay, you're a manager?

A. And I do I believe over the last 10 years since I have been with the Export Controls Division, the numerous international meetings I have attended, the numerous FTEAC meetings I have attended, the amount of time and energy that I spent on these files developed a certain expertise with respect to the role that I have to play.
Q. My question is really about the category that you fall in. Are there subject matter experts within the department?

A. Subject matter experts?

Q. Yes.

A. At the Department of Foreign Affairs?

Q. Yes.

A. Not that many. We tend to be generalists, and it's a skill-based organization. Certainly we have the knowledge, certainly we know where to get the knowledge, but we do not, as in the forestry industry where someone comes in and spends 30 years doing harvesting of logs, our cadre of professionals essentially move around the department and draw interlinkages between the different areas that we learn from.

Q. All right. Could you turn to your first Affidavit, please, that you swore for this proceeding.

A. Yes.

Q. Have you got it in front of you?

A. It's right in front of me.
Q. Go to the first page.

And as a lawyer you would know that it's important to be careful in swearing the truth of an Affidavit?

A. Yes, I do.

Q. Of course. If you go to Paragraph 2, you say, based on my experience--

MS. TABET: Sorry, I just--I want to remind you that Ms. Korecky is not here as a lawyer, and so I don't know where you're going with this, but I just want to reiterate that she cannot speak about legal issues or legal advice that she has received.

MR. NASH: She can't speak about legal issues?

MS. TABET: No, she's not here as a lawyer.

THE WITNESS: I do not work at the Department of Foreign Affairs as a lawyer, and I have been a nonpracticing member of the Bar since my call to the Bar in 2000.

BY MR. NASH:

Q. So, when you swore your Affidavit, you weren't speaking or thinking like a lawyer. You
were speaking and thinking like a policy person?

A. A policy person, right.

Q. Fair enough.

So, you say in Paragraph 2, Based on my experience, I have personal knowledge of the matters hereinafter deposed to except where based on information and belief, in which case I indicate the source of my information and my belief that it is true."

A. That is correct.

Q. If you go to the next section, you say, "Pursuant to the Constitution Act of 1867"--

ARBITRATOR ROWLEY: Where are you reading from, please?

MR. NASH: Paragraph 5.

BY MR. NASH:

Q. "The Federal Government of Canada has sole authority related to the regulation of trade and commerce. The Exports Controls Division is responsible for the administration of most of the export controls authorized pursuant to the Export and Import Permits Act."
The Constitution Act of 1867 is one of the things I did take away from my course in constitutional law.

Q. You remember that much?
A. I remember that, yes.

Q. Then if you go over to Page 2 under the headline B, "Constitutional Framework of Log Controls in British Columbia," but the next three pages are setting out the constitutional framework of log controls in British Columbia. And you say, for example, in Paragraph 9, "The constitutional division of power is between the Federal and Provincial Governments in Canada?"

A. I'm sorry, which paragraph?

Q. Paragraph 9.

A. Are you with me?

A. Yes, yes.

Q. "Are set out--is set out in Part 6 of The Constitution Act of 1867," and then you go on to review that.

And then if you go to Paragraph 10,
under--actually go to the next headline, "Categories of Lands in British Columbia for Forestry Purposes," you set out there are four categories of land for forestry purposes in British Columbia. Private land acquired through the Crown, Crown grant prior to March 12, 1906. Logs from these lands are subject only to Federal regulation, including Notice 102. They're not subject to British Columbia's local use or manufacture requirements.

A. That is correct.

Q. You define them as Federal Land. How do you know that?

A. How do I know that these lands are Federal Lands?

Q. Yes. How do you know what you stated there?

A. I know the statement to be true because there is a system that has been put in place for quite some time that sets out that these are Federal Lands, and that is Notice 102.

Q. And the system that sets out that these are Federal Lands, what is that system?
A. I know that I'm sitting in the state of Washington, D.C., right now or the District of Columbia. It's not a state, but I can't tell you how or when this became a state, but I do know for a fact that I'm sitting in this state or this district.

Q. Can you tell me how you know what the system is that defines these as Federal Lands?

A. I don't believe having an understanding of the distinction of the jurisdiction between the Federal and the Provincial Lands has a direct implication with regards to Notice 102. To my knowledge, there has not been a questioning that has been placed before the Federal Government with regards to jurisdiction over Federal or Provincial Lands.

Q. Well, aren't Provincial Lands under--aren't lands in British Columbia under Provincial jurisdiction, or do you know that?

A. They are located in the Province of British Columbia, but some of them are regulated by the Federal Government, certainly. Those would be the
Federal/Private Lands as well as those Aboriginal
Lands that are located in the province of British
Columbia.

Q. But as a constitutional matter, aren't
private lands in British Columbia under Provincial
jurisdiction, or do you know that?
A. They're located in the Province of B.C.,
but as relates to Federal export log controls, they
fall under Federal jurisdiction.

Q. I'm just asking whether--

MS. TABET: Mr. Nash, she's not an expert.
We've already established she's not an expert in
constitutional law. She can tell you what is in her
Affidavit and what is in Notice 102, but I don't
think you should be pursuing too far the issue of
what the constitutional law of Canada provides. We
can have that discussion together, if you wish.

MR. NASH: I would really appreciate if I'm
not interrupted in the cross-examination. She's
given an opinion--

MS. TABET: I have the right to object.

PRESIDENT ORREGO VICUÑA: Yes, but the
issue is that the cross-examination you are conducting should be related strictly to the Affidavit.

MR. NASH: Absolutely.

PRESIDENT ORREGO VICUÑA: And certainly not elaborate on what it is in the Affidavit. Is that right?

MR. NASH: The issue for me is that there is a constitutional opinion expressed in Ms. Korecky's Affidavit, and I want to know how she arrived at that opinion. In fact, there is more than one. So, that's the purpose of this part of the cross-examination.

THE WITNESS: In my Affidavit, I made a statement that I know to be true. The origin of that constitutional jurisdiction I'm not aware of.

BY MR. NASH:

Q. You're not aware whether private lands in British Columbia are under Provincial or Federal jurisdiction; is that correct?

A. With respect to the issue of log export controls, they are under Federal jurisdiction, and
that is why Notice 102 applies to them, and that is
why before that Notice 23 applied to them, and that
is why before that there were other LERs in place
with regards to those items, and that has been in
place for quite some time.
Q. And where does that jurisdiction derive
from?
A. Again, you're asking me a question that you
have asked, and I have been unable to answer.
Q. So, you don't know yourself where the
Federal jurisdiction over private forest lands comes
from; is that correct?
A. That is correct. And in the five years I
have been dealing with this, it's never been an
issue up until today.
Q. Isn't, in fact, the jurisdiction that the
Federal Government has over the regulation of
private lands with regards to forests, isn't that a
delegated jurisdiction from the Provincial
Government under the Forest Act to the Federal
Government or do you know that?
A. I do not know that.
Q. So, you're not able really to express an opinion on constitutional law matters?
A. I stated that several minutes ago, yes.
Q. Yeah.
You say then--
A. You asked me if I was a constitutional expert, at which point in time I said no.
Q. If you go to Paragraph 12, please, on Page 4. You refer then to the first category which we just reviewed. The first category, "although in private hands' is referred to in the industry as Federal Land because Canada has exclusive jurisdiction over that land." And you know that from your personal knowledge?
A. Those are Federal Lands.
Q. Because Canada has exclusive jurisdiction over that land?
A. Um-hmm.
Q. Yes?
A. What I know relates to the Surplus Test. That is what is my regulatory mandate, and I'm aware that the Federal Government has exclusive
jurisdiction with regards to the Federal Surplus
Test or the Surplus Testing of the logs that come
from that land. That is the scope of my regulatory
function.

Q. So, you don't know, then, that Canada has
exclusive jurisdiction over the land; that's
correct?

A. Over the land?

Q. Over the land, as you say there.

A. In what respect?

Q. In the respect you referred to. Over the
land including the logs produced on such lands. I
take that to be--correct me if I'm wrong--that
you're expressing an opinion there or a fact that
the--that Canada has exclusive jurisdiction over the
land. Am I correct?

A. What I understand to be the truth is that
we have jurisdiction over the export related to
those logs and the Surplus Test.

Q. So, that's slightly different than what you
say in your Affidavit.

A. And I apologize if I misled anyone with
that. It's an inartful way to say that we have control over the export of those logs.

Q. So, that would be your opinion today that you have jurisdiction to regulate the export of the logs; right? And that's it?

A. We have the jurisdiction to determine whether or not those logs are surplus to domestic need, yes.

Q. And that's it?

A. With regards to those lands?

Q. Yes. Or do you know?

A. Well, again, my subject matter expertise relates to this one area. What the implications are with regards to taxation, what the implications are with regards to a whole host of other matters are not relevant for my role.

Q. Did you write this Affidavit?

A. Yes, I did.

Q. The entire thing from beginning to end?

A. I wrote it, and it was reviewed, but yes, these are my words.

Q. So, if you go to Paragraph 18, "Similarly
the Province of the British Columbia does not have
the constitutional authority to control export of
logs grown on Federal or Provincial Land, which is
the exclusive jurisdiction of the Federal Government
under Section 91 of the Constitution Act. As well,
the Province of British Columbia cannot regulate the
local manufacture or use of logs grown from private
lands under Federal jurisdiction."
A. That is correct. There is no local use or
manufacture rule with regards to logs that come from
Federal Lands.
Q. But isn't it true that British Columbia
could retake its jurisdiction over those lands with
a stroke of the legislative pen?
A. Again--
Q. Right?
A. Mr. Nash, I have no idea because--
Q. You don't know?
A. No, I have no idea. I don't know at what
point in time the authority over those lands was
ceded and what was the instrument. I do know for a
fact that it did take place, and that is what is
Q. Do you know when it took place?
A. Well, it took place in March of 1906.

Q. If you go to Paragraph 25 of your Affidavit you state that British Columbia forests are divided into two economically distinct regions, the Coast and the Interior. These two regions are separated by the Cascade Mountains. The B.C. Coasts consist of the lands and numerous islands west of the Cascade Mountains and is a unique log producing region within Canada. East of the Cascade Mountains encompasses most of the land area in the Province. The mountains limit transportation between the Coast and the Interior. The distinction between the Coast and the Interior derive from differences in geography, the forest ecosystems, timber harvesting methods and costs and transportation alternatives.

A. Yes, that is correct. I have actually visited in the Interior, driven through the Cascade Mountains. I have met with industry members both in the Interior and the Coast, and I believe this to be true.
Q. Well, you believe it to be true because you had been told it by somebody?
A. I believe it to be true.
Q. Or you read it somewhere?
A. I went on the trip, I looked with my eyes, I spoke with people. I have certainly over the years gathered a fair amount of knowledge, and this is to my understanding to be the truth, and I have had no evidence to the contrary in the last five years.
Q. In Paragraph 26 the Province of British Columbia relied heavily on the forest industry for its industrial development.
A. Um-hmm.
Q. Now, really, Ms. Korecky, do you have any expertise in the history of British Columbia and its industrial development?
A. I do know that the industrial development of British Columbia is heavily dependent on the forestry industry.
Q. But in its history it's relied heavily on the forest industry for its industrial development?
A. Yes, I'm aware of that.

Q. You're not an expert in--

A. I'm not an expert, but I am aware of that fact.

Q. And then if you go to Paragraph 27, a significant--second sentence, "A significant part of Coastal lands was also Federal Land which the Province could not regulate."

A. That is correct.

Q. And again that's your opinion; correct?

A. Um-hmm.

Q. And that's as much as it is; correct?

A. Yes, um-hmm.

Q. Then in Paragraph 29, you say, "In the postwar period, B.C. was still heavily reliant on the forestry industry for its economic development. The B.C. public was generally satisfied with the B.C. Government's control on logs."

Now, in the postwar period, how are you aware that the B.C. public was generally satisfied with B.C. Government's control on logs?

A. I certainly wasn't there at that time.
Q. Nor was I.
A. Nor were you and most of the people in this room.
Q. Well, it depends on when the period ends.
A. That being said we have a certain understanding of the history generally having been brought up in Canada, and I certainly over the last several years have learned of this matter to further extent. This is a general knowledge section, Mr. Nash.
Q. If you go to Page 8, Paragraph 31, under the title four, "Harmonization of log controls between the Federal Government and British Columbia," and therein you give a history of the way the two systems came together--
A. That is correct. Um-hmm.
Q. --to be what it is today; is that correct?
A. Yes.
Q. And the goal of the system is that both regimes be harmonized?
A. That is correct.
Q. And that they both reflect one another and
10:08:18 1 that they both work together in harmony?
   2    A. Yes, that is correct.
   3    Q. And that the definitions for phrases and concepts under one Regime is the same as the definition, the phrases and concept in another Regime. They are supposed to meld together; correct?
   4    A. I wouldn't quite characterize it that way, Mr. Nash.
   5
   6    The reality is, as I mentioned yesterday, and as you just pointed out again, that there are--there is a constitutional distinction between the authorities that the Government of British Columbia has and the Federal Government has. We have two distinct legislative bases. We have two distinct focuses; and so, therefore, we harmonize to the extent that it is possible and that it is practicable.
   7
   8    So, yes, there is some interlinkage of terminology, but certainly there are some distinctions.
   9
  10    Q. You're aware that Interfor--I'm actually
going to be speaking about companies now, and

turning to some TEAC minutes, so I ask that the

session be closed to the public.

(End of open session. Confidential

business information redacted.)
Q. I would like to take you first to Exhibit 58, please.

A. Certainly.

Q. And I would just like to ask you this question: Have you become aware over the years that Interfor has been a problem in the industry with respect to the whole blocking issue and the negotiations around it?

A. I'm not aware that Interfor is deemed to be a problem. I'm aware that certainly over the last couple of years that there have been some instances with regards to Interfor.

I would point out that the relationship between the buyer and the seller in this market of a commodity which is negotiated always will have an inherent tension, and that I do hear on an ongoing basis complaints from one side and from the other.

Q. So, you describe that as a tension. You have been here for the evidence for the last few days?
A. Um-hmm.

Q. And you understand and have heard our clients' perspective on that tension?

A. Yes, certainly, and much of this I have heard before.

Q. You've heard of this before.

A. Some of the complaints, yes.

Q. And if you go--this is a minute of November 5th, 2004, which was just the year before you came on, and you will see that in the first paragraph Mr. Jones expressed pleasure at returning to the committee from a meeting and announcing his retirement on December 31, 2004.

And I gather it was right after that that you came on board in early 1905--

A. That is correct.

Q. Sorry, 2005.

If you go to the third page, you will see that there is a series of offers on the Coast on the October 1st and 15th a Bi-Weekly List?
Q. If you'll give me a second, please.
A. Yes.
Q. I was not at this meeting, so I would like to review this quickly.
Q. Sure. Take a look at it, and we can go through it quickly.
(Witness reviews document.)
Q. You see that there is a series of offers made by Interfor on applications put forth by Weyerhaeuser on various booms?
A. Um-hmm.
Q. And you will see that all of the offers are found to be fair, and you will see that most of the applications are withdrawn.
A. That is correct.
Q. You see that?
Now, was there a change in the way the minutes were done? Because in the early days it seems that the application withdrawn is actually formulated and put on the minutes recorded, whereas, in the later minutes of TEAC it seems that that notation doesn't come up. Was there a change, to
10:12:57 1 your knowledge?

2 A. The way that I read "application withdrawn"
3 is the application to advertise is withdrawn.

4 Q. The application to advertise was withdrawn?
5 A. That is correct.

6 Q. Okay. All right. You don't know that, but
7 you just read it that way?
8 A. Well, it does not indicate the offer was
9 withdrawn but the application was withdrawn.

10 Q. Okay. And if you go then to Exhibit 54,
11 which you touched on or at least around which you
12 spoke in your direct evidence, this is a letter
13 dated January 9, 2006, from Mr. Kurucz from
14 Progressive.

15 A. Yes. This is the only correspondence I
16 have received from Mr. Kurucz since I have come on
17 board.

18 Q. Right. And it's a long letter and it's
19 written just after your appointment, within a few
20 months of your appointment January 9, 2006.

21 A. That is correct. That was I went--you will
22 notice in the last paragraph of this letter he
understands that I will be in Vancouver. I called him with regards to this letter indicating that I would be meeting with Merrill & Ring, Island Timberland, and TimberWest, and he indicated that they were well aware of his concerns and that he felt there was no need to discuss this further.

ARBITRATOR ROWLEY: Could I just interrupt for a moment.

MR. NASH: Yes.

ARBITRATOR ROWLEY: The Tribunal does not have copies of all these exhibits. And if Canada has them on the machine, if they can be put up as you read them, that would be helpful to us. Thank you.

MR. NASH: Thank you.

THE WITNESS: It's Exhibit 54.

BY MR. NASH:

Q. Thank you very much.

If you go to Page 2, Mr. Kurucz states to you, "Interfor, according to their 2004 annual Report, has a current allowable annual harvest"--

A. That's in the second paragraph?
Q. Second paragraph--"of 3,234,000 cubic meters, and of this allowable volume in 2004, they supposedly cut 2,964,000 cubic meters, 270,000 cubic meters less than they could have. 2005 data is not available."

Did you look into that ever?

A. Did I look into this issue.

Q. Yes.

A. Of Interfor's annual allowable cut?

Q. Yes.

A. Their allowable annual cut is a Provincial issue.

Q. So, when you're looking at whether logs are surplus or not surplus, two requirements in British Columbia, from an FTEAC point of view you don't look at annual allowable cut?

A. No, just like I don't look--

Q. It's an irrelevancy do you?

A. Well, just like I do not look at and I have no knowledge of the Harvest Plan of Merrill & Ring or their business plan. I do not know what their projections are, and I do not know what they
Q. Do you look at allowable annual cut at all as an issue in your determination, your consideration, your opinion as to whether there is a surplus of logs in British Columbia?

A. The annual allowable cut—and let me just clarify—

Q. If you could just answer my question and then give your explanation.

ARBITRATOR ROWLEY: Do let the witness answer her question. Don't interrupt her.

MR. NASH: Yes, Members of the Tribunal, I would just appreciate to get the answer and then the explanation if I can.

ARBITRATOR ROWLEY: No, I want to be clear. If a question has been put and the witness is answering it, please do not interrupt the witness.

BY MR. NASH:

Q. And your explanation.

A. Certainly. The annual allowable cut is something that is determined by the Provincial Government, and I'm certainly no subject matter
expert as to how this annual allowable cut is arrived at. I understand that a certain allowable cut is permitted, and then the company that has been granted that annual allowable cut is free to choose how much it chooses—how much it decides to harvest or not, just like Merrill & Ring is free to choose how much it will harvest within a year.

Q. And so, to go back, then, you don't take it into— as a factor into consideration at all in your thinking about and determination of whether there is a surplus of logs in British Columbia or not; is that correct?

A. That is correct.

Who has cut what is not of relevance to us. What is relevant to us is whether or not there is a demonstrated desire to purchase logs in the Federal biweekly, and we see that when we receive offers.

Q. And you don't—leaving aside the individual companies involved, you don't even look at the allowable annual cut as a totality for all logging companies and how much they've either overcut or undercut? That's not a factor?
A. That is correct. That is not at all a factor. What we are aware of certainly and we do take into consideration, you will see it at the beginning of all of the FTEAC minutes is there is a general market review, and there are several paragraphs that do speak to what are the general conditions at that point in time.

Q. Got that.

Now, if you go over to the third page--

A. We would also--I'm sorry, just one other thought.

Q. Oh, yes.

A. We do cult the Forest Industry Trader, which is an industry paper, which generally will speak to the supply conditions within the Province of British Columbia.

Q. If you go over to Page 3 of Mr. Kurucz's letter, with all that we know of Interfor--I'm in the middle of the page, the paragraph straight in the middle, "Interfor, a company that exported logs in the past, they have mills in Washington that cut logs from B.C. They have ties to brokers that are
exporting logs, et cetera. I think I see a very big 
resemblance to Northwood Hardwoods, which is an 
example he refers to previously, and I would like to 
ask your administration to take a serious look as 
Interfor as a company that should also not be 
allowed to offer on the Federal advertised list. I 
must add that the Provincial TEAC did not rule as 
Thomas Jones did."
A. This is the Northwood Hardwoods--
Q. Right.
A. --instance. Do we have a copy of the 
particular minutes where this was dealt with by 
FTEAC?
Q. The Northwood Hardwoods is an example that 
he cited. I'm not interested in that example. But 
what I'm interested in is knowing whether you knew 
at that time that Interfor had at least flagged as a 
problem to you very shortly after you came on.
A. Certainly. And if we could go to my 
Affidavit, where I do mention that when we looked at 
issue of Interfor with respect to the 90-day rule 
that one of the persons or one of the pieces of
evidence that I did follow came from Tony Kurucz.

Q. Right.

FTEAC did look into Interfor, didn't it?

A. Yes.

Q. Not long after this?

A. That is correct.

Q. And a matter was brought to FTEAC's attention that Island Timberlands had applied for Export Permits, and Interfor was blocking the offers, if you will. Do you understand that terminology?

A. That is not a terminology that we use. It's terminology that some use in the industry to denote any offer that is received on their logs that are advertised.

Q. You've heard of that expression?

A. I've heard of that expression.

Q. And you've heard of blockmail?

A. I've also heard that industry term.

Q. And I understand you don't use those expressions?

A. Um-hmm.
Q. If you'll turn to Paragraph 65 of your Affidavit.

You state there that, "If FTEAC is aware that a company making an offer on advertised logs has exported logs 90 days before submitting an offer, FTEAC will disregard the offer."

Now, I look at the first words of that sentence, "If FTEAC is aware."

A. That is correct.

Q. The only way you can become aware is if an industry representative, somebody in the industry makes a report and brings to your attention or to the Committee's attention some kind of infraction or delinquency; is that fair?

A. With regards to a specific issue such as the 90-day rule, we do not know of, as I mentioned before, all of the business dealings that take place in the industry. There are many times where we see an Export Permit from Merrill & Ring for an Island Timberland boom. We do not know the conditions of the sale. We just are aware that there is some level of a relationship. Was I aware about this
relationship between Interfor and Timberwolf? No, but people in the industry bring this to our attention, and when it becomes known to us, then we act on it.

Q. In other words, you don't have a mechanism in place at FTEAC to become aware internally without a report from the industry to bring to your attention, you don't have that mechanism which can determine whether offers are being made on logs by a party either directly or indirectly exporting logs; that's correct?

A. That is correct.

Q. Okay. Now, if we could go to Tab--the exhibit referred to in that paragraph?

A. 30, 31?

Q. Yes, please.

Now, I think we heard from Mr. Cook yesterday that there are no written conflict-of-interest guidelines for at least TEAC. Are there written conflict-of-interest guidelines for FTEAC?

A. There are no written conflict-of-interest
guidelines for FTEAC. However, there are guidelines that are followed, and they are evidenced in the minutes.

Q. And where are those guidelines set out? Are they set out anywhere?

A. When a new member joins the Committee, there is a fulsome discussion with regards to the conflict-of-interest guidelines as well as with regards to the confidential nature of the proceedings that take place at the FTEAC meetings as well as the confidential nature of the FTEAC minutes and any documentation related to the FTEAC deliberations.

Q. And in this fulsome discussion, what do you tell or who explains the conflict-of-interest guidelines to the new member? Do you do that?

A. Don Ruhl, who is the current Chair, and myself do that.

Q. The two of you sit down with the new member and you explain the conflict-of-interest guidelines? We actually begin the first meeting; we begin that meeting with an explanation so that they
are aware before any business of the Committee is discussed exactly what the expectations are for them with regards to conflict of interest and with regards to confidentiality of the information related to the FTEAC meeting.

Q. And what do you tell them about the conflict-of-interest guidelines? What are those guidelines?

A. Essentially what we tell them is that when they come in to the meeting, they take off their individual company hat, if they have an individual company, because some of the members are retired, and that they are asked to provide their industry expertise on these topics. And that in instances where there is either a real or a potentially perceived conflict of interest, they are to excuse themselves from the proceedings.

Q. So, a real or perceived conflict. That's the definition?

A. That is, yes.

Q. A real or perceived conflict? Okay.

We will go to the minutes of March 10,
10:25:05 1 which is Exhibit 30.

2 A. Um-hmm.

3 Q. Of 2006. And you're in attendance by

4 conference call?

5 A. That is correct.

6 Q. And would you attend most of the minutes of

7 FTEAC by conference call?

8 A. I make certain, since I took this role on

9 in February 2005, that the Federal Government is

10 always represented. The reality is that we are

11 located in Ottawa, and to transport ourselves on a

12 monthly basis to Vancouver for a three-hour meeting

13 would not be practicable. Therefore, we do tend to

14 assist--to attend the meetings via teleconference,

15 and that works very well for us.

16 Q. How many actual meetings have you attended

17 in person since you started in September of 2005?

18 A. I personally have attended one meeting. My

19 colleagues have attended, I believe, another three

20 meetings.

21 Q. Over the course of the last

22 three-and-a-half years? About one a year on
A. I can't speak to what took place when I spent that year on maternity leave, but what we do try to do is we do try to get out to British Columbia for the field trip so that we have an opportunity to get ourselves into the industry and to learn something new.

Q. And so that's the field trip at the beginning; is that right? For the first meeting?

A. Typically, what happens is that the committee will hold one or two field trips a year, and the field trip takes place I believe on a Thursday, and the FTEAC Committee meeting will take place on a Friday, for example.

Q. If you go to Page 2 of the minutes, Item Number 3, market review, and just to clarify, I believe Mr. Cook confirmed for us yesterday that at the time of the discussion around the market review, all of the members of the committee would have the offers that were being considered at the Committee in hand prior to the meeting and would be expected to review them. And can you confirm that as well
from your standpoint--

A. That is correct, yes.

Q. So, you would have reviewed all of the offers or the summary of the offers before the meeting, and the market review discussion would be held after everyone has reviewed the offers; is that basically how it worked?

A. Yes.

Q. If you go down to number four, harvested surplus under number 4, Federal applications, there are 15 Federal harvested applications with offers to consider. All of the offers on these applications are under review by TEAC/FTEAC due to allegations that Interfor has indirectly been involved in the export of timber in the last 90 days. See agenda item 7-B below.

Now, Mr. McCutcheon was at this meeting it shows on the minutes; correct?

A. Yes, he's marked as being present.

Q. Right. And I think Mr. McCutcheon, or do you know, had left Interfor by this time, or do you know that?
A. He would have left Interfor by this time.

Q. He left at the end of 2006? Sorry, 2005?
A. He would have retired--I'm just trying to think exactly when he retired. He certainly was with Interfor. I believe he injured himself later in 2005 and would have left early in 2006. The specific dates I do not recall.

Q. So, he's left Interfor within a few months of the date of this meeting; correct?
A. Yes.

Q. Just before we go further on that issue, you will see that the harvest surplus on the headline under Federal applications A harvested surplus Bi-Weekly List is January 27, 2006, and February 10, 2006.
A. Um-hmm.

Q. So this meeting is being held on March 10, 2006.
A. That is correct.

Q. And involves consideration of two lists, one of which is dated January 27, 2006; correct?
A. That is correct.
Q. And the earliest that the Applicant could get on that list would have been 10 days before that?

A. That is correct.

Q. If we are looking at the Friday going back another Friday and a Tuesday, so the earliest that they could actually get on the list would be January 17; that's correct?

A. Just give me one second.

I apologize, I don't have a Table of Contents for my exhibits.

Q. I'm just actually asking for an arithmetical calculation based on the formula you gave yesterday.

A. So, the date of advertisement would have been January 27th.

Q. Yes.

A. So then the items would have been posted by the company on January 17.

Q. No later than January 17?

A. No later than January 17.

Q. And it might have been earlier other in
10:30:14 1 fact?
2 A. Potentially.
3 Q. In order to capture the Tuesday deadline, given in our example?
4 A. That is correct.
5 Q. And then going down to the issue under consideration here, what follows are the 15 applications; correct?
6 A. Yes.
7 Q. All made by Island Timberland. And you go over to the next page, and every one appears to me to be the same.
8 A. Um-hmm.
9 Q. All of the offers are made by Interfor. It is therefore recommended that the Minister refuse to review the proposed export.
10 A. Um-hmm.
11 Q. And so at this stage, all of the applications are going to be recommended to be rejected; correct?
12 A. I think it's a little more complex than that. What essentially happened was that we became
aware of the Interfor issue, and there were these offers to consider. And because we had not come to a final determination with regards to the 90-day rule, I made the request that we consider these offers, regardless, and therefore there would be a determination at least with respect to the fair market value assessment during the appropriate time period, and then either that the validity—the offers themselves if they were of fair market value would be determined to be valid or invalid.

And if you note on Page 2, in Paragraph 4(a), this is noted, and this is under 4(a) under the Coastal section right after the underline. It says, "The fairness of the offers has been reviewed at this time so that no delays are caused due to the decision not to accept the offers or not." It was to ensure that we had all the information as quickly as possible.

Q. Right.

A. So, what these particular notations relate to is the FTEAC recommendation with respect to the fair market value assessment only.
Q. So at that stage, Island Timberland would be notified of the disposition by the Committee of those offers; is that correct?

A. I can't remember the exact mechanics. This was a unique situation. I do not know when a letter of surplus or not surplus would have been issued to Island Timberlands on this issue.

Q. They may or may not have been notified. You don't just know; is that fair?

A. I don't have that information right in front of me as to when these particular letters were issued.

Q. Meanwhile, the logs are sitting in the water; right?

A. Um-hmm.

Q. Yes?

A. Yes, they are.

Q. And they have been sitting in the water since at least at the latest January 17, and we are now at March 10; correct?

A. Um-hmm, yes, so that's less than two months later.
Q. And so, at that point, if Island Timberland did not give notice of the disposition, preliminary disposition of these offers, then they don't know the status. If they did get notice, they either wait for the Committee's investigation to conclude or they sell the logs domestically; is that their alternative? Is that fair?

A. I note here that some of these fair market value assessments were determined to be the recommendation related to these assessments was that they were not fair market value offers.

And again, I don't have this information in front of me. It's really unfortunate that this issue was not raised in the Investor's secondary Memorial so that I would have a chance to find the appropriate paperwork so I could make a more fulsome response. However, I can say based on my experience and what I would seek to do would be to try to get an answer to Island Timberlands as quickly as possible, so those offers that would be determined to be not fair market value, I would assume, but again I can't corroborate for you that we would have
sought to issue a Surplus Letter at that point in
time.

Q. For the ones that were not approved, the
logs are sitting in the water and they can either
sell them domestically or wait the outcome of the
investigation?

A. Those would be the two options if at that
point in time Surplus Letters were not issued, but
again I can't say one way or the other.

Q. Right.

And then there was another month before any
further action was taken by FTEAC; that's correct?

A. That is correct.

Q. Okay. If you go to Tab Exhibit 31.

A. Well, no, I wouldn't say that, and I
apologize. I do believe at this point in time that
further information was sought.

Q. Right. And it took a month for FTEAC to
then reconsider the issue?

A. Um-hmm.

Q. And that's found at Tab Exhibit 31;
correct?
A. That is correct, under Item Number 2 where it indicates that due to a conflict of interest, John McCutcheon did not take part in the discussion related to the actions of Interfor.

Q. And that actually raises an interesting point, because—and I apologize for going back, but if you go back to Exhibit 30 for one moment? Do you see Exhibit 30 in front of you?

A. Um-hmm.

ARBITRATOR ROWLEY: Could you really try to say "yes" or "no" rather than "um-hmm."


BY MR. NASH:

Q. Now, John McCutcheon did not absent himself for the consideration of all of these Interfor offers, did he? The minutes certainly don't reflect his absence. If you go to Page 2--

A. Could I say that--

Q. --at number four, under harvested surplus, there is no reference to John McCutcheon leaving the room; correct?
10:35:38 1 A. I cannot--I agree with what you say on
2 paper that there is no reference. Whether John
3 McCutcheon left the room or not I cannot say because
4 I was not in Vancouver at the time.
5 Q. You don't know whether he did or he didn't,
6 but you would have thought that Mr. Cook would
7 accurately, as he seems to do, record when
8 Mr. McCutcheon left the room and when he came back,
9 as we've seen on other evidence in the course of
10 yesterday; correct?
11 A. One would hope, but Mr. Cook is not
12 infallible, like anyone.
13 Q. So, if we go back to Exhibit 31, we have a
14 meeting now a little over a month later, on April 7.
15 If the logs hasn't been sold domestically, they're
16 still waiting for export, they're still sitting in
17 the water, you attend this meeting by conference
18 call; correct?
19 A. April 2006, yes.
20 Q. Mr. McCutcheon is at the meeting. The
21 Chair called the meeting.
22 Number two, business arising out of the
10:36:37 1 Minutes, "Due to a conflict of interest, John
2 McCutcheon did not take part in the discussions
3 related to the actions of Interfor. A) Island
4 Timberlands letter. Background from the previous
5 meeting: Island Timberlands GP Limited submitted a
6 letter (email) to J. Cook that suggested
7 International Forest Products LTD (Interfor) had
8 exported logs in 2006. Investigation of the
9 allegation found that Interfor had paid the stumpage
10 on the volume harvested under timber mark AR3002
11 held by the Ucluelet Economic Development Corp.
12 TEAC/PTEAC discussed the situation and confirmed
13 that there was reason to suspect an indirect
14 relationship between the export of timber by
15 Timberwolf and Interfor." And I will just stop
16 there.
17 This information obviously came from
18 private industry. Mr. Ringma, no doubt, from Island
19 Timberland; right?
20 A. He's very forthcoming, yes.
21 Q. Yes.
22 And he brought it to the attention of the
Committee. The Committee spent a month investigating.

A. Um-hmm.

Q. It goes on, "Subsequent to the meeting, Mr. Cross, J. Cross contacted Duncan Davies, CEO of Interfor, and got the facts from him around the allegations. The Committee, with the exception of John McCutcheon, reviewed the facts again by e-mail and a recommendation was provided."

"The Chair of TEAC/FTEAC sent a letter to Doug Konkin, Deputy Minister of Forests and Range, and Robert Fonberg, Deputy Minister, International Trade Canada, recommending that Interfor be advised that they were in contravention of export policy. Due to their indirect involvement in export on or about February 12, 2006,"--we are now at April 7, 2006?"

A. That is correct.

Q. "Any offers by Interfor on timber advertised for export should not be considered until after April 25, 2006, which is less than three weeks down into the future Provincial timber or May 12,
2006, Federal timber. The Committee restated their support for the recommendation."

So, I take this to be that Interfor was put in the penalty box; is that right?

A. Interfor was, and I mentioned this in my previous testimony.

Q. Yes.

A. Yes.

Q. And they were put in the penalty box for 90 days; that's correct?

A. That is correct.

Q. Retroactive to almost two months before; correct?

A. Yes.

PRESIDENT ORREGO VICUÑA: Mr. Nash, sorry to interrupt, for how long do you have to go? Because we will have to break now?

MR. NASH: We can break now, if that would be a convenient time.

PRESIDENT ORREGO VICUÑA: How long?

MR. NASH: 20 or 30 minutes.

PRESIDENT ORREGO VICUÑA: Okay. So, we
10:39:15  I will break.

2        THE WITNESS: I'm correct to press ahead if
3        you don't think you have many more questions for me.
4        PRESIDENT ORREGO VICUÑA: You have 30
5        minutes, so we will break for 10 minutes.
6        (Brief recess.)
7        PRESIDENT ORREGO VICUÑA: Fine. We may
8        proceed, Mr. Nash, please.
9        BY MR. NASH:
10        Q. We were at Exhibit 31 on Page 2, and we
11        were at the bottom of Paragraph 2 referring to the
12        length of time that Interfor was going to be in the
13        penalty box.
14        So, as I understand it, then, they were in
15        the penalty box for about three weeks on the
16        Provincial side and about four weeks or maybe five
17        weeks on the Federal side; that's correct?
18        A. No, I don't think that's correct. The
19        reality is that they had placed offers on the
20        proceeding Bi-Weekly List, and those offers had not
21        been finalized. The adjudication of them had not
22        been finalized.
So, in effect, those offers were in limbo until a determination was made, so therefore de facto they were in the penalty box because they were not allowed to make offers. I mean, they had physically placed offers, but the offers that they made were not released, even though a fair market value assessment had been assigned to those logs.

Q. So, that meeting was held on March 6, where the ability for Interfor to offer was suspended, I gathered?

A. Well, it actually—the ability took place, it would appear to me from what I see here in April, but from a practical impact, those offers that they had placed on the previous biweekly had no effect.

Q. And that meeting, considering the previous biweekly, was on March 6th?

A. The previous FTEAC meetings, so those would be the biweeklies of January 27 and February 10, so essentially the offers they had placed had no status.

Q. They had offers placed in that period of January 27th in the 14-day period following;
11:00:41 1 correct?

2   A. Yes.

3   Q. And so—but the time of their suspension

4 was retroactive to February 12; that's correct?

5   A. The time would go back to the date of the

6 export.

7   Q. The date of the which?

8   A. The date of the export.

9   If you go to the--

10  Q. I don't need a source if you could tell us

11 the date of the export.

12   A. Certainly. Okay.

13   Let me go back to Notice 102, Section 4

14 which indicates that the FTEAC will not consider

15 offers to purchase logs by any person who has

16 exported directly or indirectly from Canada within

17 the previous 90 days, and the previous 90-day period

18 covers the period between the day on which the

19 export took place and the day on which the offer to

20 purchase is made. And the date on which

21 consideration would take place of those offers would

22 have been March 10.
Q. And the date of the export here is February 12, 2006.
A. That's correct.
Q. That's what the minutes says.
A. Um-hmm.
Q. And so, if you read on to the next, the second next paragraph, "The members advise that the clear notice needs to be provided to Interfor as soon as possible. They recommended that J. Cook do what is possible to get a quick response from the Ministry." The committee had concerns about the length of time it takes to advise a company if they have been put in the 90-day penalty box.

Did the Committee have concern about advising the company's competitors that the company was in the penalty box?
A. The company's competitors?
Q. Yes.
A. You refer to who?
Q. Any competitors. Did the Committee have a concern that the industry know that a company was in the penalty box?
A. You're talking about the industry as a whole?

Q. Yes.

A. Or are you referring to competitors, those other companies that can make offers, those other competitors?

Q. Any other competitors in the industry.

A. As has been mentioned previously, we have certain obligations related to privacy, to business confidential information. We are not permitted to share this kind of information with the industry from a Federal Government perspective.

With regards to the Committee and the amount of time, the concerns that they had about advising a company about putting them in the penalty box, they were aware of some of the constraints that we have because this is an ongoing issue for us.

Q. What is the ongoing issue?

A. The ongoing issue is that the Federal Government, like the Provincial Government, has certain obligations related to the privacy of information related to the people that it deals
with, and so the information regarding the 90-day rule is something that if a company is found to have violated the 90-day rule, the ruling would go to that company, but no one else would have knowledge of that.

Q. And you would be concerned about that?
A. To inform that company so that they're certainly aware that any offers that they place would not be considered valid, so that they make alternate arrangements, yes.

Q. Has consideration been given to having an open process in this Committee consideration of offers?
A. Which Committee consideration? The 90-day rule.

Q. FTEAC. Any consideration of offers. Has there ever been any discussion about the possibility of having an open forum, an open way of dealing with these matters in a transparent way?
A. The reality is is that a company which has offers placed on it is well within its right to write letters to us, and we have provided many
examples where companies have written to us. They
certainly have an input. I think that what we need
to reiterate is that the FTEAC Advisory Committee is
a consultative committee that provides advice to us.
It is not an open forum. It's not an advocacy for
any forum for any one company, but individual
companies certainly do have the ability to contact
us and, as I've mentioned previously, they call us,
they e-mail us, they write us on an ongoing basis
with any questions they may have, with any concerns
they may have.

And you asked me a question earlier as to
whether or not the company in question here that had
the offers placed on them, which would have been
Island Timberlands, would they be aware. The
reality is that if surplus or not Surplus
Letters are not issued by the Wednesday, we hear,
and the first person who would call us would be
Richard Ringma from Island Timberlands.

ARBITRATOR ROWLEY: Ms. Korecky, may I just
interrupt for a moment. The question you were asked
was whether the Committee gave any consideration to
11:05:43 1 holding its meetings in public or in a transparent
2 way. You didn't answer that question.
3 THE WITNESS: I do apologize.
4 ARBITRATOR ROWLEY: And it is important
5 that you respond to the questions you're asked
6 rather than to argue the case.
7 THE WITNESS: I understand.
8 The question of whether or not the FTEAC
9 meetings are public or not is really not a question
10 for FTEAC. It is a question for the Federal
11 Government. We have convened this Committee to
12 provide us with advice.
13 And as I read to you earlier, the Terms of
14 Reference of the Committee indicate that the
15 deliberations of the Committee are confidential.
16 Certainly, if a company would like to write a
17 letter, they can write a letter, and they do have an
18 input or they can come and provide us with--
19 ARBITRATOR ROWLEY: I don't believe you're
20 answering the question. Was consideration given by
21 anybody to holding these proceedings in public?
22 THE WITNESS: The FTEAC meetings generally?
Or with regards to the specific issue?

BY MR. NASH:

Q. My question is with regard to the meetings generally.

A. The meetings generally.

Q. Yes.

A. Not to my knowledge has consideration been given of this.

Q. As the FTEAC representative, have you ever made a recommendation to the Minister to have the meetings held in public or to have the deliberations and determinations of the Committee dealt with in an open and transparent way?

A. We believe that industry has an input into this system, that their views are considered, and that, and I do apologize, that I have never made a recommendation that these meetings become public.

Q. You never--

A. With regards to the transparency aspect, I'm not quite sure what your question is.

Q. Have you ever made a recommendation to the Minister to have the FTEAC determinations and
deliberations and adjudications dealt with in an open and transparent and public way?

A. Can you define open and transparent for me.

Q. Is there something confusing about that concept?

A. Are you asking me whether or not I have recommended to the Minister that the FTEAC Committee meetings are open to the public? Is that the question you're asking?

Q. Whether it be the FTEAC Committee's deliberations, adjudications and determinations be dealt with in an open, transparent, and public way? Have you made any recommendation to the Minister in any regard related to that?

A. I have not made any recommendations to change the process in terms of how the FTEAC meeting is run or how the meeting minutes are disseminated or not.

Q. So, the answer to my question is no, you have never made a recommendation along those lines at all to the Minister?

A. Again, and I apologize, but our view is
that this is a Consultative Committee that provides advice to the Minister and is not meant to be an open forum. That industry does have the opportunity to provide us with their input, and ultimately the Committee provides me with advice. I make decisions based on the recommendations of the Committee and the advice provided to me by the recommendations of the committee and the advise. Any other information is provided to me by industry.

Q. So, do I have it right that you've never made any recommendations to the Minister to have the TEAC/FTEAC, in your case the FTEAC, meetings and deliberations, adjudications, and their determinations made in an open, transparent, and public way; is that correct?

A. I never made a recommendation to the Minister to change the terms of reference of the FTEAC Committee.

Q. You never made that recommendation?

A. I never made that recommendation.

Q. In any way?

A. No.
Q. How many of your recommendations to your Minister are reversed by the Minister?

A. My recommendations to the Minister?

Q. Yes.

A. To date, any recommendations that I've made to the Minister?

Q. Yes.

A. With regards to surplus status?

Q. With regards to any decision, determination or otherwise, however you want to describe it, made by FTEAC and/or you.

A. Any recommendations that I have made to the Minister have been followed. Certainly recommendations from FTEAC I have asked the Minister to look beyond and look at additional information and come to a different determination.

Q. You see in the series of minutes many, many recommendations that can come out of a meeting.

A. Um-hmm.

Q. And in normal circumstances, in almost all circumstances is it fair that you pass on those recommendations to the Minister?
A. As I mentioned previously, there are many decisions that are made--

ARBITRATOR ROWLEY: Can you pull the microphone closer to you.

THE WITNESS: I apologize.

As I mentioned previously, there are many decisions that are made at my level. There are other decisions that are made at my director's level, my Director General's level, and some decisions that are made at the ministerial level, if you're asking who specifically looks and makes the decision.

You have to understand that I'm the Minister's delegate on many of the routine issues. We certainly could not trouble the Minister to sign every permit. There are some seven, 8,000 permits being issued a year, and so therefore that authority is delegated down, and I make the decision with regards to the more routine matters of business.

BY MR. NASH:

Q. Of the more routine matters, the offers that are considered to be within fair domestic value
and circumstances where it’s recommended that the Export Permit not be granted, of those routine matter do any go to the Minister?

A. The matters that go to the Minister are those where we have additional information that leads us to go beyond the FTEAC recommendation, and so you have an example of a memo that I drafted for the Minister with regards to the 90--I believe it was to overturn an FTEAC recommendation of surplus because we found that there was an instance of targeting. There have been other instances which have not been provided in my documents where I have written to the Minister, for example, with regards to the 90-day rule.

Q. It would be the exceptional circumstance where either an--well, where an FTEAC recommendation would go to the Minister?

A. That is correct.

Q. Almost all of the recommendations would be dealt with at a subministerial level?

A. That is correct.

Q. And at what level are those decisions taken
A. Those decisions of signing the permits, the Surplus Letters and the not Surplus Letters, that is managed by me, and the official permits bear the signature of the Director General.

Q. I'm not really speaking of the management and administration. I'm speaking of the decision. When FTEAC makes a recommendation, in the exceptional case it goes to the Minister and the Minister decides those; correct?

A. That is correct.

Q. In the nonexceptional case, in the routine case, who decides?

A. That's decided at the administrative level.

Q. You decide that?

A. That's correct.

Q. So, the FTEAC recommendation in almost all cases except those exceptional cases which you referred to, is a recommendation that you actually deal with?

A. That is correct.

Q. And so then you decide whether or not there
are circumstances under which those recommendations should be reconsidered?

A. Whether other factors should be considered.

Q. Whether other factors should be considered.

You make that decision?

A. Yes.

Q. And you exercise a discretion in making that decision?

A. That is correct.

Q. You look at the merits of the particular case from--on whatever basis you consider to be the merits, and you make a decision I will look into this one or I won't look into that one; is that right?

A. That is correct. And there are occasions where I will consult with legal counsel.

Q. But you make the decision?

A. And there are occasions where I will discuss with my Director or my Director General and seek their guidance and their go-ahead.

Q. But you make the decision?

A. Well, ultimately I follow up, but I...
11:14:22 1 certainly don't make decisions over my Director or
2 Director General's head.
3 Q. So, you make the decision to investigate or
4 not investigate. You're the Minister's delegate for
5 that purpose?
6 A. I am the person who has the information
7 before me, and therefore I will go. And if I
8 believe there is a need to look further into this, I
9 will discuss with my Director, my Director General,
10 depending on the particular issue, and they will
11 give me the go-ahead to follow on this issue.
12 Q. So, if you decide there is a need to look
13 into an issue, you will discuss it with your
14 colleagues, but ultimately you will make a decision
15 as to whether it should be investigated further;
16 isn't that fair?
17 A. With my superiors.
18 Q. Right.
19 A. And colleagues.
20 Q. Right.
21 A. Yes.
22 Q. Now, is it anywhere laid out for industry
representatives to know that you are the decision maker in almost all cases except those exceptional cases that you referred to?

A. Is it set out?

Q. Is it set out anywhere.

A. The Minister's responsible for administering the Act, and the way that business is run is typically there is a delegate. It is not the common practice of the Federal Government to set out who is the decision maker on each item.

That being said, industry certainly contacts me on a large number of issues, and they are aware that I am the key input into the system.

Q. So, it's not laid out anywhere in your position as the Federal FTEAC representative, you are actually the decision maker on whether recommendations will go to--recommendations will be followed by the Department of Foreign Affairs and industry?

A. That is correct, yes.

Q. And in that sense, you're the judge of whether a particular application has merit or not;
isn't that fair?

A. I think that's a fair assessment.

Q. And the Minister is, in a sense, is the Court of Appeal on this; right?

A. On those nonroutine issues.

Q. Right.

You're even a judge on whether a nonroutine issue goes ahead for further investigation or not; isn't that fair?

A. Again, when there is a nonroutine issue, this is raised with legal counsel, this is raised with my Director, and sometimes my Director General. So, certainly it depends on the particular issue in question.

Q. Somebody under the Minister is deciding whether another matter, a matter should be investigated or not?

A. That is correct, yes.

Q. And in this process of deciding whether a matter should be investigated or not, do you issue reasons for not proceeding with an investigation that you decided that you won't proceed with?
Do you send a reasoned letter to the Applicant, saying we have decided not to proceed further with this matter? We accept—I accept the recommendation of FTEAC for the following reasons, so that they can look and see what factors have been taken into account? Do you do that?

A. No, I do not. They are issued either a Surplus or a non-Surplus Letter which with a Surplus Letter being issued indicates that there is not a valid fair market value offer, and if there is a non-Surplus Letter issued, it indicates to them there is a valid fair market value offer, in my assessment.

Q. Those letters are form letters; is that correct?

A. That is correct.

Q. So all they get after they made their submission to you and you've decided that their decision is not valid, they get a form letter back saying they haven't got permission?

A. That is correct.

Q. And on those issues that you do
investigate, I think you said that you go to the offeror and interview the offeror?

A. There are occasions, yes.

Q. So, you conduct your own investigation?

A. That is correct.

Q. On the terms that you consider to be meritorious and valid terms? You investigate those facts that you think shall be investigated to make a fair determination?

A. Um-hmm.

Q. Right?

A. Yes, I do. Yes.

Q. And are the criteria under which you will exercise that investigation that you will conduct that investigation, are those criteria set out in writing anywhere for industry to know?

A. No, they are not.

That being said, industry is well aware of the criteria that are considered, and that is evidenced by the numerous letters that we have received.

Q. Well, you referred to other factors that
11:19:01 1 you take into account.
   2 A. Yes.
   3 Q. Is there a list of all of those other
   4 factors laid out somewhere in a policy statement or
   5 a bulletin or a notice to industry? In your
   6 applications for reconsideration of an FTEAC
   7 recommendation, these are the factors that I, Judy
   8 Korecky, will take into account or the
   9 representative of the Minister in determining
   10 whether an investigation will go ahead or not? And
   11 if it goes ahead, how it will be determined and what
   12 factors will be taken into consideration? Is there
   13 any bulletin along those lines?
   14 A. There is no bulletin along those lines.
   15 When I came into this position in 2005, it became
   16 very clear to me very quickly that industry was
   17 well-informed regarding the different factors and
   18 consideration. We have looked at many letters.
   19 I cannot speak to the discussions that
   20 Thomas Jones had with industry. However, industry
   21 certainly--and it has been presented as
   22 evidence--have provided many letters about the
different kinds of issues that we consider in making our assessment.

Q. What are those issues?
A. Certainly there is the fair market value assessment.

Q. Do you advise how you determine that?
A. Do I advise how I determine that?

Q. In your process of investigation, do you go back to the Applicant and advise the Applicant how you're going about determining fair market value?
A. They are aware that under the notice, terms of Notice 102 that FTEAC provides a recommendation to me, and there are instances, some of which are on the record, where a company will come forward and say I don't believe that the offer I've received is fair market value, unless they do before FTEAC makes its determination, they provide information into the process, and they will indicate perhaps just simply that I don't think that's the right value, this is what I believe to be the right value. There are times where they will give me information regarding transactions that they are aware of. So, that's one
Q. That's one aspect.

And just while we are on that aspect, you actually make now--come now to your own independent determination of fair market value in this process.

A. I have to look at that factor. I look at the recommendation provided me by FTEAC, and then I look at any other information that has been provided to me.

Q. Right.

Well, you make an investigation. You go out and try to determine what fair market value is by calling up, for example, the offeror. Why did you put that offer in? That's one thing you do? What's your support for that offer?

A. What I tend to do is I tend to take the information that is provided to me in the offer. I listen to FTEAC recommendation. I read the information provided to me by the advertiser. And in certain occasions the advertiser provides information, and it is exactly in line with what the Committee does, with what the Committee provides to
they indicate this is a low offer, and therefore the issue stops there. In those instances where the company indicates to me that they believe the offer to be low and they provide me with another piece of information that happens to differ in terms of the recommendation provided to me by FTEAC, I look to the evidence before me. And if I feel there is merit to further investigating, I further investigate.

Q. So, you look at all the evidence that when you say is provided to you, you actually go and initiate your own steps in that investigation. You're not just a receiver of information, you're actually someone who is going out finding information, including these calls to the party that's put in the offer?

A. Certainly we refer to the trader. We look at other offers that have been received on similar booms. We try to make an assessment based on the information before us.

Q. Right.
And do you tell the Applicant what information you've taken into consideration in your adjudicative process in coming to your determination as to fair market value?

A. Well, they certainly are aware that their information is considered and the information provided by FTEAC is considered.

Q. Do you tell the Applicant what information you are taking into consideration and what steps you're taking to obtain that information in order to come to a fair determination of fair market value?

A. Do I break down what I just broke down for you?

Q. Do you tell the Applicant what information you're looking for, what you found, and how you've come to your decision in determining fair market value?

A. Do I tell them the kind of information I would like to see from them? Yes, but the other steps?

Q. All the other steps you don't advise them of?
They are certainly aware that FTEAC provides a recommendation, but any other information I do not advise them on.

Q. The steps that you take in order to obtain this information and the information you receive from those other sources, do you tell the Applicant I'm taking these steps, and I'm going to do A, B, and C, and once you have done it, and you've got all your information, I have received this information, and I'm coming to a fair determination of market value. Do you tell the Applicant that you're doing those things?

A. Those additional steps?

Q. You don't. So that's all behind closed doors so far as the Applicant is concerned. That's correct?

A. From their perspective?

Q. Yes. And, in fact, the manner in which you finally arrive at your decision, no reasons are ever given; correct?

A. The determination is made, and no reasons are given beyond the fact that we have determined
that the offer, because in this case I'm assuming
that it would be a determination that the offer is a
fair market value offer and that the offer is a
valid fair market value offer, and therefore the
boom was declared not surplus.
Q. So, you tell the Applicant the result, not
the process?
A. That is exactly correct.
Q. Or the evidence you have looked at?
A. That is correct, um-hmm.
Q. Could you turn to your Affidavit at
Paragraph 85, please.
A. Um-hmm.
Q. Paragraph 85 states that Notice 102
requires that applications to advertise logs located
in remote areas be advertised in volumes of not less
than 2,800 cubic meters per application. "Remote
area' is defined in the industry as areas from which
logs must be barged rather than towed."
My first question is: Where is that phrase
defined?
A. Actually before I answer your question,
11:26:05  1 would you mind terribly if I made a correction? And
2   I do apologize.
3       Q. Make the correction to me.
4       A. I do apologize, I really did not want to
5   mislead anyone, but I would remark that there is an
6   error here in the first sentence. It should read
7   and it's really striking the last two words, so the
8   sentence should read: Notice 102 requires that
9   applications to advertise logs located in remote
10   areas be advertised in volumes of not less than
11   2,800 meters cubed, period.
12       Q. So, to answer my question.
13       A. To answer your question, remote area--
14       Q. Where is that phrase defined?
15       A. That phrase is not defined. It's referred
16   to in Notice 102.
17       Q. It's simply referred to in Notice 102?
18       A. That's correct.
19       Q. It's not defined anywhere?
20       A. No, it is not defined. It is not publicly
21   defined.
22       Q. Is it privately defined?
Within the scope of the Committee, it is defined and attached to minutes that you referred to yourself yesterday.

Q. So are you saying that the minutes we referred to yesterday in the 1986 definition is the governing definition of "remote"?

A. That is correct. That is attached to FTEAC/TEAC minutes, yes.

Q. And that is a different definition than you've given here?

A. What I said was that remote area is defined in the industry, and this is the general understanding within the industry as areas from which logs must be barged rather than towed. And that is the general understanding in industry as I understand.

Q. As you understand.

A. That is correct.

Q. Have you ever received a confirmation from an industry association or group to say we understand that remote area is defined as barging rather than towing?
A. Let me explain. When I first came on board and I had that discussion with Don Ruhl, one of the questions I did ask him, and I went through Notice 102, and we had this discussion, was can you please define remote areas for me. Do we have a map? And he told me at that time that there was no such map and that generally it is known as barge rather than tow. However, that there were more specific details in terms of the length and distance, length of time it takes and the distance traveled. That answer was satisfactory at that point in time because I knew where to go to get the information if I was ever asked a question on this matter. However, since I came on board in 2005, I do not recall having been approached by any company with a question regarding remote status.

Q. But to answer my question, you have never actually received a submission from any industry association--

A. I just said that, that I never received a question, I've never received a comment--

Q. Perhaps you will let me finish my question
11:28:49 A. Um-hmm.

Q. You've never received a submission from the forest industry as a whole saying that they understand remote areas to be defined by the bargeing rather than towing?

A. That is correct.

Q. And we saw yesterday that Mr. Cook apparently a year ago did not know what factors were taken into account when he wrote Mr. Walders? You were here for that evidence?

A. Yes, I was.

Q. And you heard his definition of remote?

A. That is correct.

Q. And do you agree with his definition now, or do you support your own definition?

A. This is not my definition.

Q. What is your definition?

A. My definition is the definition that is found in that policy note of 1986.

Q. Right.

A. As I mentioned to you, this is something
that we have never had to apply, so this is a notional element of the system because we have never been asked. There have never been any complaints with regard to remote area status.

I would say that if someone were to ask me, and if Merrill & Ring in particular would like to have a determination, what they ought to do is come to me. I would take this to the FTEAC Committee as has been done in the past, and this is noted in previous minutes where questions about remoteness arise. I would seek their recommendation. I would discuss this as well with BCMoF to ensure that any position we took is consistent with positions they have taken in the past, and we would make a determination on this matter.

Q. And there is no manual actually that sets out all those steps that a person like, for example, Mr. Kurucz, should follow. He approached Mr. Walders back in 1999 is the evidence?

A. That's correct.

Q. And Mr. Walders seems to be the go-to guy on remote both from his standpoint--
A. Mr. Walders is an employee of BCMoF.

Q. Exactly.

A. And as was brought into evidence the other day under Notice 102, questions regarding the Federal system really ought to be raised with the Federal Government.

Q. Even though the two systems are harmonized?

A. That is quite correct. We have jurisdiction.

Q. Right.

A. As you painfully pointed out to me.

Q. So, in your determination as to fair value, when you are doing your own investigation, how do you come to your own assessment and decision on the plus or minus 5 percent?

A. I think that if you will allow me, I would like to explain the process a little bit and how we get to the 5 percent.

Q. If that helps you in answering the question, then by all means.

A. And certainly I will get to the 5 percent issue.
Essentially when the Committee looks at the offer, they take into account all the information provided. They compare this boom, two booms they have seen on the domestic market, and they make a recommendation. So they look at the species, they look at the sort, they look at the length, they look at the width, they look at the volume. They look at the diameter.

Q. You're actually going a little beyond my question actually. I was looking at your examination.

A. My determination.

So, ultimately what happens is is that a range is assigned.

Q. A range is assigned. So if it's a hundred dollars, if they determine that fair market value for a certain kind of log of a certain quality is a hundred dollars, it would be 105 or 95 would be acceptable? Is that the way it works?

A. The range, let's say as an example, would be 100 to $110. And so, when we look at offers that are received, we see offers that are 100, 101, 105,
11:32:26 1 110, sometimes 115, and on the rare occasion--and
2 this happens a handful of times a year--we might see
3 an offer that's at $99.
4 And you have to understand that it is very
difficult, and I think others will speak to this, to
5 assign an exact value to a boom of logs.
6 Q. Right. I've got that one.
7 A. Yes.
8 So, when it comes to looking what is on the
9 margins of the range, the 5 percent rule is not an
10 absolute rule. Sometimes we're looking at $99 for
11 an offer, sometimes $98. The boom is looked at a
12 little more carefully. Sometime at 97, people will
13 say, well, you know, that's low.
14 Q. That's a little low.
15 A. That's low.
16 And you will see in the FTEAC minutes that
17 when we got to that margin that it is referred to as
18 a low but fair. And again--
19 Q. Low but fair?
20 A. Low but fair.
21 Q. So in that example the 97-dollar on the
range of 100 to 110 would be low but fair?

A. That is correct.

Q. And that would be fair offer and export would not be granted?

A. That is correct.

Q. That's quite a margin for somebody running a logging company. It's a pretty big margin, wouldn't you say, that 13-percent margin in there?

A. It's not a 13 percent.

Q. From 97 to 110?

A. From 100 to 97.

Q. Okay. So, you will even go below the lowest part of the range?

A. This is the range, is a hundred to, let's say, 110, and there are times when an offer that is $99, it's very close, will be accepted.

Q. Is it always a range that you come to, or is it one, usually one-- Typically it's a range?

A. That is correct.

Q. Not a fixed figure. Just over to Notice 102, just to confirm with you, Notice 102 is not--
A. Could I respond to one other element with regards to the 5 percent rule, if you please?
Q. Is it a guideline or a rule?
A. A guideline. I apologize. It's 5 percent element.
Q. It's a guideline. Go ahead.
A. I cannot find the exhibit. Perhaps I can get a little assistance. The exhibit that sets out all of the offers that have been made and considered by FTEAC.
Q. Actually it's not something that's necessary for an answer to my question.
A. But maybe we won't refer to the document, but in reality the 5 percent aspect of this has not had a direct impact on Merrill & Ring, and in my Affidavit there is an exhibit which sets out all of the offers that Merrill & Ring has received.
Q. This is entirely unresponsive?
A. And whether the adjudication is fair market value, low, or below fair market value. And if you look to that exhibit, you will see that in the period of interest here from December 2003 to the
present, there has not been one assessment of low
but fair.

MR. NASH: Mr. President, I really hesitate
to intervene, but I have been trying to be patient
with the witness's answers which have been largely
unresponsive to my questions. It's taking time.
It's taking the Investor's time, and this has
nothing to do with my question.

MS. TABET: I believe she was answering
your question with respect to Merrill & Ring.

PRESIDENT ORREGO VICUÑA: Well, the
question is very simple. You got your reply, and
there is a reference to some other document. If it
is pointed to us that that would be more than enough
for this purpose, so you may continue with the
questions.

BY MR. NASH:

Q. I think you've explained the document
already; that's correct, Ms. Korecky?

A. Yes.

And the document is Exhibit 85.

Q. Thank you.
Notice 102 is not legislation; that's correct?

A. That is correct.

Q. It's a policy?

A. That is correct.

Q. And it's a policy that applies only to logs from British Columbia?

A. That is correct.

Q. It's a statement respecting the policy and administrative practices concerning British Columbia logs; that's correct?

A. That is correct.

Q. Not Alberta logs, Ontario or Quebec or New Brunswick logs?

A. That is correct.

Q. Has there been any change to Notice 102 since its inception in April of 1998?

A. The actual text of Notice 102?

Q. The text?

A. No, there have been no changes since then.

Q. But the practice has changed from time to time?
A. Yes, certainly.

Q. And the decisions made under it will change will those practices as well?

A. That's correct.

Q. You have been here for the evidence of Mr. Schaaf, Mr. Stutesman, Mr. Kurucz, and Mr. Ringma.

Do you conclude from their testimony, from your perspective, that the blocking they described is actually going on, and the blockmail that they describe is actually being paid?

A. Is being, beg your pardon?

Q. Is being paid.

A. I don't understand that last.

Q. That the blocking is going on and that the ransom has been paid in response to the blockmail, if I can use those vivid terms, which they've used?

A. Certainly, yes, they've all used that.

Q. Okay.

A. From our perspective, offers are placed on the Federal Bi-Weekly List, and this is certainly allowed, and it is set out and is expected part of
Are there instances where there is perhaps unfair targeting? Yes. And when we've become aware of that, we act.

With regards to the rest, I don't have the factual background. I was not involved in the discussions, in the negotiations involved, so I can't really speak to that.

Q. Have you heard the stories before today or yesterday or the day before?
A. I've heard those stories, and I've certainly heard other stories from the mills as well.

Q. Right. And having heard those stories, do you have any sympathy for Merrill & Ring in this process?
A. I'm sympathetic to everyone's concerns and everyone's needs. I have certain things that I--certain elements that I can address and certain elements that I cannot address.

Q. Now, the test that is applied in determining fair domestic value is the Surplus
Requirement Test; is that correct?

A. That is correct.

Q. And it's intended to test whether or not there is a surplus of logs in British Columbia or a shortage of logs in British Columbia?

A. It is there to determine that there is adequate supply and distribution.

Q. Which is--

A. As per--

Q. A same way of saying is there a surplus or a shortage. It's a surplus requirement test; correct?

A. It is a surplus. Adequate supply and distribution is the way that we term it. We don't look at surplus or not surplus.

Q. Something the opposite of a surplus is a shortage; right?

A. We are talking about supply and distribution, and so while there may be within the Province of B.C. logs of a certain type, and they may find themselves in the Interior, that is not a very helpful to a mill that is located on the Coast
Q. With respect, that's an argument. You're looking at surplus, and surplus you're testing whether there is a surplus by determining a fair domestic value; isn't that what you're doing?

A. Essentially, we look at the fair market value.

Q. And another way of looking at fair market value is whether there is a shortage. There is a surplus. The opposite is a shortage; right?

A. I don't look at it in that way.

Q. And a shortage would be the opposite of excess supply, and you would think it would have a determination on price; right?

A. I don't look at it in those terms.

Q. Well, what do you look at in terms of when you're doing your own independent investigation?

What do you look at in terms of how the relationship between surplus and fair domestic value?

A. What I look at is whether there is an expression of need, and that is concretized by an offer, so that's the first thing: Is there an offer
11:40:36 1 on the table?

2 I look to see the pattern of offers on that company, I look to see their pattern of offering on other companies, and I look to assess whether there is a need for those logs.

6 Q. So, you apply this surplus requirement test?

7 A. There is a need.

9 Q. And in determining the need, you described--you apply the surplus requirement test; that's correct?

12 A. Okay.

Q. How does the determination of whether an offer is fair or not relate to whether or not there is a surplus?

16 A. We look at this on a mill-by-mill basis, for the most part, and there are instances where certainly during the market review we are aware of market conditions.

20 Q. I'm speaking about when you're actually making your own determination on those cases.

22 A. And I look at what the market review
Q. But how do you make the connection between surplus and price in applying that test?
A. Those are two different considerations.
Q. Okay. Explain that for me.
A. Okay. As you're well aware by now, we look to whether there is a valid fair market value offer. The validity relates to the 90-day rule. The validity relates to the completeness of the offer. We look at the fair market value assessment.

And then if the issue arises as to whether or not the mill has demonstrated a need for those logs or a desire for those logs, we look into that as well, if there is some question as to whether this is an untoward offer.

For the most part, we take for granted that a mill that places—that goes to the trouble of going and viewing the booms and placing an offer on the booms has a need and a desire to make an offer, a legitimate offer, on those booms.

Q. So, you accept at face value that an offer that comes in is a legitimate offer?
11:42:32 1 A. That is correct.
2 Q. Okay.
3 A. The process, Notice 102 intends for
4 companies to be able to make offers.
5 Q. Right.
6 A. For the most part, companies will go and
7 see the logs.
8 Q. Right. FTEAC doesn't go and see the logs
9 in determining price?
10 A. No, they do not.
11 Q. There is a Memorandum of Understanding
12 which you referred to in your direct evidence
13 between the Minister of Forests and the department;
14 that's correct?
15 A. Um-hmm, that is correct.
16 Q. And that provides for cooperation?
17 A. Yes.
18 Q. And an exchange of information?
19 A. Yes.
Q. And part of the cooperation includes the sharing of information about surpluses and shortages in logs, of logs in B.C.; that's correct?

A. This is Exhibit--and I apologize. I would just like to see what I'm responding to. You're referring to which section?

Q. I'm just referring to your understanding of the document.

Isn't part of the sharing in the cooperation between the two levels of Government include information about surpluses--

A. That could be one element.

Q. Just let me finish, please.

Isn't the discussion between the two levels of Government the sharing of information and cooperation? One of those elements is sharing of information about surpluses and shortages; correct?

A. I see that the document refers to an exchange of relevant information. Are there discussions at times about state of the market?

Yes.

Q. Right.
And those would be--include discussions around whether there is a surplus or shortages?

A. Some instances.

Q. In British Columbia; that's correct?

A. Yes.

Q. Okay. You referred, actually if I could refer you to Claimant's Reply Schedule of Documents Document Number 80, please, which is the Investor's request for documents from Canada. If you go to Request Numbers 58 and 59, 58 is documents--and this is a Request for Documents evidencing the policies or motive for not extending standing timber exemptions to timber on Federal timber mark lands in British Columbia. And the next request was for documents evidencing the policies or reasons for extending or not extending standing timber exemptions for timber on the South Coast of British Columbia.

And you responded by a certificate sworn on August 27 of last year, a copy of which I will show to you, certifying that there were no documents after your comprehensive, extensive, and thorough
search for them.

A. No documents in addition to the documents that have been previously provided.

Q. No documents in response to this?

A. That had not been previously provided in my first Affidavit, yes.

Q. Well, your certificate says, by signing this document, you are confirming that you have completed a comprehensive, extensive, and thorough search for records of all media types related to this action and no relevant records were found, and you swore that.

A. Yes.

Q. Correct?

A. I did swear this.

Q. That's true?

A. That is true.

Q. And what you swore is true?

A. What I swore is true. My understanding of the document is that we were to provide any information that had not been provided with the first Affidavit.
Q. Even though this certificate does not say that; is that fair?

A. (Witness nods head).

MS. TABET: I believe the Tribunal Order did, and I think we can stop with that line of questions.

BY MR. NASH:

Q. If you turn to document request number 11 on Page 3, the request was made by the Investor for documents evidencing any shortage of logs anywhere in Canada related to, A, the needs of national defense; or, B, log supplies for domestic sawmills. And you swore a certificate on the 27th of August '08, a copy of which I will show you, certifying that there were no documents.

A. Yes, I recall signing that.

Q. And that were true?

A. That was true.

Q. Thank you very much. Those are my questions.

PRESIDENT ORREGO VICUÑA: Thank you, Mr. Nash.
Any questions on redirect?

MS. TABET: Yes, I do.

REDIRECT EXAMINATION

BY MS. TABET:

Q. Ms. Korecky, Mr. Nash took you through a few, I think three or four of the minutes of the meetings of FTEAC at various dates between 1998 and 2006.

Can you tell us how many meetings there are a year of FTEAC.

A. Typically, there are 12 meetings a year.

Q. And so, in eight years, it would be about--my math is terrible, but more than a hundred meetings?

A. That is correct.

Q. Okay.

And, to your knowledge, does it happen frequently that people have to leave the room because of conflicts of interests?

A. It happens, certainly, on occasion, yes, on an ongoing basis.

Q. Now, can you remind me of the date of
Mr. McCutcheon's termination from Interfor?

A. I believe it was towards the end of December 2005.

Q. And when were the meetings that Mr. Nash discussed with you that he was referring to Mr. McCutcheon being in the room?

A. Those were in--I believe it was March, April 2006.

Q. You referred to field trips that you did. Can you explain what those field trips are.

A. Essentially once, twice a year, a field trip is organized to provide the Committee with an opportunity to go out into the industry and to look at different kinds of operations. Sometimes these field trips take place in the Interior, sometimes they take place on the Coast. At that point in time they may meet with different industry players and have an opportunity to discuss matters with them and to hear their views.

Q. And you have been on those field trips?

A. I have been on one field trip in the Interior, yes, but my delegates have been on various
11:50:03 1 other trips.

2 Q. Ms. Korecky, are you aware of the term

3 "ministerial discretion"?

4 A. Yes, I am.

5 Q. And is that what's granted under the Export

6 and Import Permit Act?

7 A. That's correct.

8 Q. Do you know if the ministerial discretion

9 under the Export Permit Act on Notice 102, whether

10 it's been challenged before Canadian courts?

11 A. Ministerial discretion with regards to

12 Notice 102 broadly?

13 Q. Yes.

14 A. Notice 102 more broadly was challenged in

15 the Federal Court of Canada under a constitutional

16 challenge of Notice 102. Well, there are two

17 elements to it. One element was a constitutional

18 challenge as to whether the Federal Government had

19 the constitutional authority to create policy Notice

20 102, and whether or not the legislation provided for

21 policy Notice 102. And both the Federal Court and

22 the Federal Court of Appeal found that, yes, the
Federal Government did have that authority.

Q. And has the way in which Notice 102 been applied by the Minister been challenged?

A. Certainly. There have been many challenges. We have been in constant litigation since 2000. I have personally been involved in five different cases on this to date.

Q. Thank you, Ms. Korecky.

Just give me a moment.

(Pause.)

Q. If I can just--I think I finished my question to Ms. Korecky, but I would just like to address the procedural issue that Mr. Nash raised with respect to the document request. And can I just ask my colleague, Ms. Di Pierdomenico, to address that.

BY MS. DI PIERDOMENICO:

Q. Hi. Okay.

So, the question that was asked Ms. Korecky by Mr. Nash was whether or not you had found documents relating to document requests 58 and 59, I believe.
Q. Now, when you did your document request, was there a specific date or timeline that you were given in terms of how far back you should look for documents?
A. Certainly. There was a timeline. I cannot remember the specific timeline, but we certainly did adhere to it. I would assume that it really related to the coming into force around the date of the coming into force of Notice 102.
Q. If I could just refer you to Page 2, the actual request that you were given.
A. Um-hmm.
Q. I'm sorry, she doesn't have the request.
A. Yes, I have it. It's Tab 80.
Q. So, at the top of Page 2, it reads: "Unless otherwise stated, documents should be produced for the period from December 1st, 2003, to June 4th, 2008."
A. That is correct.
Q. And therefore the documents that are requested before that date were not produced?
A. That is correct.

We--when we did the document search almost a year ago or over a year ago, we adhered to the dates that were provided to us at that time.

Q. Thank you.

PRESIDENT ORREGO VICUÑA: Thank you.

Well, we have finished with this examination, Ms. Korecky. Thank you very much for your appearance.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR DAM: I do have a question or two, if you don't mind. You used the word confidential quite often. Is that a defined term?

THE WITNESS: It is a term which--and I do not know, and I apologize that I am not as familiar with the Privacy Act. However, this is a question that really goes to legal counsel.

With regards to Notice 102 and minutes under Notice 102, those are confidential to the Minister unless the Minister decides to release them as allowed by Federal law, and that would be the...
restrictions of the Privacy Act.

ARBITRATOR DAM: It's your understanding that's the result of the Privacy Act.

THE WITNESS: Yes.

ARBITRATOR DAM: And if a member of the Committee discusses with other people what happened at a meeting, is that a violation of the Privacy Act, in your view?

THE WITNESS: It's a violation of the confidentiality aspect.

ARBITRATOR DAM: Of what?

THE WITNESS: Of the confidentiality aspect of the Terms of Reference of the Committee.

ARBITRATOR DAM: It's a violation of the Terms of Reference? There was another word in there that I didn't--perhaps I misheard. Perhaps it's picked up by the Reporter. It's a violation of the confidentiality aspect.

THE WITNESS: Aspect, yes.

ARBITRATOR DAM: In other words, it's kind of a violation of a rule; it's not necessarily a
11:56:06 1    THE WITNESS: That's correct.

2    ARBITRATOR DAM: The same would then be

3    true of you if you were to discuss with outside

4    parties what happens, it would be not a

5    statutory--would not be a violation of the Privacy

6    Act. It would just be a violation of the

7    confidentiality aspect of the way business is done

8    in the department; is that right?

9    THE WITNESS: As my legal counsel has

10   informed me, we are not allowed either verbally or

11   in writing to provide business confidential

12   information.

13   ARBITRATOR DAM: Who is "we"?

14   THE WITNESS: We being Government.

15   ARBITRATOR DAM: But the members can?

16   THE WITNESS: The members, however, are

17   bound by the Terms of Reference of the FTEAC

18   Committee.

19   ARBITRATOR DAM: And by being bound by the

20   Terms of Reference, what would be the consequence if

21   they were to do so?

22   THE WITNESS: They would be censured and
they would potentially be taken off the Committee.

ARBITRATOR DAM: Well, what is--let me ask you this question. You frequently said, well,
everybody knows what the rules are and so forth and how things work, et cetera. How do they know?

THE WITNESS: This is a very interventionist industry. They call on an ongoing basis. They ask many questions as to how the rules work, and this is, I'm assuming, a separate question from your first question. So, generally with the rules and how the rules work, we receive calls, faxes, E-mails, and Requests for Information as to how we do things, and to the extent that we can share that information, we certainly do.

ARBITRATOR DAM: How do you determine what you can share and what you can't?

THE WITNESS: We can share how we operate. We cannot share the information that is business confidential or that which is deemed to be the information that becomes advice to a Minister that becomes part of the deliberation process as relates to specifics--
ARBITRATOR DAM: But you really make that determination not on the basis of any rules or regulations, but just how you decide to handle it.

THE WITNESS: It's the way we do business in Government.

ARBITRATOR DAM: Right.

What if a member of the press calls?

THE WITNESS: A member of the press calls?

ARBITRATOR DAM: Yes.

THE WITNESS: The Department of Foreign Affairs and International Trade Policy is that we direct them to the media branch, the experts, the specialists, and they will then liaise with us to determine the communications with the media.

ARBITRATOR DAM: And so, by the industry, you mean people in the logging and milling industry?

THE WITNESS: That's exactly it, yes.

ARBITRATOR DAM: All right. Thank you.

ARBITRATOR ROWLEY: Ms. Korecky, how many times has Merrill & Ring complained to you or to the Federal Government, to your knowledge, about being denied export license applications?
THE WITNESS: Your question relates specifically to applications themselves or the process in general, just to clarify?

ARBITRATOR ROWLEY: I thought I was clear.

Applications, they have applied for an Export Permit. They have not been granted one. How many times have they complained to the Federal Government?

THE WITNESS: With regards to a surplus status, because that's the precondition to getting the permit, they would not be denied a permit. They would be denied surplus status. I'm sorry to correct you, but it leads to the same place.

No?

ARBITRATOR ROWLEY: You know, surplus status is a step to getting there. What they are seeking is an Export Permit. Am I correct?

THE WITNESS: Certainly, but the way that the process works, Mr. Rowley, is that they cannot apply for a permit unless they have surplus status, so they are not denied a permit, they're denied surplus status.
12:00:06 1 ARBITRATOR ROWLEY: Okay. Thank you.
2 Then so I'm clear, how many times has
3 Merrill & Ring complained, to your knowledge, to the
4 Federal Government about being denied surplus
5 status?
6 THE WITNESS: Since the beginning of Notice
7 102, I can't speak to all of those examples. There
8 are examples--
9 ARBITRATOR ROWLEY: I'm asking about your
10 knowledge.
11 THE WITNESS: My knowledge.
12 Since 2005, they have written a number of
13 letters to us about the process, and they have
14 provided input into the process and complaints about
15 the process. With regards to a specific
16 determination that has been made, so an ex post
17 facto complaint; I'm not aware of many.
18 ARBITRATOR ROWLEY: Well, I am interested
19 in specific denials, so leave aside complaints about
20 the process that are generic, and so is it right--is
21 it your evidence that as regards being denied
22 surplus status with respect to a particular
application, there are only a few complaints that
you're aware of?

THE WITNESS: That is correct.

ARBITRATOR ROWLEY: People have different
ideas of what constitutes a few. Can you help
me--less than five or more than five?

THE WITNESS: I would probably say less
than five.

ARBITRATOR ROWLEY: Would you say less
than, when you say more--less than five, you
believe.

THE WITNESS: I would say less than five.

ARBITRATOR ROWLEY: And those complaints
would have come to your attention originally? I'm
not suggesting you will remember them now, but they
would have come to your attention.

THE WITNESS: Those complaints would have
come to my attention.

ARBITRATOR ROWLEY: And have those
complaints been produced in this litigation, and are
they part of the record?

THE WITNESS: I'm trying to think--I know
that Mr. Stutesman has contacted me about certain
issues. In some instances they have been telephone
calls. I do not recall that there is anything in
writing, and I apologize if I lead you in error on
this, that there is any evidence on the record of
something in writing that they have provided to us
ex post facto a decision having been made.

ARBITRATOR ROWLEY: So I'm going to assume
that your evidence is that you believe there has not
been a complaint in writing, a specific complaint in
writing about a specific rejection, and that
complaints that you have received have been oral,
either in person or by telephone.

THE WITNESS: After a decision is made?

ARBITRATOR ROWLEY: Correct.

THE WITNESS: That is correct.

ARBITRATOR ROWLEY: And perhaps I'm missing
something. Are there complaints that are specific
before a decision is made?

THE WITNESS: Certainly. Merrill & Ring
provides input into the process with regards to
specific offers, and you will have seen the letters
they have provided. As well, they provide general
comments, critiques about the system, request for
changes.

ARBITRATOR ROWLEY: I'm not interested in
the critiques about the system or the general.

THE WITNESS: My apologies.

ARBITRATOR ROWLEY: I'm interested now in
understanding what Merrill & Ring has been saying to
the Federal Government about particular
applications, and so they, as I now understand what
you're saying, they make specific input with respect
to specific applications both before and after a
determination has been made as to surplus status.

THE WITNESS: They tend to provide input
into the process before the decision is made. And
when I look to my Affidavit, I see that with regards
to an appeal of the ministerial decision that there
is no record of Merrill & Ring coming after the fact
in complaining about a specific application.

ARBITRATOR ROWLEY: So, if there is no
complaint after a surplus or a nonsurplus decision
has been made, then is the--I don't quite understand
where the input fits in. Is it into the TEAC and
FTEAC process itself?

THE WITNESS: On occasion, and sometimes
directly to myself.

ARBITRATOR ROWLEY: So, this is input,
then, to assist TEAC, FTEAC, or yourself as the
Minister's delegate in making a decision, is it?

THE WITNESS: That is correct.

ARBITRATOR ROWLEY: And in doing so, does,
to your recollection, Merrill & Ring traditionally
support their input with evidence as to the market
value of the timber in the application at issue?

THE WITNESS: To my recollection, Merrill &
Ring will typically provide anecdotal evidence. I
do not recall off the top of my head a specific
instance where they have provided an invoice. There
are companies that have done so. Possibly Merrill &
Ring has done so, but I do not recall a specific
example right now. But again, that happens on a
rare basis. It typically is anecdotal evidence, "we
believe that a boom should be valued at a certain
level," and I do have evidence to that effect as an
12:06:27 1 exhibit to my Affidavit.

2 ARBITRATOR ROWLEY: I'm not talking about a
3 letter which says logs of X sort ought to be worth
4 $95. I'm talking about evidence in support which
5 says here are three contracts or here are three
6 transactions that were entered into in the last
7 period which reflect a certain price. That's the
8 sort of evidence I'm talking about.

9 THE WITNESS: Certainly. And I have been
10 provided that kind of evidence on a handful of
11 occasions with regards to the industry at large. I
12 do not recall whether Merrill & Ring was one of
13 those companies that did so.

14 ARBITRATOR ROWLEY: And when you have been
15 provided with that sort of evidence, has it affected
16 the outcome positively for the person providing that
17 sort of evidence?

18 THE WITNESS: On occasion, that evidence
19 has--has made the difference.

20 ARBITRATOR ROWLEY: Now, I think you
21 probably will have answered this question when you
22 told me that Merrill & Ring has not complained, to
your knowledge, about ministerial decisions, but let me put it in any event. You talked about being subject to a good deal of litigation concerning Notice 102.

THE WITNESS: Yes.

ARBITRATOR ROWLEY: Has Merrill & Ring initiated any judicial review proceedings or other proceedings in connection with ministerial decisions concerning its export log applications?

THE WITNESS: No, they have not.

ARBITRATOR ROWLEY: Thank you.

PRESIDENT ORREGO VICUÑA: I thank you, Ms. Korecky.

Just one follow-up question. It has come up several times how do you actually determine whether an offer is fair and that it reflects the fair market price. Well, yesterday, I was left with the impression that that same determination then at the level of Mr. Cook, which is the, say, the first round of information is a rather difficult thing to do. It's based a bit on industry information, a bit on the market, which is not quite transparent or not
12:09:45 1 quite evident in any event.
2 So, information is gathered from different
3 sources, and finally it comes to a conclusion on
4 whether that is fair or not and can be compared to
5 something else fairly.
6 Now, my question to you, Ms. Korecky,
7 relates to the fact that, as you're sitting away,
8 are you entirely satisfied that what has been done
9 before you have to have your say reflects actually
10 that, or you have to convince yourself as the
11 Federal representative that that is, in fact, so,
12 and that the information is a good one and so on and
13 so forth? Now, of course, later you can have
14 submissions by the industry saying this is fair or
15 not fair, but at the first level of decision when
16 you have to determine let's approve the offer
17 because it's fair enough, do you or are you able to
18 conduct an independent assessment of that market
19 value at a distance? How do you work it out?
20 THE WITNESS: I look to the information
21 that we have with regards to previous offers, other
22 offers that are on the list. Certainly one can
ballpark certain types of booms of logs, but this is a very precise science, and that is why we have our industry Advisory Committee. There is one general publication which is called the Forest Industry Trader, and not that one could be a hundred percent guided by that, but if you look to that document, they also provide ranges. Each boom is unique, and each boom is individual. It is something like appraising a diamond, with a different cut, different quality, what have you, and that becomes something that really the experts have the most intimate knowledge on.

And a boom, there will be a range for that boom. That is again not to say that's the best value that can be received for that boom, but I feel confident that the ranges that we receive accurately reflect the ranges that are in industry. The reality is that as I mentioned before, most of the trading that takes place in Vancouver is on the pure domestic market, and that is the information that comes to us. It is those transactions that lead, that essentially are the ones that are considered by
And I have to say one more thing, if I can, that I actually had a discussion with Paul Stutesman about the issue of what other sources could we be guided by, and I said to him I would welcome an independent, objective kind of reporting on this issue. Can you point me to one? And Mr. Stutesman told me that he could not.

PRESIDENT ORREGO VICUÑA: Thank you, Ms. Korecky, for your statement.

ARBITRATOR ROWLEY: You were recorded in the testimony by saying that this is a very precise science, and I would have thought you meant an imprecise science in the answer you gave, and I just don't want there to be a misunderstanding later, so I don't want you to say one or the other. I just want to you say whatever it is you intended.

THE WITNESS: It is an imprecise science, and that is why a range is generally attributed to a boom.

PRESIDENT ORREGO VICUÑA: Mr. Nash, please.
BY MR. NASH:

Q. Just one question arising from the questions of the panel and the answer given.

A. You mentioned that booms are like diamonds?

Q. And do people buy them by description?

A. Yes.

Q. Okay. Thank you.

PRESIDENT ORREGO VICUÑA: Right, thank you, Ms. Korecky, for your participation. You are now excused.

(Witness steps down.)

PRESIDENT ORREGO VICUÑA: And we are ready to proceed for whatever time we have.

Now, let me give you the time. We have spent until now. The Investor has used seven hours and 45 minutes. The Respondent has used two hours 42 minutes. So, that's where we stand, and I do mention this so that everyone will be able make its own estimates.

Well, then we have now the statement by Mr. Bustard. Is Mr. Bustard here?
MS. TABET: We will go get Mr. Bustard.

PRESIDENT ORREGO VICUÑA: Okay.

SECRETARY OBADIA: Is it going to be open or closed?

MS. TABET: Open.

SECRETARY OBADIA: Open, okay.

(Pause.)

BRIAN BUSTARD, RESPONDENT'S WITNESS, CALLED

PRESIDENT ORREGO VICUÑA: Good morning, Mr. Bustard.

THE WITNESS: Good morning.

PRESIDENT ORREGO VICUÑA: Would you please care to read the Witness Statement that you have before you. It should be on the table.

THE WITNESS: I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.

PRESIDENT ORREGO VICUÑA: Thank you, Mr. Bustard.

Professor Dumberry, will you make the direct, please.

MR. DUMBERRY: Thank you, Professor.
Q. Good morning, Mr. Bustard.
A. Good morning.
Q. What is your current occupation?
A. I'm a forest consultant.
Q. You work for which company?
A. Vanlog Forestry Services Limited.
Q. Okay. And can you tell us what this company does exactly.
A. Yes. Vanlog is been in existence for about a year-and-a-half, and during that period I have been involved in advising clients on such matters as log prices on a bank of a log market, quality control issues on the bank of a log market, and regulations, some of the clients I have worked with are interested in export regulations. I have been advising them on that. Two projects I had were concerning marine accidents. One was a large barge which I did some work on that on behalf of the underwriters. Another one was on a booming booming ground.
Q. Thank you.

So, you have been working for the last year-and-a-half for that company?

A. That's correct.

Q. Thank you. Could you briefly describe to us your previous work experience in the log industry in B.C.

A. Yes. My first approximately 15 years was as a forest engineer working on Coast of British Columbia. I worked for a large integrated forest company, and we had--the company had extended holdings right from the tip of Alaska right down to the Washington border.

The next 20 years I worked for--as a large company that had of which I was a log seller for, and then I moved by career for about half of that 20 years as a log buyer. And I bought for sawmills, plywood mills, and pulp and paper mills primarily located in Vancouver.

Q. So, just to recap here, of these last 35 years of work experience, you have been involved working for both buyers and sellers on the log
market?

A. That's correct.

Q. Okay. Are you aware of the Log Export Regime and more in particular Notice 102?

A. Yes, I am.

Q. Do you have any personal knowledge of the procedure for the advertisement of logs on the Bi-Weekly List under Notice 102?

A. Yes, I do.

Q. In which capacity and how?

A. In Notice 102 was--1998 was first enacted, and during that period I was a log seller for TimberWest, which is a large owner of private lands and some public tenure in Coast of British Columbia. And in 1999 I went to a company Primex Forest Products, which bought exclusively on the bank over log market. It had no logging of its own. Subsequently that company was taken over by a company, International Forest Products, commonly known as Interfor. In that capacity I was the General Manager of log supply and buying for up to five mills.
Q. Could you slow down?
A. Certainly.
Q. Thank you so much.

So, is it fair to say that since 1998, you have advertised logs on the Bi-Weekly List, and you have also made offers on logs on this list?
A. That's correct. From 1998 for the first next two years.
Q. Okay.

Okay. So, when--I'm trying to understand the perspective of the buyer now.

So, when a buyer is interested in buying logs on the market, on the B.C. market, where would that buyer first have a look at? Would it be the Bi-Weekly List?
A. No. That's the--the log buyer--many of the mills in coastal British Columbia are large consumers of logs. The amount of logs that are available on the Bi-Weekly Export List is relatively small compared to the amount that they buy. So, a buyer would be looking--he may have 20, 25 different suppliers that he's buying from, and he will be
dealing with those people—in addition, he will also
look on the Surplus Test.

Q. So, in other words, the Surplus Test—the
list is one amongst many options available for the
buyer?

A. That's correct. It is one of many of his
options. In fact, it's an option that he doesn't
frequently go to because under the Surplus Test
there is a considerable amount of time until the
logs are actually available to purchase.

Q. Thank you.

Could you briefly describe for us what is
the procedure for the advertisement of logs under
Notice 102.

A. Certainly.

When a log seller, for instance a logger,
decides that he would like to put the logs up for
export and test the surplus to see if there is a
surplus on a domestic market, he takes that boom of
logs with its different characteristics that, for
instance, length and diameter, et cetera, and he
sends that list to the Federal Government. The
Federal Government then takes—advertises that list, that boom of logs, sorry, on the Bi-Weekly List, and from that the buyer of the sawmill, for instance, the log buyer, will have access to those logs. The list indicates where the logs are located, and so he will make the decision whether he was—is interested in buying those logs.

And at that time he will—there is two options he can do. He can go up and inspect the logs and make an offer, or the other option is he can contact the person, the seller, that has those logs advertised.

Q. Okay. So, from the perspective of the buyer at this stage, which is before an offer is made on the logs, there are basically two options which are available?

A. That's correct.

Q. Can we talk for a second about the second option you mentioned. Could you explain a bit further what is that second option.

A. The second option is where the buyer will contact the advertiser of those logs and indicate to
12:24:45 1 him that he is interested in buying the logs that he
2 has advertised on that list.
3 Q. So, I would like to understand. So,
4 basically, that would be a phone call, a letter, or
5 how does that work?
6 A. It's usually a phone call. Most
7 transactions and most discussions on the Vancouver
8 Log Market are done over the telephone.
9 Q. And then what happened next? What happened
10 during that phone call usually?
11 A. By the buyer indicating that he's
12 interested in that, purchasing those logs, it's an
13 indication to the seller that these logs may not be
14 surplus, and that it gives the seller the
15 opportunity to say I would very much like to export
16 these logs, can I work with you, would you be
17 interested in, if I offered you a similar boom of
18 similar volume and quality to make up for this boom
19 that I would like to export? It's a simple
20 negotiations. That's the type of business that's
21 done regularly in the purchasing of logs on the
22 Surplus Test. It's just normal business.
Q. So, let it be clear on that. For you these negotiations which are before an offer is made on the list are simple business negotiation between companies?

A. That's right.

I indicated I have done it for 20 years and they're just--to me and to others it's a normal way of doing business.

Q. Allegations are made by the Investor in these arbitral proceedings that there are threats that are made by some companies, potential buyers, and there is also allegation of intimidation. Do you have any personal knowledge as a buyer, because you have acted as a buyer in the past, of any such threats or intimidations?

A. During my period as a buyer and when I also directed people, I'm not aware of any intimidation or allegations of such as you mentioned or threats.

Q. Okay. I would like to go back to the first option you mentioned. Now we just covered the second option. I would like to go back to the first option you mentioned earlier.
Could you describe for us again this first option.

A. The first option is the buyer has been alerted that these logs are available under the Surplus Test, that the seller is interested in determining if they're surplus, so the buyer will get in an airplane or water taxi because British Columbia--the Coast of British Columbia is very remote in a lot of locations, and it's not like getting in your car and driving to the location, so they have to hire a water taxi or an airplane at considerable expense. It could be a 500 to a thousand or double that in some cases if you're located in very remote areas.

So by doing this, the buyer is indicating he's very serious interested in buying these booms because he's making an investment in time and money to go and look at those logs. So, he will go and look at those logs. And if he looks at them and he says, yes, those are the types of logs that I'm interested, my mill is interested in buying that type of log, I'm going to make an offer on those
So, he will go back, and then he—the next step is that he will submit an offer to the Federal Government indicating on a written offer which he signs and he's put a lot of thought into this. These are very experienced people that do this, and he puts a price on it, and he will indicate that this is what he is willing to pay for that boom.

Q. So, in your own experience, it is the general practice that companies that are really interested in booms would actually visit and inspect these booms to ensure the quality of these booms?

A. If they are going to do on that option, there have the two options. If they do choose to go to that option, that's correct.

Q. Okay. Now let's move on to a second phase. So, the first phase we covered is when an—that's before an offer is made on logs that are advertised on the list.

Now, let's move to the second phase which is basically when an offer is actually made by a company on these logs. I would like to know what
12:29:06 1 happened then.

2 A. Once you submit the indication with the
3 formal offer, then there is a window of opportunity
4 at that point because you also have to send the
5 letter to the seller of the logs, so you've got the
6 buyer is sending out a letter to the Federal
7 Government, and he's also sending the same letter
8 out to the seller of the logs, so this is a trigger
9 to the seller, and the seller will say--he may
10 choose at this point to say, look, give you a phone
11 call is say I realize you're serious on this, you
12 have taken a look at those logs. At this point I
13 would like to offer you another boom, a substitution
14 boom. This is another way of normally transacting
15 business under that option.
16 Q. And this transaction would start with a
17 phone call, or would it be a letter, an E-mail?
18 A. Usually, it's a phone call. Like I
19 mentioned, most discussions are done on the phone.
20 Q. And you would describe these as
21 negotiations between companies?
22 A. That's the part of the negotiating process,
Q. Okay. I'm sure you were aware in these arbitration proceedings allegations have also been made that at this later stage there were threats and intimidation made. Do you have any personal knowledge in your 20 years of experience, do you have any personal knowledge of such threats and intimidation?

A. I have personally not been threatened or intimidated.

Q. Okay. Have you heard about these threats and intimidation?

A. Of the people that I'm working with and myself, I have not heard of that.

Q. Okay. Thank you.

So, now let's move to the final stage of the process which is once an FTEAC recommendation is made, that let's say the logs are not surplus.

So, what happened at that later phase? I'd like to know what happened at that later phase.

A. Once the FTEAC has ruled on those logs and they have determined that the offer that was
submitted by a buyer is fair and reasonable, then those booms are deemed to not be surplus to the domestic forest sawmilling business of the Coast of British Columbia.

So, at this point the buyer has a decision. He can still sell those logs. He can sell them to whoever he wants, so he can sell them to this mill over here or this supply mill or whoever he wants, or he can sell them to the buyer. He's under no obligation under the person that the buyer that made the offer on the original purchase--oh, sorry I'm going so fast.

The seller--I will go back. The buyer has--once they are deemed to be not surplus, the seller has now--will sell those--has to sell those on the domestic market because they are not no longer--they are deemed to not be surplus.

So, the seller can sell those to whoever he wants, but if he decides that he wants to sell them to the person, the buyer that put the original offer in, the buyer has to buy them. He's obligated to buy them. But the seller can sell them to whomever
he wishes, and that's a very important part of the Surplus Test.

Q. Why is that?

A. It's critical because it does away with frivolous offers by a buyer who may have no intention of buying the logs, but just wants to possibly disrupt the competitor. So by having that obligation in there, that puts some teeth in the Surplus Test, and that the buyer will not put in a frivolous offer because he can't afford to buy those logs and just sit on them. The boom of logs could be worth from anywhere from 50,000 to $200,000, and so he is not going to buy those logs and sit on those logs. He has to know that he can put those into his mill. They're not frivolous offers.

And that's—the Surplus Test is very simple, and it is very effective in my experience, in my 20 years of experience. The Surplus Test works.

Q. Can I come back to something you said earlier. You mentioned the fact that one of the options for a buyer is to actually go to the list,
and then you mentioned several other options which are available to buyers.

I understand from your Affidavit that you've worked for a number of years for a company Interfor.

A. That's correct.

Q. Can you tell us that was from which state--

A. I started with Interfor. The company I worked for, Primex Forest Products, a supplier of lumber to Japan, was purchased in March of 2001 by International Forest Products, so I worked from March of 2001 until December 31 of 2007 with Interfor. My capacity was a General Manager of log supply, so I was responsible for making sure the mills had an adequate supply of logs to meet the manufacturing requirements.

Q. And at the time you were working for Interfor, was it the general practice to go for logs that were advertised on the list or to go for different options?

A. When you were purchasing logs, you looked at all of the options. It's very important to have
many suppliers. When you have a large sawmill, you have millions of dollars invested. You don't want to invest it—you don't want to be relying on the Surplus Test. The Surplus Test comes and goes. One week there may be several booms offered, and another there may be months before other booms of the quality that you're looking for. So, you have to have many, many different suppliers, so you are—you don't want to put all your eggs in one basket. You're constantly looking for other—for new suppliers.

Q. But percentage-wise, would you say that it was a majority of time that you would not—that you would not go on the list, or just have a rough idea.

A. Well, I would say in the last two years they probably haven't looked at the list at all with the market being so poor.

When the market was strong and there was a shortage of logs, and the mills were requiring inventory, then you were frequently looking at—you were looking at the export Surplus Test every time it came out. So, it's a factor of supply and
demand, do you need the logs, and if you need the
logs, the Surplus Test is one of only--only one of
many options that you do to purchase the wood.

Q. And in your 20 years of experience, you
certainly know about offers being withdrawn.

Would that happen before the logs
are--there is an offer that is made on the logs or
after? Could you describe how this works.

A. Well, it's being withdrawn. First the
offer has to be made.

Q. Yes.

A. So an offer, that's Option 2, or sorry,
Option 1, the buyer has inspected the logs. He's
decided he wants those logs for his mills. He's put
an offer in on them.

Then that triggers, like I mentioned
initially, the seller of the logs says, hold on. I
think I want to make a deal here. This is important
to me to get this boom of logs out on the export.

So, he has gone to the buyer on the telephone or
whatever, and he said, I think we better make a deal
here. If you want that logs, I know you're
interested in that logs, I want to get my boom out
on export, maybe we can make a deal. That's
negotiations. That's what it's all about.
Q. So the reason why they want to make a deal
is because both parties have an interest in making a
deal, or is it a result of intimidation and threats?
A. No, both parties--when--a boom is rejected
on the Surplus Test. I've always said both parties
have lost, and that may seem a little confusing but
you ask why is that? Because the reason is is the
buyer--the seller hasn't been successful in getting
his logs out, so he's not very happy. The buyer,
because the seller does not have to sell to the
person who put the offer in, he's under no
obligation that he probably is going to--I'm not
very happy with this situation. I'm going to sell
to this other guy. So neither the buyer nor the
seller has been able to capitalize and make a deal,
so neither party has won. They both have lost.
So, there is an incentive for both parties
to come to an agreement, and that's what happens in
the majority of the cases.
Q. When you say that a seller that would advertise logs on the list would be unhappy because he cannot export, why would that be?

A. Well, he may have cut the logs to a certain--he may have targeted a customer that he wants to sell those logs to, so he may have incurred some costs to get those booms on the surplus list in a way that is marketable to his customer, which is an export customer. So the fact that he has to sell that on the domestic market that he is not happy with having to do that.

Q. Is it fair to say that this unhappiness is rather rare? I mean, let me rephrase that. Under your many years of experience, logs--is it true that logs that are advertised on the list are very often getting the surplus permit?

A. Most logs that are offered under the Surplus Test either go to stage--to Option 1 or Option 2, the two options where you have the negotiations start, and the negotiations are just about in most cases are successful. So, the number of booms that do not get out are in a minority.
Q. Let's talk about the minority now.

What could--when you were working for Interfor and these other companies, would that be around 90 percent? 95 percent? 70 percent?

A. I would certainly say it's the number of logs when I was working for that company that we were not successfully able to negotiate an agreement with them was certainly less than 10 percent, and it may be more like five, but I just don't know that number.

Q. Thank you.

One last question: We've talked earlier about negotiation between different companies. In your own experience, is the Government of Canada involved in these negotiations?

A. Absolutely not. They're not. They're involved in all kinds of other things. They take all our taxes and stuff, but they're not involved in any way on negotiations on export.

Q. Thank you. I have no further questions.

PRESIDENT ORREGO VICUÑA: Right, thank you, Professor Dumberry.
Will we have cross-examination? We don't have much time before the break.

MR. NASH: We will have cross-examination.

Perhaps I could cross-examine for 10 minutes and then we have lunch?

PRESIDENT ORREGO VICUÑA: Okay, that's all right.

CROSS-EXAMINATION

BY MR. NASH:

Q. So, Mr. Bustard, good afternoon.

A. Good afternoon.

Q. The last seven years of your career in the industry approximately prior to becoming an independent consultant were with Interfor?


Q. And your position was General Manager of log supply?

A. Coastal log supply.

Q. Coastal log supply.

And can you give a bit more elaboration about what your responsibilities were.
A. I was responsible for the maintaining the inventory, a sufficient inventory for the mills to match the market, the lumber cutting market that they had, and there was also Interfor is a large logger, and so the--some of the logs were not consumed internally, so they were sold on the open market, so that fell under my responsibility.

And I also had some responsibilities for part of that time for the chips, the residual products from the sawmills.

Q. So, in terms of the--you say it's a large logger. About how many cubic meters of wood would Interfor harvest in a given year?

A. It varied. The company during that period was withdrawing, getting smaller, selling off some assets. They sold off quite a few assets, and initially the allowable cut was approximately 3 million meters I believe if my memory is correct, and it was probably down by 2007, probably down maybe somewhere around the low 2 to 2.1, 2 million.

Q. And when you're talking about the allowable cut, can you explain that for the Tribunal.
A. Yeah. The allowable cut is—in British Columbia—on Coastal British Columbia, you have two types of tenure or two types of land. You have Federal Land of which Notice 102 is involved with, and you have the Provincial Land. So, the Interfor had no Federal Land. Interfor had Provincial Lands, and it was made up of different tenures, timber licenses, and timber Tree Farm Licenses.

Q. And so how does the annual allowable cut fold into that?

A. The Ministry of Forests, the calculations are based on the land base, and different forests things that are happening degenerates, kicks out a volume that you are allowed to harvest on those areas annually.

Q. And so, for the early part of the 2000s, Interfor's allowable annual caught was approximately 3 million?

A. Yeah, I believe it's somewhere around that. It may be a little less than that, but it's somewhere in that range.

Q. And when did it start to decline?
As the markets deteriorated, the company made the decision to reduce its allowable cut. Now, I would like to be very clear: I do not work for Interfor. These are my--anything I say is my personal basis. It's not--I'm not in any way reflecting what the opinion of Interfor, and so this is not--Interfor has given me no direction. I haven't talked to them in a year, over a year.
Q. We don't want to you do that.

A. So, it declined during that period.

Q. Okay. Within the allowable cut, are you allowed some variation from the actual number, or is it a max? Can you go over the allowable cut?

A. My expertise is in log supply. I haven't--I'm not involved in calculation of the AAC, so I'm not an expert to be able to answer that question.

Q. Okay. When you say your expertise is in log supply, how is that distinguished from the other aspects of, let's say, the other functions and responsibilities within a company like Interfor?

A. Well, the company is broken into the divisional operations which is responsible for producing the logs. That's the logging part. It's got the logging operations, and it will have sawmill operations which does the sawmilling, and then it has the executive, and it has the administration and the accounting functions.

Q. And were you one of the executives as a
12:47:05 1 General Manager?

2 A. Yes, I was.

3 Q. Okay. Were you located in Bentall 4 Building in downtown Vancouver?

4 A. No, I wasn't. Part of the time I was out on the Pateleau area where one of our sawmills and the operation, and then we consolidated our office at an office in Bernabi.

5 Q. In Bernabi, okay.

6 Did you work with a gentleman named John McCutcheon? Do you know him?

7 A. Yes, I did, I do.

8 Q. And how long have you known John McCutcheon?

9 A. Probably, I've known John the whole 20 years in the log business, but I didn't know him well until I went to work for Primex, which was in 1999, and I got to know John quite well in 1991.

10 Q. Because John was with--John McCutcheon was with Primex and then became part of Interfor, along with you?

11 A. That's correct.
Q. What was Mr.--
A. I was with Primex at the time also when it became part of it, so I was with John at Primex.
Q. Right. And the two of you went over to Interfor?
A. That's correct. That group of us did.
Q. Right.
And what was Mr. McCutcheon's position at Primex and Interfor through the change?
A. John was--there were two log supply managers for the Fields Sawmill, which is located in the Campbell River area, and John was one of those log supply managers for Fields Sawmill.
Q. So, was he under you in a way?
A. At that point he was not. When the operations consolidated in 2001 under Interfor, I took on the responsibility of all of the mills' log supply, and John reported to me.
Q. And John McCutcheon is a person involved for many years in the forestry industry?
A. That's correct.
Q. Did a gentleman named Phil Warnery work
12:49:03 1 with you at Interfor?

2 A. Phil Warnery, that's correct.

3 Q. How long did he work for you and what was

4 his position?

5 A. Phil was one of the junior log traders. He

6 came on to--he was hired in the log supply probably

7 in about 2002.

8 Q. And was he with Interfor working as part of

9 your team until you left in 2007?

10 A. Yes.

11 Q. And did you have other members of a log

12 supply team, traders and so on, to--

13 A. Yes, there was a group.

14 Q. To fill your mandate.

15 A. Of actual log traders?

16 Q. Yes.

17 A. There were some that had crossover

18 functions. There was probably five to six

19 individuals.

20 Q. And did you all work in the same physical

21 area? I'm speaking in the Interfor years.
A. In the Interfor years--for part of the time we did, and there was--part of the operation was at one mill and the other was at another operation. So, we weren't all in the same office for most of the time.

Q. Were there other log supply people at Mr. McCutcheon's level or was he the only one at that level under you?

A. At the time at Interfor or at Primex?

Q. At Interfor.

A. At Interfor, yes.

Q. He was the only one?

A. No, there were others.

Q. There were others?

A. No, there were others in his similar position.

Q. Did you work with those other, that group of more senior people under you at one location?

A. No.

MS. TABET: I don't mean to interrupt again, I'm sorry, but we are keeping it within fairly related to the Affidavit, the Witness
MR. NASH: I hear my friend, but this is cross-examination, and I think we are entitled to ask questions about the background to this matter. Arising out of the Affidavit.

BY MR. NASH:

Q. Sorry, did you work with Mr. McCutcheon in the same location?

A. For part of the time I did.

Q. And which part was that?

A. The latter part of, say, around 2005, approximately.

Q. So from 2005 to--he left Interfor in around to the end of 2005; right?

A. You know, I should know that, but I don't remember the exact dates, but he did leave Interfor probably--probably two years before I did, so that would be 2005.

Q. I think you said that the allowable annual cut was being reduced through the 2000s, to when you left in 2007, it was around 2 million. Is that your recollection, it was in the 2 million cubic meter
12:52:27 1 range?

2 MS. TABET: Again, you're cross-examining
3 him on the allowable cut for Interfor. That has
4 nothing to do with the content of the Affidavit, not
5 even related to the content of the Affidavit.
6
7 MR. NASH: Mr. President and Members of the
8 Tribunal, in any ordinary proceeding if evidence has
9 come up in--during the proceeding and a witness
10 comes after that evidence is heard, then questions
11 can be asked of that witness about the evidence in
12 the hearing. It relates to issues arising in this
13 matter. It relates to evidence that we've heard
14 from other witnesses. It is in some ways responsive
15 to issues that are raised in the Investor's
16 materials and their statements, and it's all
17 relevant in my submission.
18
19 PRESIDENT ORREGO VICUÑA: It might be very
20 relevant but the issue is that he's not supposed to
21 know or state or be asked about things that are not
22 related to his own statement. Say someone already
23 spoke about legal issues. Would you think that
24 because he came in later he should answer that? No.
So, please stick to the subject matter of the statement and to the extent related, of course, you may ask questions, but if it is something which flies a bit beyond, then it's beyond.

MR. NASH: I do believe, with great, great respect, that in circumstances such as these, that the questions that I'm asking are relating to issues that have arisen in this proceeding. They're directly relevant to the proceeding; and, in fact, at their core arise out of and relate to the affidavit in any event. Around the issue of the nature of the negotiation between the parties, the kinds of deals that are made, whether that's in normal business circumstance and so on.

And Mr. Bustard was with one of the players in the industry at the time, can speak to those negotiations, but we will have some questions about the negotiations, and those questions will relate to some of this background information I'm dealing with.

PRESIDENT ORREGO VICUÑA: Well, we will have to break now, in any event, but let me mention
to you which is the general guideline. If you are asking him about the way buyers and sellers negotiate and which the implications of the negotiation, that's all right. But to the extent that you are asking him to speak about what did he do or someone else did for some other company, I think it is a bit beyond.

MR. NASH: Thank you, Mr. President. We will consider and deal with that over lunch.

PRESIDENT ORREGO VICUÑA: Okay. Shall we break now for an hour?

MR. NASH: That's fine.

PRESIDENT ORREGO VICUÑA: Thank you.

(Whereupon, at 12:55 p.m., the hearing was adjourned until 2:00 p.m., the same day.)
AFTERNOON SESSION

PRESIDENT ORREGO VICUÑA: Right. We shall get restarted, Mr. Bustard.

Mr. Nash.

CONTINUED CROSS-EXAMINATION

MR. NASH: Mr. President, Members of the Tribunal, I just want to clarify where I anticipate going with my questions and how they relate to the statement and to the evidence that Mr. Bustard gave this morning. In his statement, and indeed in this evidence this morning Mr. Bustard described the--

PRESIDENT ORREGO VICUÑA: Would you get closer to the microphone.

MR. NASH: --a relationship between buyers and sellers and how they interact in the marketplace.

He also referred to buyers and sellers' intentions and their motivations, and he also has referred in his statement to his own experience. And he was also asked by me friend Mr. Dumberry about the role of Government in this engagement and in the negotiations between the
buyers and sellers, and, of course, we know that
Mr. McCutcheon had a role to play in this process.
He was the Chair of an Advisory Committee to
Government, and he was a close colleague working
with Mr. Bustard at the time.
So, I don't intend at all to depart from
anything that is in his statement or in the evidence
that he's given this morning. All of my questions
will relate to those issues, but they will include
discussions of his experiences in his most recent
job in industry as a log buyer at Interfor.

PRESIDENT ORREGO VICUÑA: Right, but let me
clarify one further point. To the extent that he
will have referred to the subject, you, of course,
are very welcome to discuss it with him. But to the
extent that it might involve questions that he does
not mention, for example, I'm not sure--I don't
remember, I think, the case of Interfor is not
discussed--then the relationship becomes a bit
distant.
So, let us be practical about it. You ask
your question. If you feel that it's something that
is beyond your knowledge or your information or what
you should be doing, you just say so, and that's it.

THE WITNESS: Thank you.

MR. NASH: Thank you, Mr. President.

BY MR. NASH:

Q. Mr. Bustard, in your experience during the
2000s, it was common for you to use the export
control system to accommodate your company's needs?

A. During that period you mentioned, the
to buy on the Surplus Test which you're
referring to was one of many options that we used.
It was, as I mentioned earlier, there was--we
used--primarily we purchased wood from the open
market from many, many suppliers, and on occasions
when we required, we would also purchase wood off
from the Surplus Test, make offers on the Surplus
Test. Now, if we made offers on the Surplus Test,
it didn't necessarily mean we were able to purchase
it, as I mentioned this morning.

Q. And of course, you had your own logs?

A. The company that I was employed by had some
of--had a logging program, that's correct.
Q. And they were, during that period, allowed to cut anywhere between 2 to 3 million, depending on the time period, 2 and 3 million cubic meters?

A. To my recollection, that's right.

Q. So was that a large portion of the log supply that you relied upon?

A. We—even though you cut 3 million meters, a lot of the wood—the forest grows—the nature of the stand is a lot of the trees you aren't able to use in you manufacture of your plants because these mills are all specific using different types of trees, so we didn't generate enough logs from our own operations to run those mills. These were world-class mills. They were using—they could use 750,000 meters annually per year, and we would not be able to supply that out of the allowable cut because there wasn't enough of that suitable wood from that, so we had to buy aggressively on—we were an aggressive buyer on the open market.

Q. You were an aggressive buyer on the open market?

A. We required many purchases.
Q. Did you monitor the 14-day advertising period that the list appears, the Bi-Weekly List, for logs that you might be interested in purchasing?

A. At the start of the year, TEAC and FTEAC publish a list of when the Surplus Test is—when the advertising will be out, so there's no need to monitor it because it's readily available.

Q. Okay. So, you know the dates the period is coming up on?

A. That's right. They're readily available. It's on the Internet.

Q. Comes up on the Friday, every second Friday?

A. Yes, I believe that's what it is.

Q. And would you be watching that 14-day list closely to determine whether there was anything advertised that you might want to buy?

A. If we were short of logs, that was one of the areas that we would monitor, that we would look at. That was one of the options. If we did not require the logs, and if the mills had enough wood or we were shutting the mill down for market.
reasons, then we would not be searching for wood off
the--from our different suppliers, including the
Surplus Test.
Q. And were you involved in negotiating deals
in advance with exporters who you either knew were
going to be exporting or you expected might be
trying to export in order to get some of your log
supply?
A. There was a period that that was--when
there was a lot of stability in the market and mills
knew they were going to run and that they knew they
needed logs or were short of logs, then that was one
of the options that a buyer may choose is to look at
prebuying a volume of logs.
Q. I'm really thinking more of you and your
experience and what your experience was. Did you
have--
A. I have--personally I have done that. I
haven't done that for a long time, but there was too
much risk to the sawmill.
Q. How does that work?
A. Well, if the market falls, then you are
14:06:31 obligated to buy those logs, so it works to the
2 advantage of the seller and the buyer if there is a
3 good stable market, and they both wanted to look at
4 the opportunity to give them some stability. If the
5 market is not a strong market and they expect there
6 will be some downturns, then they will not enter
7 into an agreement like that.
8 Q. Well, it works to the benefit of the buyer
9 because the buyer gets those logs at cheaper than
10 the international price; right? That's how it works
11 for the buyer.
12 A. The buyer pays what he will negotiate with
13 the seller at the time, and that price is based on
14 many, many things. Supply and demand, like I
15 mentioned, is a big factor. The quality of the logs
16 is a big factor. International currency is a big
17 factor. All of those factors are considerations
18 when you're buying logs and selling logs on the
19 international market.
20 Q. But the benefit to--one of the benefits to
21 the buyer is that if an exporter wants to export
22 logs where the price might be higher and you can buy
them domestically where the price might be lower,
you get them at a better price than the exporter realized?

A. The benefit to the--in a situation like that, the benefit to the seller is that he knows that he will be able to export a volume because what he's done--what he's done is basically, like I explained the Surplus Test, the substitution booms, so what he's doing is he's saying rather than a boom by boom substitution, he's taking this volume. Okay, we will give you a volume of substitution if you allow this volume in recognition of this volume going out.

So, it's just basically just looking at a bigger picture. Rather than doing this little tiny piece, he's looking at this big piece. So if there is an advantage to the buyer, there is an advantage to the seller. Otherwise they wouldn't do it.

The buyer--the seller, he's not forced into doing that. In many cases the seller may be the one that approaches the buyer and asks him, are you interested in turning an agreement like this where I
offer you a fairly big package of substitution logs rather than a boom by boom, and then the buyer at that time will look at it and decide whether he's interested or not.

Q. Forgive me, I'm not familiar with the term substitution in this context. Can you explain that.

A. The--go back to the initial discussions that we had when the buyer approaches the seller and says he's interested in buying the logs that you have. You're on the Surplus Test. You had some logs that were available for sale. The buyer will entertain an offer from the seller of substitution logs.

Q. Substitution of what?

A. Of logs of equal quality and equal volume to the volume that he has up on the export on the Surplus Test.

Q. I see.

So, it comes at a time when the logs that he has for international sale, the ones he would like to sell internationally come up for sale or been advertised for sale on the 14-day list in the
A. Well, you're mixing, you're putting everything together. You're asking me what is the substitution in the context of this, and I told you what that is, and now you're asking me about the substitution. I don't follow what you're asking. Could you please break it into portions.

Q. I will do my best. Perhaps I didn't follow you exactly, and I apologize for that.

As I understand it, the process you're talking about is a buyer and a seller entering into an agreement whereby the buyer will agree to buy a certain boom of logs or a certain volume of logs, and agree to take those in substitution for the logs that the seller has and wants to sell to the export market. Have I got that right? Or is it slightly wrong?

A. I would like to rephrase that.

Q. Okay.

A. I believe what you're referring to is the opportunity for the seller to buy logs of equal quality and equal volume in recognition for allowing
the logs to be--not putting--allowing the logs to be
declared surplus. They're not putting an offer on
the surplus.

Q. So, the negotiation is the seller--the
buyer comes in this scenario, I think you said the
buyer is selling logs, but the buyer comes to the
seller, and says I want logs of a certain grade and
quality and volume. And you've got logs that are on
the export market that are similar to the grade and
quality and volume that I want of the sort, and so
in order to allow to you go through the export
process without getting an offer from me, if you
give me these logs, the other set of logs in
substitution for them, I won't make an offer in the
logs you have on the list?

A. You've sort of got it right, but you sort
of got it backwards.

Q. Oh.

A. It's the seller--the buyer--the seller puts
the logs up for export.

Q. Right.

A. Then what he's doing is he's saying he's
testing the surplus. He's testing the domestic market. Does anybody out there want to buy these logs? Are they surplus?

So, the buyer comes along and he looks at those logs, if he goes out and inspects them, and sometimes he says, no, I don't want those logs, and other times he says that's exactly what I want.

And then he says--he may approach the seller and he may say I would like to buy those logs, and in--and that is the trigger for the seller to say we would like to work with you. We know you've indicated you needed those logs. We know that the mill needs those logs. Would you consider taking these logs that we have that are similar logs to the ones that we have on the Surplus Test, similar quality and volume in substitution? That's what the substitution is.

Q. Right.

A. It starts with the seller.

Q. Starts with the seller.

A. The seller because he's putting the logs up on the export. He's the one that's testing Notice
14:12:52 1 102 to see if there is a surplus. The buyer isn't.

Q. You were a buyer of logs in the last seven years in your career before going to independent--

A. I was a buyer or the people that I was working for me were buyers of logs during the--primarily from 1999 to 2007.

Q. And your interest was in getting logs as cheaply as possible in order to make your mills more profitable?

A. Price is only one consideration when you get to logs.

Q. Let's take two logs of the same quality, size, species. You want to get--you want to get the log that's the cheapest if they're equal logs.

A. You want to get the log--no two logs are the same, and that's what people that don't understand the business don't realize that each log is different. Each log has different characteristics, whether it's the rate that it's grown, the knot size, the rot, all those things.

There is no such thing as two logs the same.

So, a buyer will look at those logs, and he
14:13:54 1 will say that's the log that I want to buy, and if
2 the seller can say, well, you know, I've got a log,
3 they're not exactly the same but I think they will
4 work for you, have a look at these. That's
5 negotiations. That's how it's done.
6 Q. And that's the negotiation and the deal is
7 that, listen, if you give me these logs I won't put
8 an offer in on these logs. Is that basically true?
9 A. What you're saying is let's work together
10 on this. We want to both win on this, and this goes
11 back to one of the original streams I said. You're
12 not out to try and disrupt the seller's business.
13 You are not trying to put impediments in the way,
14 you're trying to work with them, so you want two
15 winners. You want to win and you want them to also
16 be a win. If they lose, they are not going to do
17 business with you. And you don't kill your
18 customer. You want to establish a good business
19 relationship where you're both winning and that's
20 what the business is about. That's where the
21 negotiation is.
22 Q. I get it.
The way the exporter wins is by getting his logs out. They're free to go now because the buyer in that scenario has not put an offer up. Fair enough?

A. What the exporter is able to do is he has targeted those logs to a sale, and he--or he may have targeted those logs to a customer, and so he is able to follow through with that sale to that export customer.

Q. Right. So, he's been able to free up his export logs to get them out of the country, to get them to an international buyer in the most effective way he can, given the parameters of the system. Fair enough?

A. You sort of put some words in my mouth.

Q. I'm not trying to do that.

A. Well, what he's done is like I said is he's basically--he's freed up those logs to try and sell them to the customer that he had targeted because he may have put extra costs into them like I explained earlier. He may have cut them to different lengths, he may have sorted them to different sizes and all
kinds of different things, so he doesn't want to
sell those to a customer that he hasn't been
targeting.

Q. Right.

So, could you understand from your position
as a log buyer that a log seller might not--dealing
with you--might not consider that discussion, that
conversation to be one where there are parties of
equal strength, equal bargaining strength, if you
will, that the seller has a sense that basically I
would like to get these logs out. I would also like
to get these logs out for export, but I have to give
up these logs that I would like to get out for
export in order to get the first package out.

A. It goes back to the basic premise of Notice
102 of the Federal Lands. It's a Surplus Test. And
anybody that's been in the business that's got the
experience knows that's how the--what they have to
do is make volumes available to the buyer in order
that there isn't deemed to be a shortage.

Q. At a price set in relation to the Committee
or by the Committee?
A. The price isn't set by the Committee.

This is what negotiation is. Negotiation is setting the price. You've got a buyer, the seller. The two negotiate. The Committee has got nothing to do with setting the price. Which Committee are you talking--

Q. Once those logs go to TEAC or FTEAC, the Committee is assessing the value of those logs against their consideration of domestic fair value. Do you know that to be the case?

A. Well, the logs never go to TEAC. The only thing that goes to TEAC is the offer or in this case we are talking FTEAC, and for those who don't know, F stands for the Federal portion which is the private lands.

Q. We've heard a little bit about that.

A. Okay, sorry. They haven't let me in on any of these discussions.

Q. That's why you have been sequestered.

A. I don't recall what's been discussed.

Now I have lost my train of thought. Could you restate the question.
Q. You were talking about logs not going to FTEAC, and I think where you were going with that is that there are logs, this first batch of logs that has been negotiated away to allow the other batch of logs to be exported.

A. Yeah. All FTEAC does is makes a recommendation on the offer that is being submitted by a buyer if the buyer and seller have not been able to come to terms and agree on a negotiated settlement so that both parties are satisfied with getting volumes out.

Q. So, it's not unknown that offers will be put in on certain logs which are hopefully destined from the seller's point of view for export, and that in that period after the offer is put and FTEAC meets, deals are done?

A. Before?

Q. Before.

A. Certainly.

Q. Before FTEAC meets.

A. Sure, that's just another one of the ways of negotiating. You can negotiate when prior to
14:18:43 1 putting the--like I mentioned there's the two
2 options. Prior to going out and looking at the
3 booms, or you can negotiate prior to putting the
4 letter in. Or the letter can be submitted, but it's
5 a dangerous game if you do that because you have to
6 get the log--the offer has to be withdrawn by the
7 seller. And the seller isn't necessarily going to
8 do that. Like most experienced people won't go that
9 route because there isn't enough time for the seller
10 to go out and look at the logs.
11 Q. Are you talking about the buyer here?
12 A. I said the buyer. Seller.
13 (Simultaneous conversation.)
14 A. The buyer, if the logs are--if a buyer has
15 submitted an offer on the logs and the seller comes
16 to him after the offer has been submitted to FTEAC,
17 my point--this is a dangerous way to do this because
18 the buyer will look at that offer, and he will not
19 have enough time to get out and inspect the logs
20 prior to FTEAC making its decision. So, the seller
21 will ask the buyer, you know, we want to work with
22 you, will you consider removing your offer. In some
cases if the buyer and the seller have a historically a good working relationship and they trust each other, then they will do that. If on the other side if they have in the past they haven't--don't have that good well established relationship, then the buyer may not want to withdraw his offer because once he's withdrawn the offer, he has no assurance that he's going to get a boom of equal quality and equal volume. For instance, the volume that may be offered may be too small a diameter like maybe his mill wants a log that big, only offers this guy, the seller offers him logs that big. That isn't suitable.

So, unless he has trust with the buyer and seller have trust, they don't--won't--they are very careful about going--withdrawing the offer close to when TEAC is going to make the decision, or FTEAC.

Q. So, you were responsible for, it sounds to me like, marshaling vast quantities of logs for five sawmills?

A. The--

Q. How many million cubic meters would you be
pulling together in a year?

A. It depended on the year. The company that I worked for was, because of the very difficult economic situation was reducing the number of sawmills, so the number of sawmills in 19—say, 2001 might have been—I'm not sure if it's six sawmills probably averaging somewhere between four and 600,000 meters per year.

Q. So, 2.5 million cubic meters a year on average in that range?

A. Or could be—probably more.

Q. Even a bit more.

So, there must be a certain strategizing that you have to do in order to coordinate the needs of all those mills during that period to ensure that they've got the supply that you want them to have and that your employer wants them to have.

A. Yes.

Q. Right.

And so, in terms of the developing strategies, you scope out markets, you think about who the log suppliers might be. You think about
where you can get logs either in the open market or
with specific suppliers, where you can get your own
logs. All that true?
A. Yes. Most large companies have budgets,
and they're constantly updating those budgets
financially probably--well, they do it every quarter
in a major, and in my situation the logs, it was
dynamic spreadsheet that was being monitored weekly.
Q. And as part of that strategy, you would be
looking at each of the markets to see which is the
most likely source of logs that your mill supplied
to see--and to monitor them?
A. You would have customers that you would
expect to be able to buy logs from, correct.
Q. Suppliers that you could buy logs from?
A. Suppliers--customers meaning suppliers.
Q. Right.
And the negotiation around the export
destined logs would be just part of that strategy;
is that fair?
A. Yeah, but the problem with the export logs
is you never knew whether they were going to be--how
many logs were going to become available. So, it wasn't your first choice. You always went to the customer that's out there logging or the small business sale that's doing some logging or somebody wants to trade something. That was your primary source of wood. When you're doing one month or six month budget, you have no idea how many logs that the exporter is going to try to put up. The export was done--you looked--it was more of a need at the time. They're an incremental volume at the time that sort of filled the hole. They weren't your main--they couldn't be your main source of wood.

Q. But it was part of the strategy to identify that possible source of export logs--of logs for your supply, and to deal with that as situations came up as best you could?

A. When I was doing the budgeting, when I was putting those down, I would very seldomly put down an export, somebody that was exporting the logs with the volume attached to them because I had no idea. I only--you deal with facts, you try to look at what your most likely place you're going to get the wood
Now, if you're weren't able to get the wood or the competition was buying the wood or there was all kinds of dynamics happening, the mills are running at a faster rate, then you looked at the alternate supply. One of the alternate supplies was the test on the Surplus Test. Were those logs--they were tested., were they surplus to the domestic and if you needed them, then you would look at them.

Q. And that's a component of your overall strategy to fulfill the log supply needs of the mills?

A. Overall to me sort of implies longer term. Looking on the Surplus Test was a short term.

Q. A short term?

A. Yeah. You looked at the biweekly. You didn't know what--like I mentioned, you only knew it was available that week. Two weeks you didn't know it was available, and so you couldn't rely on it. When you're running an organization and investment that you've got, you've got to get dependable supplies, and you can't--the mill cannot run out of
wood. It cannot run out of wood, so if it's looking to buy, so you want to go with the people you know that it worked. Getting wood off the Surplus Test was not--not always available.

Q. And would you be looking at that on a particular week-by-week basis at the possibility?

A. If you were--if your mill was short, desperately short of logs, which happens, you would looking at it day-by-day basis.

Q. And there must be a certain intelligence in the forestry community about who is doing what and what supply they might have and what supply they might want to get out and what supply they want to leave and so on. You must monitor that?

A. There's a very--people work very hard at networking with people, so you are always phoning people asking them what they're doing with their logging program. Do you see any logs for sale this week or next week out, and you're constantly monitoring that. That's part of the--that's the log trader's function.

Q. You refer in your statement to blockmail,
blocking and blockmail.

A. Which paragraph is that?

Q. Go to Paragraph 20.

A. Okay.

Q. And it's really just blockmailing to be here. You say that Merrill & Ring and some private landowners use the term blockmail to describe the situation where domestic log processors are apparently threatening to make offers on advertised logs if the log producers do not supply them with the logs they want. The choice of the term blockmailing with its clearly negative connotations illustrates their frustration with being required to assure adequate supply of the domestic log before being allowed to export their logs.

So, you've heard of this term?

A. The first part of the first sentence in the statement that I made, Paragraph 20, if you refer to it, it's a quote from Paragraph 8 of Mr. Ringma's statement. I didn't make that statement. I just repeated his statement.

The choice of the term blockmailing, I
I would say is—clearly has negative connotations. It implies some wrongdoing. There is no wrongdoing. I have elaborated at great length in the first part of our discussion on negotiations.

The negotiations are when the log seller puts logs up for to test the Surplus Test, and he puts on the list, out comes the list, the Bi-Weekly List, these logs are available for the Surplus Test. The buyer goes out and looks at them. They start negotiations. Then he phones either the buyer or seller, make contact. That's what the negotiations are. It's not blockmailing. Blockmailing is just like I say it's a negative term that doesn't indicate what's going on. What's going on is negotiations.

ARBITRATOR ROWLEY: Mr. Bustard, thank you for that, but the question you were asked was, had you heard of the term blockmailing? You weren't asked for a description of the paragraph.

THE WITNESS: Okay.

Yes, I have heard of the term blockmailing.
Q. And you're heard of that term in the context of the very kind of negotiations we are talking about; isn't that right?

A. The term--I hadn't heard the term until probably the last five years is when the term started coming up.

Q. And it became a term to describe what is going on by some at least, what they feel is going on in this negotiation process to get their logs freed for export.

A. It's a term that I don't use. It's a term that some people have chosen to use because of its negative connotations and maybe their frustrations with having to deal with the Surplus Test, which tests the--whether there is surplus on the domestic need.

Q. Let's leave aside any impugning of anybody and any nefarious or negative connotations and just look at the process.

Can you understand the seller's frustration in having to sell domestic--internationally destined logs that they want to sell domestically for a lower
price in the domestic market? Can you understand that frustration?

A. The frustration is self-induced.

The--under Notice 102, there is called the Surplus Test. In order for the logs to be deemed surplus, they have to go through the Surplus Test.

Now, if a seller is frustrated, I would suggest that maybe he doesn't know the requirements under Notice 102. The people that the successful negotiations are carried out when both parties understand Notice 102.

Q. Are you aware of TEAC changing the rule regarding being in the penalty box? Have you heard that term, the "penalty box"?

A. Yes.

Q. And where are you familiar with that term from?

A. It's a description that's used when--if someone is exporting logs, has been granted an Export Permit, under the regulations they are not allowed to offer on the Surplus Test for a period of 90 days until such time as the logs have either left
Q. And are you aware of a change in the rule regarding the penalty box made in the last few years?
A. In which year?
A. 2007? 2007, I don't know. If you tell me what it is, maybe I can refresh my memory.
Q. I'm just asking if you're aware of a change.
A. 2007--I usually have a pretty good memory, but I don't remember something at that point.
Q. Perhaps I can assist, but do you recall in early 2006 your company being in the "penalty box"?
A. There was a period where Interfor was deemed--I believe what it was we were indirectly exporting logs to the States.
Q. And that was through Timberwolf?
A. I don't remember. It was through a broker. I don't remember the exact situation.
Q. And in Interfor, your previous company had operations down in the States; correct?
MS. TABET: I don't mean to interrupt, but just two points here. First of all, this is not related to his Affidavit. I will let you continue to a certain extent, but if you're going to refer to any restricted information, then obviously be careful about that.

MR. NASH: Yes. I'm not going to refer to specifically to any meeting, but this does arise from Mr. Bustard's statement.

MS. TABET: Where?

MR. NASH: And in respect to his direct evidence as well this morning. Relations with Government, whether Government has a part in the negotiations and so on, which was led by Mr. Dumberly.

THE WITNESS: By who?

MR. NASH: Mr. Dumberly.

MS. TABET: I mean, again, I wish you to be careful because I don't believe that part of the earlier discussion about penalty box and Interfor was something that should be of knowledge to your clients.
MR. NASH: I'm quite happy to make the session nonpublic and private at this stage.

MS. TABET: But also again this is not part of Mr. Bustard's Affidavit.

MR. NASH: We addressed that point, but I think our clients would have--a closed session.

PRESIDENT ORREGO VICUÑA: Yeah, that can be done, but the question is whether it is connected or not. In your view, what's the connection between what you are being asked and your own statement?

THE WITNESS: I see no connection whatsoever and what I have written in my Witness Statement to any reference to the company that I was formerly employed by being in the penalty box. I don't see any connection.

MR. NASH: It's in regards to the relationship between buyers and sellers in the market which he's given a lot of evidence about in his statement, the impact on buyers when they don't comply with the rules that are in place, the position of Government in that process, and the way rules are changed.
PRESIDENT ORREGO VICUÑA: Well, to the extent that you feel, Mr. Bustard, that it's not part of your statement, you just say so.

THE WITNESS: Okay.

PRESIDENT ORREGO VICUÑA: And we move on.

BY MR. NASH:

Q. I gather you don't think it's part of your statement?

A. It's not part of my statement.

Q. I'm going to suggest to you that there is a game strategy that goes on here, whereby buyers using the system as it exists have a strategy to get logs at a price that's favorable to them in order for sellers to get their logs out for export. Isn't that really what's going on--it's a game going on, isn't it?

A. There is no game. It's serious business, and it's serious money involved in buying logs. It's not a game. In my mind it's a very serious business, and I'm not quite sure what you're asking me.

Q. Well, it's a game whereby the buyers get
logs cheaper and the sellers get their logs
liberated for the export market. Don't you agree
with that?
A. The—under Notice 102, in order to get an
Export Permit, you have to test the domestic market
for a surplus. The—when the logs are put up under
the Surplus Test, the buyer has the opportunity to
look at those logs if he requires them. That's not
a game. That's the regulations under which logs are
given the opportunity to be exported out of the
country is that there first has to be deemed a
surplus. And in order to be deemed a surplus, the
domestic sawmill has an opportunity to look at those
logs that are put up for export and make a decision
whether those are suitable for them.
Q. Did you discuss in your company's
participation in this process the buyer and seller,
did you discuss the strategies with Mr. McCutcheon?
A. My company is Vanlog Forestry.
Q. The previous company that you were with,
the previous company.

MS. TABET: Mr. Nash, again not related to
MR. NASH: Mr. President, Mr. Bustard has given examples of what has happened in his own experience in his statement, and it's in the context of what's happening between buyers and sellers. Part of that experience will have been in the context of what he was doing for seven years prior to leaving his previous employer. We don't have to name the previous employer if there are sensitivities around that, but he can't speak to his experience in this relationship with buyers—between buyers and sellers with him in the position of buyer without going to what his experience was and how he came to the understanding which he's described in relatively theoretically terms where a buyer and a seller, how he came to that understanding of what that relationship is and how business is conducted and how it operates.

PRESIDENT ORREGO VICUÑA: That is what Mr. Bustard is discussing, and he may discuss all of that, but not in the context of the activities of a company that's not part of this case. He may say my
experience is whatever it was, as we have been
hearing, and that would be it, but whether there was
a company doing this or doing that, that's
different.

MR. NASH: My only comment would be that we
have to test his experience as against the construct
that he's developed in his statement, and that is to
establish and assess the credibility of the witness.

PRESIDENT ORREGO VICUÑA: Well, we have
done—we have discussed the points at various times
now, Mr. Nash.

MR. NASH: I think you ruled against me.

PRESIDENT ORREGO VICUÑA: I'm not ruling
against you. What I'm ruling is that you have to
keep to what the witness is discussing in his
statement, and from there you can ask the questions,
but then does not relate to whether company A or B
did C or D.

BY MR. NASH:

Q. Could you turn to your statement, please,
Mr. Bustard, at Page 7 at the top, second full
sentence--actually, I'm sorry, let's go back to the
bottom of Page 6, Paragraph 22, and at the very bottom, if a boom is of equal volume and quality, the buyer will be satisfied, just on that point. That's the boom—that's the substitution boom; right?

A. That's correct.

Q. Okay. This removes the possibility that the buyer might make an offer on the advertised export boom and prevent its export. That's the logs that are being liberated for export?

A. That's the win-win.

Q. That's the--those are the logs that are being liberated for export by the buyer not putting up an offer; right?

A. That's right.

Q. Or withdrawing an offer?

A. There was a substitute boom that was purchased, so he did not follow through with his offer on export.

Q. Then it says, "It has been my experience that this arrangement works between two companies that understand that logs cannot be exported from
British Columbia unless they are surplus to the needs of the domestic market."

Now, just going back to that, in your experience, you're suggesting that these two parties, the party that wants to get their logs out and the party that wants to get these other logs, the buyer, are parties of equal bargaining power?

A. What I'm suggesting is that the party—the seller would like to get his logs to be able to export his logs, and the buyer requires logs for his sawmill, so this is—this has been satisfied when both—when a substitution boom is purchased by the buyer.

Q. Do you consider the two parties in an equal bargaining position?

A. The power to the seller is that the buyer may go through and spend a lot of expenses and effort searching out the boom, determining what the boom is suitable for his mill at great expense like I mentioned, water taxi, flying up, et cetera, and the--but the buyer doesn't—the seller doesn't have to sell that boom to the buyer, so the buyer spent
all this money determining whether this boom is
suitable only to have the seller decide not to sell
it to him.

Q. Well, couldn't the buyer put in a lowball
offer without doing any inspection and await the
outcome, the duration of the period between the
close of the 14-day period and the TEAC meeting and
then withdraw it at the last minute?
A. Could I put a question to you? Would you
buy a used car without looking at it first? You do
not buy a boom of logs without looking at it. There
is too much involved. There are--no experienced log
buyer will put an offer in. You just can't do it.
There is--you're--the mill is depending. You have
hundreds of people working in the mill depending on
the buyer to get out, look at those logs based on
his experience and make the right decision. You
can't put in an offer just to--because to try and
finesse a boom.

Q. What about a lowball offer that has no
chance of being accepted by the seller, the TEAC
meeting is four, five, six weeks away, and the
offeror puts in the offer, lowball offer. It's not
going to be accepted?

A. Right.

Q. And using that as a negotiation tactic
during that four- or five-week period to get some
cheap logs? Is that completely theoretical?

A. But then what kind of relationship are you
going to have with the buyer and seller?

Q. A bad one.

A. Yeah, that's right. That's why I say that
buyers and sellers that understand the log market
don't do that because they've got to get long.
They've both got their strengths and weaknesses, and
you want a win-win situation. You're not going to
do something that's going to leave a really, really
bad taste in the seller's mouth because he's never
going to deal with you, so you may as well write him
off.

Q. And you said you were, in response to
Mr. Dumberry's question about the role of Government
in this negotiation, you said that Government is not
involved, but Government has a Committee, an
Advisory Committee that's waiting at the end of the day that's going to pass judgment on whether those--whether those logs can be liberated for export. Isn't that fair?

A. My understanding of the statement from Mr. Dumberry was, were they involved in the negotiations, in the negotiation process for the purchase of logs, and I said no, and we don't want them involved.

Q. But rising just on the role of Government, the Government has an impact on these negotiations; isn't that fair?

A. Could you explain why? How does it have an impact? To me the Government has no impact. The only impact is the Government has--they have a Committee which makes recommendations, but those recommendations are after the negotiations is basically--has failed, so then it goes to the next step which is the Government. That's not the negotiations. At that stage, the negotiations are done.

Q. Well, they're indirectly--
A. There are two losers then.

Q. The committee being an Advisory Committee for Government is waiting to have its meeting, and it may not be directly involved in the negotiation, but it certainly impacts the negotiation because the exporter might not be able to get those logs out if the Committee says no.

A. Well, that's all semantics.

Q. Isn't that fair?

A. To me, the Committee, that's the last step. The negotiations are all over by the time it gets to the Committee.

Q. Yet the negotiations are, indeed, over by the time it gets to committee.

A. Right.

Q. There is that whole four- to six-week period which is open for negotiations for the seller to negotiate with the buyer and the buyer to say I will pay you this for that, and I will let those through.

A. My memory doesn't serve my quite right, but I think there is a two-week, 14-day period, I may be
14:46:10 1 wrong on this, but I think it's 14 days from the
2 time that the biweekly offer comes out until the
3 buyer has to make his offer.
4 Q. The offer is in the 14-day period, but the
5 negotiation after the offer is posted and not
6 withdrawn sits there waiting to be considered by
7 FTEAC?
8 A. You're right. There is an additional.
9 Q. Four to six-week period; right?
10 A. I'm not sure that the amount. I can't
11 answer that. I don't know that, but there is a
12 period in there. Yeah.
13 Q. And that's when the offer can be withdrawn?
14 You could pull your offer?
15 A. It has to be withdrawn prior to FTEAC
16 making its ruling.
17 Q. Right.
18 And sometimes these offers could be
19 withdrawn the day before the meeting; right?
20 A. There is a schedule that it lists on the
21 schedule that the time that it has to--the date that
22 it has to be withdrawn by, so that's a well-known
Q. Could you turn to Tab 37, please, of the Investor's Schedule of Documents. I would like to turn you to page 766. Are you with me?

A. Yeah.

Q. This is an examination of Mr. McCutcheon in the proceeding involving TimberWest, and starting at 766, "To get back to this concept of a game that is being played, I think you have agreed with me that you played the game when you were a log buyer in order to get fibre, to get the logs that you needed for your various businesses; correct?

"ANSWER: Yes.

"QUESTION: If it weren't for that need, you wouldn't be playing this game?

"ANSWER: Unless I was in one of my previous position or went for my own company and I was trying to export. I had been in the game all along. I played both sides.

(Pause.)
"QUESTION: To get back to this concept of a game that is being played, I think you have agreed with me that you played the game when you were a log buyer in order to get fibre, to get the logs that you needed for your various businesses; correct?

"ANSWER: Yes.

"QUESTION: And if it weren't for that need, you wouldn't be playing this game.

"ANSWER: Unless I was in one of my previous positions or went for my own company and I was trying to export. I have been in the game all along. I have played both sides.

"QUESTION: Right, but looking at your log buyer hat, when you were a log buyer?

"ANSWER: Yes.

"QUESTION: You were playing this game in order to get supply; correct?

"ANSWER: If I needed it, yes

"QUESTION: Right. And you regarded
the game as something of a necessary evil
to get the supply?

"ANSWER: Absolutely, and I say that
in the sense that I never liked the game,
not because I thought I was doing anything
wrong because you have an opportunity to
make an offer, but I didn't like the game.

"QUESTION: But it was important that
the game be there because it enabled you as
a log buyer to get the wood that you
needed?

"ANSWER: If there was no other way to
buy wood.

"QUESTION: And there would be times
if that system, that game weren't there
that you wouldn't have been able to get the
wood that you needed?

"ANSWER: That's true. The only other
way to get it would be to increase your
price to get people to log more.

"QUESTION: Exactly.

"ANSWER: Yes."
Now, did you have any discussions in your experience with Mr. McCutcheon along the way which reflect his approach to this negotiation process?

THE WITNESS: Well, my first--

MS. TABET: Excuse me, what's the relationship to Mr. Bustard's Affidavit?

MR. NASH: Mr. McCutcheon is.

MS. TABET: You will ask general questions about the approach of negotiations?

MR. NASH: About the negotiations, yes.

BY MR. NASH:

Q. Go ahead please.

A. Mr. McCutcheon, prior to working with me and for me in that order had his--he had worked several companies, with several companies before. I have no idea what time frame he's talking about, what company he's talking about.

There--my discussion--okay. I don't understand--to me this is something out of--I don't understand the details of it behind it.

Q. Well, to give you a temporal indication, he says at Line 8 of Page 767, I have been in the game
all along. I play both sides, and he’s stating this in June of 2006.

A. I don’t know if he’s referring back to 1980 or 1985 or 1990. I have no idea.

Q. Do you recall having discussions with Mr. McCutcheon along these lines?

A. I don’t—I don’t recall.

Q. Okay. Thank you. Those are my questions.

PRESIDENT ORREGO VICUÑA: Thank you,

Mr. Nash.

Is there any redirect?

MS. TABET: No.

PRESIDENT ORREGO VICUÑA: I have just one question.

THE WITNESS: Certainly.

PRESIDENT ORREGO VICUÑA: For Mr. Bustard to clarify my own mind.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT ORREGO VICUÑA: Assuming that the game is a fair game, there is still the question of the Regime having been put in place to guarantee, assure the supply of wood logs to the processors.
That's the essence, and that's the meaning of the Surplus Test and everything else that we have heard about.

Now, here comes a question of the substitution. If you have a boom that it's intended for export, on which the rest of the offers and so can play, but at the same time you can find another boom which will be substituted for the first, it means that you have two supplies of the same boom for the processor. Is that not so? You have two sources of the same kind of or equivalent kind of logs, so where is the shortage?

THE WITNESS: The one boom is going to have the opportunity to be exported, and the other boom you will cut in your mill, so that volume that you're cutting your mill makes up for the volume of the perceived shortage.

You don't--you don't enter into negotiations for the purchase of a boom that's advertised unless you have a need for it, and so you look at it--sure you would like to get both booms and you might need both booms, but you'd rather--if
you can get one, you're better off than none, so you will try to get the one boom, and that means the other boom is going to be--going to be exported, then you have lost the opportunity in that boom, but at least you've got half of it, so you've got a portion.

PRESIDENT ORREGO VICUÑA: My point is slightly different.

THE WITNESS: Okay.

PRESIDENT ORREGO VICUÑA: It is that if you have one source of supply--call it boom one--

THE WITNESS: Okay.

PRESIDENT ORREGO VICUÑA: --and that's what the processors did, they need one boom of supply; right? Now, the seller comes in and tells them look, forget about that one because I have a separate interest, but here you have boom number two, which will satisfy your needs on equivalent terms.

THE WITNESS: Right.

PRESIDENT ORREGO VICUÑA: So, is it not that there are two booms and then two sources of
1 supply for the same demand.

2 THE WITNESS: But you're just looking at
3 one player. There may be several players involved
4 also buying, and so the seller may, if the boom that
5 he is giving you in exchange, he may sell that to
6 somebody else, so it doesn't satisfy your
7 requirement. It's not like there is only one player
8 like there is many players out there buying that
9 could be buying the same type of log. I don't know
10 if I've addressed that properly.

11 PRESIDENT ORREGO VICUÑA: Well, that's
12 certainly a different scenario. Here we are talking
13 of one buyer/one seller. Of course, if you have 10
14 buyers, most probably they will not be addressing
15 one boom. They would be addressing 10 booms. And
16 then if for those 10 booms the sellers, either the
17 same or different sellers come in and say, wait,
18 wait, here you have another 10 to substitute for,
19 then it means you have 20. Is that not the right
20 math?

21 THE WITNESS: Well, there is a limit to
22 the--unless they have the opportunity to--unless
they're able to have additional volumes for--to
substitute for it, there is a limit to what they can
do.

PRESIDENT ORREGO VICUÑA: That's an
assumption that there is something to substitute
for.

THE WITNESS: Right.

PRESIDENT ORREGO VICUÑA: Okay, fine.

Thanks very much, Mr. Bustard, for coming.

(Witness steps down.)

PRESIDENT ORREGO VICUÑA: We are ready to
proceed with the next participant, who is an expert
witness, Mr. Robert Low.

ROBERT LOW, INVESTOR'S WITNESS, CALLED

PRESIDENT ORREGO VICUÑA: Good afternoon,
Mr. Low. Would you please care to read the Expert
Statement that you have in front of you.

THE WITNESS: Yes, sir.

I solemnly declare upon my honor and
conscience that I shall speak the truth, the whole
truth, and nothing but the truth.

PRESIDENT ORREGO VICUÑA: Thank you.
14:58:40 1 Mr. Low.

2 You will now be examined first by

3 Mr. Appleton.

4 MR. APPLETON: Great, good afternoon,

5 Mr. President, Members of the Tribunal.

6 DIRECT EXAMINATION

7 BY MR. APPLETON:

8 Q. And good afternoon, Mr. Low.

9 Mr. Low, I asked you to prepare an

10 Independent Valuation Report of the damages caused

11 to Merrill & Ring by the Log Expert Control Regime.

12 Your Report is set out in a binder in front

13 of you. You see this binder?

14 A. Yes, I do.

15 Q. Could I ask you to turn, please, to Tab 1?

16 MR. APPLETON: And Members of the Tribunal,

17 you have a binder as well? Very good.

18 BY MR. APPLETON:

19 Q. Now, you have included your curriculum

20 vitae at Page 66, if I could just ask you to turn to

21 the back of your Report. And I will put it up on

22 the screen.
I see that you're a Chartered Accountant and a Chartered Business Valuator. Could you just please tell the Tribunal what a Chartered Business Valuator does, please.

A. A Chartered Business Valuator is a person in Canada who has qualified under a professional designation with a program of study and examination and experience, and that indicates a specialization in business valuations and damage quantification.

Q. I see that you have published many articles in the field of business valuation and damage quantification.

How long have you worked in the area of the quantification of damages?

A. I have practiced exclusively in this field for the last 31 years.

Q. Would you please explain to the Tribunal the premise of your Report, the Report that's here before us. Perhaps you could look at the slide on the screen here.

Is this slide an accurate depiction of the methodology used in your Report? I put this
together myself, so it's relatively simple.

A. The methodology in this Report, although there is a great deal of detail one should drill down on a raft-by-raft basis, really can be stated quite simply. The damages in this case are a measure of the Export Premium that has been quantified on a raft-by-raft basis. That Export Premium is then multiplied by the volume of each of those rafts that had been affected by the Regime. And to that amount which is then each of the rafts is summed into a total, we added the compliance costs or the costs incurred by Merrill & Ring in complying with and meeting the requirements of the Regime.

The analysis was based on two time periods, the first time period being the past historical time period and retrospective past, but the past time period runs from December 27, 2006, when the claim was filed, until the end of 2008, which is the approximate time at which my Report was prepared. The future time period relates to the period beyond December 31, 2008, and covers the
period 2009 through 2016, which is the period during which Merrill & Ring intends to deplete its forest assets.

Q. Now, if we turn to Tab 3 of the binder before you, you will find a copy of Mr. Bowie's Report. I will give you a moment to turn to that.

A. I have it.

Q. Now, he has summarized the methodology you used in your Report and the damages that you identified, and he set this out in his Report at Page 17. I replicated that page and put it up here on the screen.

Could you please explain this summary to the Tribunal. I just point out this is the summary that was done by Mr. Bowie of your Report, so perhaps you might tell us if it's an accurate summary, and then we might use it to go through a few things.

A. Certainly.

The summary is accurate in all respects except for one, and that is that this heading here is not a correct description of what I've done.
Q. Excuse me, for the record, could you just explain what the "this" is here, sir.

A. I will.

The column here is for Article 1110, and the date that's referenced there is March 27, I think, 2006. And that date should, in fact, be and according to my Report is December 27, 2006, being the date of the claim. Other than that, the numbers that are depicted here and the descriptions coincide with my Report.

And this happened to be a useful way to look at the conclusions because it breaks some things out that are included in the schedules of my Report, and rather than having to flip back and forth, Mr. Bowie set them out in a little different fashion, and they're summarized on one page.

Q. Now, if I could just get you to look at the large screen for a moment, I see that there are a number of total losses figures at the bottom. There are three columns. At the bottom of each column there is a total, and I see the totals are somewhat different. Could you please tell the Tribunal why
there are differences in the total damages in terms
of the calculations of each NAFTA violation, please.
A. Certainly.
Each of these columns represents a
different or a combination of Articles under NAFTA,
and the descriptions down this side apply to
virtually all of them.
The descriptions relate to the lost Export
Premium that we've quantified and the costs being
incurred, and then broken into two periods being the
past and the future.
And these totals agree with my Report.
They are consistent with what my conclusions are.
And Article 1102 and 1105, in my opinion, result in
the same damages, the same nature of breaches. And,
accordingly, I came to the same conclusion with
respect to both the Lost Export Premiums and the
costs incurred.
Under Article 1106, the numbers are almost
the same, except that we have excluded the claim for
the cost related to payments for the fee-in-lieu
that have been paid to the Province, and that amount
is indicated here. That is really the only
difference--

ARBITRATOR ROWLEY: Could I just interrupt.

When you say "here"--and you have done it a few
times--you really must say where; otherwise, the
record will be incomplete, and the transcript will
be useless to me when I go back and look at it.

THE WITNESS: Thank you very much for that
reminder. Sorry.

Under the Article 1102 and 1105 column, the
difference between that and the Article 1106 column
is that the 1106 column does not include the
fee-in-lieu payments that were included in the 1102
and 1105 column as a cost attributable to the
breach.

Article 1110, the right-most column, is
comprised principally of the same numbers, but the
concept is different. Effectively, rather than
breaking this into a past and future lost with a
segregation of December 31, 2008, the damages under
an expropriation claim are determined at the date of
the breach, so effectively all of the damages,
whether they are now in the past or the future, were present-valued or discounted back to December 31--December 27, 2006. And then to that number this item in just above the middle of the right-hand column has compound interest being added to the claim in some two-odd million dollars, and that compound interest is added pursuant to Article 1110, where interest is added at a commercial rate from the date of the expropriation until the amount is paid.

That is the single biggest difference between these give or take 16 million-dollar columns under 1102, 1105, and 1106, and the $18 million under Article 1110. It's a little more complicated than that because of present valuing, but the biggest single difference is the application of compound interest.

BY MR. APPLETON:

Q. Now, Mr. Low, I'm going to start from the top of the chart. I see that this methodology refers to the term "Export Premium." Would you please explain to the Tribunal what you mean by the
The term "Export Premium," and can you explain to the Tribunal how it's calculated, please.
A. Yes, I can.

The Export Premium that has been developed in this methodology is to determine a fair export market price for a raft of logs and subtract from that the price that was obtained in the real circumstance by Merrill & Ring for that same raft of logs with the only adjustment thereto being the transportation difference. In other words, if the Fair Market Price is in a different market—for instance, the United States being a U.S. customer versus the actual transaction was a Canadian domestic sale—we adjusted that difference by the difference in transportation costs to get that raft to the relevant market.

How we went about this was that it was based off a raft schedule so that each raft was dealt with individually over this time period of some four years. And this was based off a schedule that was developed by Merrill & Ring prior to this claim being brought. So, a lot of the data was
accumulated at least up until December 27, 2006,
absent any consideration of this Tribunal. And it included a lot of data on the raft itself, the process, what market it was sold into, and all of this detail.

And the only thing that was added to it was for each raft there is—and in this analysis was an indication of what the appropriate sort was. Merrill & Ring assigns a sort to a raft, and this sort is a very specific sort. We've heard evidence from Mr. Schaaf and Mr. Stutesman with respect to the amount of information and the consistency that goes into their sort description.

And for each sort--

Q. Excuse me, I'm very afraid I didn't realize that we are open and we have the private financial data which is being live-fed and everything else, and I'm sorry that—if you pause for a moment, we are going to have to close the session at this point, and I'm going to ask you will deal with that and those people who can't be shared will have to go. But I want to make sure we are going to dive
into much more, and I just thought we had better deal with this now at the outset. I'm very sorry. I have been so desirous to go as far as I can and leave this as open as I can.

(Comment off microphone.)

MR. APPLETON: Yes, I did. Thank you, Mr. Rowley, for reminding me of my omission. I hope it's the least of my sins today, sir.

(End of open session. Confidential business information redacted.)
Q. I'm very sorry, Mr. Low. I really did not want to interrupt you. I could try and look back in the record from where you were—

A. I think I could pick it up.

Q. I really apologize. Would you please pick it up from where you left it.

A. From this raft schedule, what was added to it was, based on this sort, there was a determination of where to use the term "the target market" for that sort was, where typically that sort market went. So, if it's hemlock, it's Asia. If it's something else, it's the United States. And there are sorts that are destined for Canada, as well.

So, the sorts had already been assigned because that's how they run their business. The target market was then assigned based on the sort, and it was then applied consistently throughout this four years of data.

At that point, typically a Log Sale
Agreement that had been entered into by the Merrill & Ring Group with an arm's length third-party customer was selected, and the price in the target market and the price on that Log Sale Agreement was used as this fair market in this so-called "best market" or "target market" for that raft. And the intent was that that not be an exceptional price, not be an aberrant price as there are aberrant transactions from time to time, but representative of a Fair Market Price at that time of when the actual transaction, sale transaction, occurred in the relevant target market. And that is how we then determined this Target Market Price, adjusted for freight, and then subtract the actual price that was realized to determine the Export Premium.

Q. Mr. Low, again, I apologize for interrupting—we won't have to do that again—but could you tell me why you believe that there is an Export Premium, like why it exists?

A. As I'd indicated in my Report, I believe that there is a general recognition in the industry,
forestry industry, in British Columbia that there is
an Export Premium, and I had a number of sources in
trying to confirm that belief. Certainly, we've
heard the Merrill & Ring witnesses here--Mr. Schaaf,
Mr. Stutesman, Mr. Kurucz and, sorry,
Mr. Ringma--all identify the Export Premium concept.

In addition, Deloitte, the firm that I'm a
partner with, being as large as it is, has a very
substantial Vancouver office, and I had discussions
with two of my partners who deal extensively in the
forestry business in British Columbia, and they
indicated an understanding that this Export Premium
did, in fact, exist.

And there were then two other sources.
There is a public company that publishes an Annual
Report and, in fact, Quarterly Report, that
discusses the Export Premium that they are able to
realize each year and the significance of that to
their operations.

And then, lastly, I gave consideration to
the determination of the fee-in-lieu that prior to
2004 was, in fact, premised on 100 percent of the
difference between the export price that's realized and the Vancouver Log Market price. So, a recognition, I believe, that there is an Export Premium.

All of those led me to believe that the Export Premium existed, was known to exist, and our approach was attempting to take a fact-based historical amount analysis in trying to quantify what was lost by Merrill & Ring due to the Regime.

Q. Mr. Low, just to close the loop, do you know for a fact that there was ever any monies collected by the Government of British Columbia during that time period when the fee-in-lieu was based entirely on the Export Premium?

A. Yes, I am aware of that. And, in fact, in the record here, there are payments made by Merrill & Ring on that basis.

Q. And during that time period?

A. During that time period.

Q. Okay.

Mr. Schaaf has testified that there are occasional instances when the price realized by
Merrill & Ring actually exceeded the fair export market price. This is referred to in Mr. Bowie's Supplemental Report as instances of Negative Export Premium.

Did you consider this Negative Export Premium in your Report, sir?

A. Yes, I considered it.

The suggestion in both Mr. Bowie's Report and Mr. Jendro's Report is that these Negative Export Premiums should be accumulated and deducted from the Positive Export Premiums that I'd calculated. And I don't believe that that's correct, and there are a number of reasons for that.

First of all, the market periodically presents opportunities to Merrill & Ring that perhaps a raft can be sold in a different market than the target market we selected. And, on an opportunistic basis, if the price is better, Merrill & Ring is going to take up--take advantage of that opportunity and perhaps realize a price that's higher than the Target Market Price that was selected based on the typical sort and the typical
market that that sort goes to.

There is nothing that I have seen in the Regime in the way it's managed and operated that would suggest that the Regime creates a positive factor where Merrill & Ring can do better than its target market, certainly not that it wouldn't be able to realize absent the Regime in any event. So, I think these negatives do occur, and they occur simply on happenings in the marketplace shouldn't be deducted on that basis.

Secondly, the approach that we took here was to look at a specific Log Sale Agreement with a customer in the target market. There is no range of price around that price that's in that Log Sale Agreement. It's a specific amount. And the belief, in my understanding and my opinion because of the way I adopted this, is that Merrill & Ring would be able to sell additional volume into that contract, realize that price in that target market; and, accordingly, these positive or--sorry--negative premiums--that's the easiest way to think about it--really don't come into play. They're simply an
opportunistic happening that would have happened in any event, and the Log Sale Agreement price is a fixed amount, and that's the amount that's relevant at that period in time.

Q. I want to make sure I understand. Could you explain what you mean when you say that Merrill & Ring could have sold more into certain Log Sale Agreements? Because Canada asserts that there would not be demand for additional volumes of wood, so could you just explain your view to the Tribunal so we are perfectly clear.

A. Yes, I can.

I'm not suggesting that Merrill & Ring Canada could sell additional volume into a Merrill & Ring Group Log Sale Agreement necessarily over and above the volume. Maybe the customer would want more of it, but perhaps not.

What I'm suggesting is that the Merrill & Ring volume out of Canada could be sold into the existing contract volume and, in fact, replace volume that Merrill & Ring sorts--sources on a contract basis from other companies. They, in fact,
are a trader of wood, a contract trader, and instead of supplying contract volume into these Log Sale Agreements could substitute it or have substituted it if could get out of Canada with this Merrill & Ring volume that we believe has been affected by the Regime.

And, accordingly, what Mr. Stutesman, in fact, said the other day was he had instructions from both Norm and their respective boss that Merrill & Ring volume came ahead of the trading volume that they did, and therefore I think it's very appropriate to say that volume could have been sold into these contracts.

Q. Mr. Bowie, in his Report, has referred to the retrospective past harvests. You also referred to that earlier in your testimony today.

Could you please explain this concept, Mr. Low?

A. The retrospective past harvest is an amount of harvest that Merrill & Ring and its consultant, Mr. Ruffle, with respect to the Harvest Plan believe would have been harvested in these years between
2004 and 2008, absent the Regime. The market during that time period was a good market. And absent the restrictions, absent the blockmailing, Merrill & Ring believes that it would have harvested more and sold into that market.

And the concept is consistent with a but-for type of analysis of but for the Regime and the way it's operated with impacts with blockmailing, Merrill & Ring would have harvested more in the past.

Q. So, why is it necessary for this Tribunal, then, to consider the retrospective past harvest?

A. It was an example of a result of the operation of the Regime. And what we are trying to do is say, absent the Regime, what would Merrill & Ring have done? How would it have sold differently? A, it would have exported more; B, it wouldn't have incurred costs; C, it would have harvested more in the past.

Q. Now, Mr. Low, I'm going to ask you to look again at the chart, but I'm going to look at it on the large screen.
That third column under Article 1110, the expropriation column, you pointed out to us the issue about interest.

A. Yes.

Q. I've got my pointer on it, mid-level, and how you have applied interest in this case. Could you please explain the basis upon which you've come up with a rate for interest in this case.

A. Article 1110 describes a requirement to add interest at a commercially reasonable rate from the date of the expropriation, and I selected a rate of 6 percent, which, at December 27, 2006, was the Canadian Bank Prime Rate at the time.

Q. Would you explain to the Tribunal why it could be appropriate to add interest to the other heads of damages if they so decide in this case, Mr. Low?

A. If the Tribunal decided it was appropriate to add interest, that would be within my understanding of their power to do so. The reason it's in Article 1110 and not the other ones is that
it is a component of that article, whereas it's not in the other two.

Q. Would it be acceptable for them to rely on the commercially reasonable rate schedule and information you put in your Report with respect to the other heads as well, if they so decided?

A. If the Tribunal so decided, I think it would be appropriate, yes.

Q. All right. Now, you say that you have calculated your values on a but-for model of causation. You explained already a little bit what that means already. I want to focus on one point that Canada has particularly raised about your Report.

You calculated damages on the basis that the Regime did not apply to Merrill & Ring but that it continues to apply to others. Now, why did you do this, sir?

A. That really is not the correct characterization of what I have done. We have not taken an assumption that the Regime is not going to apply to Merrill & Ring. It's not a case where the
Tribunal has the ability to strike down at least
against Merrill & Ring the Regime. The Regime has
existed in the past. The Regime is going to exist
into the future, to my understanding in any event.

And what we have done is simply determine
if there is a breach of these Articles of NAFTA, as
has been alleged, what the damages would be that the
Tribunal could award as compensation for the damage
done to Merrill & Ring.

Q. Just to make sure I understand you, and I'm
going to do this from memory of the NAFTA, I think
what you're suggesting is that under Article 1135 of
the NAFTA the Tribunal doesn't have the authority to
strike down laws. It only has the authority to
award monetary compensation. Is that a way of
summarizing what you're saying here?

A. Yes, I think that's absolutely right.

In fact, the expressions of surprise on the
part of Canada's experts kind of came as a surprise
to me, but the but-for type of analysis, I think, is
not only recognized from judicial decisions that
I've read, but is a very common and normal type of
Q. Okay. I'm going to turn to just a slightly different set of issues. I would like to turn to the issue of Georgia Basins.

Now, Mr. Schaaf gave some testimony at the beginning of our hearing about the transfer of the real property, of certain properties--these are the Squamish and Menzies Bay properties that were held by Merrill & Ring Forestry L.P. over to another company called Georgia Basins. If you recall, they transferred the real estate but they retained the Forest Tenure for a period of time, and they transferred the property to, I believe he said, the next generation or other generations of Merrill & Ring descendants into this company.

I wonder if you could explain to me something about the calculation of damages from these two properties--that's Menzies Bay and Squamish. First, let's look at the period before December of--maybe December 31, whatever the date December 2006, let's start there and work our way along.
A. It's my understanding that although these properties had been sold to Georgia Basin, Merrill & Ring had, in fact, retained the forestry rights for a period of time that effectively expired at the beginning of 2007.

And absent the Regime, Merrill & Ring and Mr. Ruffle are of the opinion that volume of logs would have been harvested from those properties prior to that time, and that's a component of the retrospective past harvest, that volume would have been taken on a but-for type of assumption absent the Regime from the Georgia Basin properties before the expiry of the forestry license or ability.

Q. Could you then explain to the Tribunal the calculation of damages applicable to logs from these same two properties after December 31, 2006.

A. There is in the calculations here no damage attributable to any forest products off the Georgia Basin properties after the December 1, 2007. The only impact is in the retrospective past harvest; and, indeed, is separately identified.

Q. Excuse me, just for the transcript I was
looking at and your answer, I was asking you about December 31, 2006, and I see in the record you used the date 2007. Which is it? Whatever answer it is it is, but I just want to make sure that you ought to answer my question or I understand what you're saying.

Is it December 31, 2006, or are you referring to another date in 2007?

A. If I referred to 2007, my apologies. I would have--what I was trying to get at was January 1, 2007, so the same temporal date, the end of 2006.

Q. I understand.

And why is there no damage to Merrill & Ring Forestry L.P. after that date at the end of 2006 from these particular properties?

A. From these properties, the right to harvest on those properties ceased at that date.

Q. So, it's not theirs anymore?

A. It's not theirs anymore.

Q. Okay. Let's turn to something else. I think I understand this now.

Mr. Bowie states that 32 percent of the
Can I take you to Table 3 of your Report on Page 27. And we can see from the table that this is a summary of actual Past Losses by Actual and Target Market.

Can you explain the basis for Mr. Bowie's claim.

A. Yes, I certainly can.

And Mr. Bowie's comment in this regard is, in fact, correct. If I could start by explaining this chart and then get into these percentages.

Down the left-hand side of this chart, we have pairs of destinations, if you will. The very first one is Canada-U.S. The first destination there, Canada, is, in fact, the market in which the raft was actually sold.

The second geographic destination in the first line being the U.S. is the target market, so where this particular raft for all intents and purposes should have gone absent the Regime.
The second line on the left, Canada/Asia, is again where the raft was actually sold in Canada but was intended by sort to have an Asia destination. If I then proceed all the way across to the second column from the right, that is the sum from each of the years on the schedule for the Lost Export Premium—

Q. Excuse me, you mean the column entitled "Total"?

A. Yes, the column entitled "Total." --is the Lost Export Premium relevant to each of those circumstances.

So, for the first line, Canada being the actual where the product--where the raft was sold, should have been sold in the United States. The total damages in our Past Loss, actual not retrospective, just the Past Loss of what was actually sold, is 1,637,000, I think that is.

Q. My eyes might be better than yours.

A. A million-six.

And if I take those top two lines being the
million-six and million-222 together, that
represents 68 percent of the total of $4,201,000.
The portion that Mr. Bowie is referring to
in his Report of where we're claiming that Merrill &
Ring incurred damages on rafts it did, indeed,
export are the four lines that followed after the
first two.
So, on the left-hand column, the third line
down is Asia/Asia. So, what that description says,
from all this analysis of all the rafts, is that
those raft, indeed, were sold into the Asian market,
should have been sold into the Asian market, but
there were damages. There were Lost Export Premiums
relative to those.
And then the same for the other three where
it was actually sold into the U.S., should have been
into Asia, actual U.S.--target market was U.S., and
the last one actual market Asia should have been in
the U.S. All of these pairings came out of this
target market analysis versus actual.
If you sum those last four items under
total below the first two columns, the first two
lines starting at a million dollars and running down to $10,000, they sum to the 32 percent that Mr. Bowie referred to of the $4.2 million Past Loss.

So, Merrill & Ring was able to sell those into an export market, sometimes even the correct export market-based on sort, but with not a complete realization of the Export Premium that was expected.

If I could refer the Tribunal to the last column on the right, it says "weighted average per meter cubed--cubic meter, sorry, the first two being where Merrill & Ring was not permitted to export to the target export market. The average loss per cubic meter is between, call it, 20 and $33 per cubic meter.

The following four categories where Merrill & Ring was allowed to export reflect a significantly lower loss per cubic meter. So, rather than in the first two lines being prevented from exporting, the Regime for the next four lines has caused some realization to be less than the expected realization of the Log Sale Agreement that was appropriate.

And why does that happen? It happens
because the cut-and-sort obligation pursuant to the Regime prevents the raft from being cut to the customer's specifications, and therefore they're not perhaps going to pay the best price that they would pay if it was cut to suit. So, we are having a case here where there is suboptimization of what's being delivered to the customer.

Secondly, if Merrill & Ring can enter into a supply agreement for a period of time even three months, there is an ability to, with security of supply, have a slightly higher payment by the customer under that contract, and that has been missed here on these rafts because we've had no security of supply because of the Regime.

And then lastly, the delay from the Regime because of the time period involved from cutting to delivery to a customer is so long there is damage that occurs that wouldn't occur absent the Regime situation. The damage is from sun, it's from water, it's from teredos, et cetera. And the customer will discount what might have been an agreed price on that basis.
The concept here is these Log Sale Agreements had a price, and some of them were for three months, and they're for a sort, HK, whatever the sort is, and there is a price for that sort on either a cubic meter or board foot basis, and these customers on that basis are prepared to commit to that price without inspecting the logs because they're not going to be delivered for some period of time.

So, the customer is prepared to deliver to a Merrill & Ring sort based on its description; and, when that arrives, they are going to make sure they fit into that sort category, but they are prepared to commit to a price in advance based on the Merrill & Ring sort.

Mr. Bowie has criticized your assessment of the volume of logs that would attract incremental costs. Could you comment on that and explain this issue to the Tribunal, Mr. Low.

Yes, I can.

This is one of the main differences between Mr. Bowie and myself with respect to incremental
costs due to the Regime.

Mr. Bowie, relative to the amount of volume that I think has been affected by the Regime, has come up with a lower volume, and I can describe it pretty simply. Mr. Bowie's volume is made up of logs that were exported and logs that were not given an Export Permit, not given an export letter, an authorization letter. So, they were deemed not surplus.

Those are the two categories that he has included and said these are the logs that are impacted by the costs of the Regime, and the nature of those costs are set out in the Report.

But there is a third category of log that is impacted by these costs, and the third category are what has been termed here as "ransomed logs."

So, they are logs that entered into the system, the export market system, and they have been advertised--sorry, they have been cut and sort according to the Regime requirements, the normal B.C. standard. They have been rafted from remote locations. They have been put on the advertising,
two-week advertising. Maybe there has been an offer, maybe there hasn't, but rather than proceeding to the end of the system at that point, they have been ransomed, traded off so that other logs could get exported. But they started into the system, and starting into the system and getting to the advertising point is where you realized all of these incremental costs.

So, there are two sources for the data that we used to determine this incremental amount of logs or rafts that were affected. One was the raft sheet itself, this lengthy analysis of all the rafts that were sold by Merrill & Ring during this time period, and there was a column on that analysis that indicated a ransom status for the rafts.

And there is another test, and the other test, in fact, can be derived from Mr. Bowie's Report, and that is that there is an analysis in his Report of all of the rafts that were advertised by Merrill & Ring. Well, if they were advertised, they were in the system. They were subject to the Regime; otherwise, they wouldn't have been
And if I look at his analysis which I think came from Ms. Korecky of the numbers, the number of rafts that were advertised, in fact, agree to the number of rafts that are included in my analysis of damages related to incremental costs. And, therefore, I think they entered the system, they were advertised, they've incurred losses, and it comes under the three categories of what happened to the logs.

Q. There is yet another significant issue that was identified by Mr. Bowie. He's identified two areas of the Regime, and I just put it up on the screen here. Two areas of the Regime that there would be additional delays as a result of compliance with the Log Export Control Regime.

A. Yes.

Q. Do you agree that these two areas would be the only areas where there would be additional delay caused by the Regime?

A. No, I don't. The two areas that were
identified, and from Mr. Bowie's Report were
identified based on discussions he had with—or the
Affidavit of Ms. Korecky are solely the period from
the beginning of the advertising biweekly period,
two weeks, plus the time thereafter to receive the
Surplus Letter, whether it's positive or negative.
So, 21 days there, approximately 14 days of
advertising, seven days to receive the letter was
the time frame given to him; and then, plus, an
eight-day time period to obtain the Export Permit
once it was applied for.
So, Mr. Bowie in his Report identified 29
days, and we have the reference there from his
Report as to where that was, that he rounded up, and
he used a delay period of 35 days, I think being
20 percent more than 29, but those were the only
components that he identified.
My Report, which was issued before
Mr. Bowie's, indicated that our opinion was that the
delay due to the Regime was, in fact, 60 days.
Q. Now, Mr. Low, I understand that you've
actually prepared a more detailed analysis
15:49:19 1 specifically responding to Mr. Bowie, and that we
2 can either discuss it individually--don't put it up
3 yet please--but I would rather use this
4 demonstration aid and have the numbers. It's much
5 easier than taking somebody through. It makes a
6 terrible transcript for all the numbers, so I would
7 like to distribute that right now. We will give it
8 to Canada first. We could give it a number, and
9 then we will give it to the Tribunal and to the
10 witness.
11 And I would just like you to explain the
12 differences between your approach and Mr. Bowie's
13 approach, to highlight it and make it as simple,
14 please, as possible so we could understand it. We
15 will distribute it over to the Tribunal.
16 (Pause.)
17 MR. APPLETON: While we have this document
18 here, let's take a short break and resume.
19 Ten minutes, Mr. President? Excellent,
20 thank you.
21 (Brief recess.)
22 PRESIDENT ORREGO VICUÑA: Fine. We are
We have an hour and 20 minutes, if you can figure that out as to organize yourselves.

MR. APPLETON: Just before we go back on the record, that last item needs to be given an exhibit number, and so I've asked the Secretary if she will give that.

I believe the next number is Exhibit 3, if I'm correct. That's the number, so this should be Exhibit 3?

SECRETARY OBADIA: Exhibit 3.

MR. APPLETON: That way we could refer to it in the record and make a nice, clean record for everyone.

So, do we need to mark that on the record, or can we just assume it is now marked? Let's assume it's marked and I can proceed, yes? Okay.

BY MR. APPLETON:

Q. So, we will just start again from here.

Mr. Low, before the break, you were about to explain the demonstration aid discussing your views about the issue of delay attributable to the
Log Export Control Regime Procedures. We had set out Mr. Bowie's points and you had commented on it, and we then took our break. I hope that situates from where we are. Would you comment, then, Mr. Low, on your views with respect to the time.

A. Yes.

As is indicated on what is now Exhibit 3, in the bottom right-hand corner, you can see the reference to 60 days of delay; that was the view that was expressed in my Report. And we had gone through this analysis and had looked at not only the time periods that were identified by Mr. Bowie and Ms. Korecky, but the other impacts of the Regime on the process of starting from cutting the tree right to delivery of the customer.

The difference, if you will, there are three columns "Per Deloitte" here, is what the typical time is with the "Procedures in Place," the next column is "Absent the Procedures," with then the third column on the right-hand side being the "Difference Due to the Procedures."

And the analogy that we are drawing is,
rather than being subject to the Procedures, that Merrill & Ring in Canada would operate in a similar fashion to its Washington operations where the customer, in fact, goes to the property, selects the trees or views the trees, and then they cut to suit and do all of that sort according to the customer's requirements.

And then this series of delays occur, for instance, in the very first line of harvest, buck, sort, scale and accumulate volume, it takes time to accumulate the volume in order to ship from these more northerly remote areas according to the sorts that the Government mandates and the way the rafts must be accumulated. That would be more efficient under a non-Regime, so that's, for instance, where the first seven days comes from. And we went through that analysis right from the beginning to end and determined that, in fact, there seemed to be a 67-day delay period due to the Regime when one considered all of the factors which we rounded down to two months or 60 days.

Q. Okay. I think that's very clear. It makes
it much easier to have it on a piece of paper.

Mr. Low, Mr. Jendro in his Report says that you used quarterly exchange rates to determine the Best Market Prices that caused a portion of the price difference claimed as a shortfall. Do you agree with his assessment?

A. No, I don't.

One of the things in Mr. Jendro's Report is he, to my reading of it, perhaps finds an error, which he did find an error in one of the quarters, and then makes an attribution of that error to the Report but never really--and says, "Oh, it's contributing to a systemic error," but doesn't quantify it.

So, with his objection to this use of quarterly foreign exchange rates to do the determination of the Target Market Prices, what I did was go back and re-do the analysis using Monthly Exchange Rates. And when I did that over the rafts that are component of the loss or contribute to the loss, the impact was .16 of 1 percent of the accumulated premiums. It was an extraordinarily
small amount.

So, the impact of his criticism of Quarterly Exchange Rates, in fact, was unfounded, that in the end the Quarterly Exchange Rates were a good proxy for Monthly Exchange Rates.

Q. Let's continue to focus on some things with Mr. Jendro's Report for just a couple of minutes. Mr. Jendro has criticized your Report, saying that you did not use complete scaling information. Can you comment to the Tribunal on that characterization, sir.

A. Yes, I can.

There's a component here where the Canadian market uses a cubic meter scale. The foreign or export markets use a scribner scale or a thousand board feet. So, some of our data on the Log Sale Agreements--target market is in scribner or thousand board feet--some of it has been converted along the way and is shown in cubic meters.

And where rafts under the actual sale were process, were part of the logs the Log Export Regime, they had to be dual-scaled, so we had actual
data with respect to a raft that was subject to the
Regime in both cubic meters, as required under the
Regime, and scribner, as required by a customer.

What Mr. Jendro said again was that he believed we had a systemic error where the conversion rate that we used, which was based on a long-term average, years of data, of conversions between metric and scribner that had been accumulated, we had converted these into then Canadian prices so we could determine the Canadian dollar loss in cubic meters, and he thought we had a systemic error because of these conversion factors that he determined were too low.

In fact, it's a broader problem than that, that Mr. Jendro believes that sorts don't adequately reflect criteria of how it then ties to prices of various rafts. His principal argument is it is a diameter argument where he thinks all the diameters are messed up and the rafts actually result in—that are used for target markets are larger and therefore they're generating higher prices. What Mr. Jendro has failed to understand and has been discussed by
Mr. Schaaf and Mr. Stutesman and Mr. Kurucz are that the Merrill & Ring sorts are far more particular, far more encompassing than are the Canadian standard sorts, for example. And as I'd indicated before, customers, based on a sort, are, in fact, prepared to commit to a price in advance, based on that sort description. And not having appreciated that, and certainly the comments written in his Report, I think he's misunderstood why we didn't have to do a scale. He thinks every single raft should be dual-scaled and the comparator should be scaled, and that information just wasn't available. So, we used these long-term averages. What I did with his criticism was I took all of the rafts that had dual-scale data and had thousand-board-feet prices for the Target Market Prices, re-did the analysis using then actual conversions on these actual rafts. And they accounted for approximately 30 percent of the total damages of $4.2 million. So, a significant test. What I found when I re-did the calculations
based on the exact conversion rates between scribner and board feet was that, in fact, the damages on that 30 percent went up by 3 percent. They didn't go down. We didn't have systemic error. The long-term average was a good proxy for doing exact raft calculations.

Q. While we are on this issue of scaling,

Mr. Low, Canada has stated that you made an error by assuming that metric scaling was not required--sorry, that--well, yeah, that metric scaling was not required by the Province of British Columbia. Do you agree with that?

A. I think--

Q. Do you want me to repeat the question? I will do it.

A. No. I think I know where you're going, but I don't think it's stated quite right.

Q. All right. Canada says that you made a mistake because you seemed to have assumed that there was no requirement to engage in metric scaling in British Columbia; and, therefore, you have sought some damages with respect to the costs of dual
scaling between scribner and metric for export rafts. Is that any clearer?

A. Yes, yes, it is.

Q. Okay. So, can you tell me--can you comment for the Tribunal as to whether or not that is an accurate criticism?

A. Yes, I can.

And I don't agree with Canada's experts in this regard. Dual scaling results because the Regime requires metric scaling. The export customers for these target markets aren't interested in metric. They deal in scribner or thousands of board feet. And, accordingly, for every raft that Merrill & Ring wants to export, they have to incur a cost of scaling in both: one for the Government, one for their customers.

The Government's experts have suggested that dual scaling or metric scaling is required for other reasons; and, therefore, this dual scaling is not solely a cost attributable to the Regime, and have made reference to property tax in British Columbia requiring a scaling measure.
In fact, the Forest Act in British Columbia contains a clause where a company, an owner, of forest properties can apply for an exemption from metric scaling. That exemption can be given. And because the Province and, indeed, the Federal Government is revenue-neutral on that, there isn't a tax related to that metric measure, they shouldn't particularly care about the metric measure.

So, the provision could be granted. The property tax, in fact, can be done, since we are going to scale in board feet, board feet with a conversion back to metric if that's what they want. And, accordingly, I still believe that dual scaling is a cost to Merrill & Ring that's solely a result of the Regime. And Merrill & Ring or, to my knowledge, other forestry companies haven't applied for this exemption because they're required under the Act to scale, in any event.

Q. You mean under "the Act," you mean the Log Expert Control Regime?

A. That's correct.

Q. Notice 102, all the other things we have
16:27:18 1 been talking about?
   2 A.  Right.
   3 Q.  Okay. I just wanted to be sure we are all
   4 clear.
   5 Now, early this afternoon you discussed the
   6 Negative Export Premium. Do you remember that
   7 discussion?
   8 A.  Yes, I do.
   9 Q.  In that context, I asked you some questions
  10 with respect to Mr. Bowie's observations of your
  11 Report, and Mr. Jendro's section, and Mr. Jendro
  12 also comments about that. He says that the Negative
  13 Export Premium should be eliminated; that is,
  14 eliminated from your calculation of damages. Can
  15 you comment on Mr. Jendro's comments and give some
  16 context to this for the Tribunal.
  17 A.  Yes, I can.
  18 Mr. Jendro goes through an analysis of the
  19 amount of negative premium that he believes should
  20 be offset against our conclusions, in addition to a
  21 number of other criticisms, many of which I have now
  22 talked about.
He quantifies an amount that should be deducted of approximately $600,000 of Negative Premium. His calculation was, in fact, based on an analysis of quarter time periods, so three-month time periods during this analysis in the four years that we have looked at.

And the negatives where negatives and positives occur within that four month by sort, so within a sort there is both the negative and a positive, he's accumulated and said those should be deducted from our conclusion, that that's a systemic thing of you're going to get positives and negatives in the market.

So, in addition to all of the comments I made before, that because of the Log Sale Agreement and the specific value being ascribed to the target market, I went back and looked at his calculation and said, "Quarters aren't really relevant. You should do the analysis on a monthly basis if you're going to do it," which would then be consistent with his foreign exchange criticism and other comments. And if you do this analysis of offsetting the
positive export premiums with the Negative Export

Premiums, but looking at it monthly by sort, in
fact, the amount of negative that should be deducted
on that theory drops to $228,000. And out of a
calculation of some-odd $12 million of Lost Export
Premium, 228,000 is certainly not hugely significant
if it were to be deducted. I just don't think it's
appropriate to deduct it in any event.

Q. Mr. Low, you will be thankful to know this
is my last question about Mr. Jendro's Report, not
my last question.

Mr. Jendro quotes a report prepared for the
Government of British Columbia which says that the
value of logs exported to the United States is
higher than the value of logs sold on the domestic,
I guess, B.C. market because of quality variance and
not because of the operation of the Log Expert
Control Regime. Mr. Reishus also refers to the same
quotation from that same Report.

Do you have any comments?

A. Yes, I do.

In part, I concur with the comment,
if--particularly with all of the information we've heard over the last two days about what happens in British Columbia and the nature of the wood product that is retained--in fact, in some cases where that product is more suited to British Columbia than it is to be exported--such that, in our analysis of actual market and target market, we would refer to that as Canada/Canada, should be here.

If you look at what gets exported and what gets retained, the lower value log material on average they use in Canada. From Mr. Rowley's discussion of the buck versus the middle and the top part of the tree, the pulp part lower value stays in Canada. There is a market for it here.

So, the comment that the average value that's being exported is higher than the average value that's staying in British Columbia is absolutely reasonable and rational. What we are trying to come to is not this difference in quality but taking a raft that has a stated quality and saying what does that raft fetch in the Canadian market versus an export market?
And, in fact, the same report—in the same area of the report that that quote came from refers to actual reasons why an export premium would exist. And in this case there is at least three of the reasons that are cited there that I think are relevant. One is that the difference in transportation costs can cause a difference in price. Well, what we have done in our analysis is take that into account. If you recall, I said we made a transportation adjustment. If a raft was sold in Canada, should have been sold in Washington, we've deducted that extra transportation cost from the Washington price to get it there.

There are two other reasons that come out of this Report. One is Government intervention, and in this case we know that there is an export tariff on lumber. And these mills in Canada are producing lumber that fetches a world price. So, if the United States producers are not paying that, the Canadian producer gets the same price in the world market but has to pay in this case a 15 percent duty. Their net revenue is 15 percent lower than an
equivalent U.S. mill. The Canadian mills have to have a return on their investment, have to try to make money. They're going to try to get that out of somewhere. They're going to try to get it out of their log purchases.

Secondly, as we've heard in this hearing, the Canadian mills have become somewhat antiquated relative to export mills, and certainly the labor costs in British Columbia are significantly higher than the labor costs in Washington. And those factors again contribute to the fact that the Canadian mills can accord to pay less than can the export markets.

So, the export differential--the export premium is, in fact, being economically driven, isn't necessarily being created by the Regime, the Log Export Regime. But what the Regime does is cause Merrill & Ring to have an inability to access that market. It prevents--if you go back to the slide that we were showing before where it's Canada actual U.S. target, Merrill & Ring has been prevented from exporting those logs and realizing
that premium. So, it's a case where the Regime has prevented access to an export market. The Regime contributes to Lost Export Premium in other ways due to delays, cut and sort, those things, but there is a significant component of it that is simply causing an inability to access the export market.

Q. Mr. Low, aren't there any changes or corrections that you would like to make to your Report?

A. Yes, there is.

Q. I understand that you've prepared another demonstration aid on this. Would you distribute this to Mr. Low and to the others. We will need to do it to the other side first. I will put it on the screen for Mr. Low. Put it on the screen, please. And could you explain what this is. And I'm going to ask this be marked as Exhibit Number 4, these.

A. Yes, I can explain what this is.

The demonstration aid that's up on the screen, the top half of Damages Summary, Low Report, Executive Summary, Page 4, is a reference to the
first four pages of my Report, which is a summary letter. And on the fourth page is the top half of this page and the conclusions that we reached for each Article: 1102, 1105, 1106 and 1110. These are the amounts that agreed to the Bowie analysis that was up on the screen before.

In Mr. Bowie's Report, one of his criticisms was that in coming to the cost attributable to the Regime with respect to boom materials and log inventory cost, so we are now talking about carrying costs of having boom materials tied up for months around rafts of logs, and at any point in time the amount of inventory that has to be carried relative to the longer holding period for export control-affected rafts than domestic rafts, we had calculated that against the entire inventory amounts. Mr. Bowie in his Report correctly pointed out that the Canadian portion of those inventories that Canada actual, Canada target market, legitimate Canadian inventory and boom materials aren't affected by the Regime, and that we had
What I have done on this in the bottom half is indicate the change to my conclusions based on a revision to take out the Canadian inventory portion of holding costs relative to boom materials and inventory. And the amount is approximately $103,000 for Article 1102--looks like 103-and-a-half--and 1105 and 1106, and the amount for 1110 is approximately 18682 now becomes 18555 is $127,000, which is a higher amount due to the interest factor being applied. So, the 18 million is higher than 16. The adjustment relative to these amounts is higher, so $127,000 instead of 103.

And the bottom half of this page labeled "Revised" is, indeed, the revised conclusions that should be taken from my Report.

Q. Do these corrections affect your conclusions generally in your Report, Mr. Low?
A. No, they simply affect this one item.

Q. Okay. Thank you very much, Mr. Low.

Counsel for Canada may have some questions for you now.
Mr. Appleton.

Who will conduct the cross-examination?

MR. LITTLE: Good afternoon, Mr. President.

My name is Scott Little.

PRESIDENT ORREGO VICUÑA: Thank you.

CROSS-EXAMINATION

BY MR. LITTLE:

Q. Good afternoon, Mr. Low.

A. Good afternoon.

Q. I am going to be asking you some questions on your damage assessment today, and in particular the damages claim based on Merrill & Ring's raft analysis. And when I'm finished, my colleague, Mr. Watchmaker, will have some questions for you regarding the damages claim based on the cost of compliance with the Regime.

So, Mr. Low, you prepared an Expert Witness Report in these proceedings; correct?

A. Yes, I did.

Q. All right. And we've heard a lot of new evidence in your testimony this afternoon. I want
And I want to, first of all, just confirm the materials that you based your Report upon, and I believe that's set out at Page 46 of your Report, Section 9.

A. Yes, that's correct.

Q. Okay. Let's briefly go over the approach to calculation of damages in the case. You've provided some testimony on that this afternoon. Could you please turn to Tab 1 of the Core Bundle of the documents, please, that you have just been provided.

A. Yes, I have it.

Q. Can you identify this letter, please.

A. Yes. This is the first four-page letter that precedes the detail of my Report.

Q. All right. And could you turn to Page 3, please.

A. Yes, I have it.

Q. Okay. At the bottom of Page 3, you've provided a chart setting out the categories and the amounts of damages calculated under NAFTA's
16:43:43 1 Article 1102 and 1105; correct?
   A. Yes.
2 Q. And the chart is broken out into three
   categories; correct?
   A. Yes, it is.
3 Q. And those are Past Losses, Costs of the
   Procedures, and Future Losses; correct?
   A. Yes.
4 Q. And there is a corresponding amount
   pertaining to each category of cost?
   A. Yes, there is.
5 Q. And as you've highlighted and just amended
   slightly, the total amount for these three
   categories of loss at the time of this letter, sir,
   was $16,804,068; is that correct?
   A. That is correct.
7 Q. Okay. And these are the damages being
8 claimed under Articles 1102 and 1105; correct?
   A. Yes.
9 Q. So, they're identical?
   A. They are.
10 Q. Okay. Looking back to Page 3, the Past
Losses, the claim for Past Losses is 9.1 million?

A. Yes.

Q. All right. You said in testimony earlier today that the Past Loss Period runs from December 27, 2006, when the claim was filed, until the end of 2008, until the time that your Report was prepared; is that correct?

A. Yes.

Q. Okay. I just want to clarify this because at the top of Page 4 you do state that Past Losses relate to the Lost Export Premiums on rafts sold and logs that could have been sold between November 2003 and December 2008, so I just want to be clear.

A. I'm sorry, that was an error on my part when I spoke this morning.

Q. Okay.

A. The Past Loss Period runs from three years before December 2006.

Q. Okay. Thank you.

Now, looking back on the chart on Page 3, there is also a claim for the Cost of Procedures; correct?
A. Yes, there is.

Q. In the amount of 4.7 million?

A. That's correct.

Q. All right. And moving back to the top of Page 4, you say that "Costs of Procedures are for additional costs incurred, and to be incurred, by Merrill & Ring to comply with the Procedures."

Correct?

A. Yes.

Q. And that's for the period 2003 to 2016?

A. That's also correct.

Q. Okay. And then looking back at the chart, there is a claim for Future Losses in the amount of 2.97 million; correct?

A. Yes.

Q. And you provide a description for those at the top of Page 4, as well. The Future Losses relate to the Lost Export Premiums anticipated to arise between 2009 and 2016; is that accurate?

A. Yes, it is.

Q. Okay. So, is it fair to say there is really two elements, then, of the damages claim?
First of all, the claim for Lost Export Premiums,

and second of all the claim for costs to comply with

the Procedures? Is that a fair assessment?

A. It could be characterized that way, yes.

Q. Okay. Can we turn to Page 7 of your Expert

Report.

A. Yes.

Q. Okay. Now, starting at Paragraph 1.34, you

explained the basis on which you calculate damages

under each NAFTA Article; correct?

A. Yes.

Q. And at Paragraph 1.37, we've got under

Article 1102 national treatment. You set out the

reasons for why the Procedures contravene

Article 1102?

A. Yes.

Q. And I note that the heading for

Paragraph 1.37, for example, you state that Merrill

& Ring is subject to different rules than other

timber companies.

A. Yes.

Q. Okay. And you provide a list of six
16:47:52 1 elements of the Regime that Merrill & Ring claims
2 contravene Article 1102--correct?--in
3 Paragraph 1.37.
4   A. Yes.
5   Q. And then turning the page over to
6 Paragraph 1.38, here you state that "the losses
7 related to the breach of Article 1102 include," and
8 then you go through a list of losses: One, the Lost
9 Export Premiums.
10   Do you see that?
11   A. Yes.
12   Q. Okay. Secondly, the costs incurred due to
13 the procedures on federally and provincially
14 regulated timber; correct?
15   A. Yes.
16   Q. Third, the costs incurred to comply with
17 the Procedures regarding timber harvested in remote
18 Coastal areas?
19   A. Yes.
20   Q. And, finally, the fee-in-lieu paid on
21 export sales of provincially regulated logs; right?
22   A. That's correct.
Q. Okay. Now we've got Article 1105, and in Paragraph 4.41 you set out the reasons why the Procedures breached this Article; correct?

A. That's correct.

Q. And these reasons are identical to the ones provided under Article 1102?

A. They are, yes. They're stated the same way.

Q. Okay. And if you look at Paragraph 1.42, you state that "the losses related to Article 1105 include," and it's the exact same four elements that were listed under Article 1102; correct?

A. That is correct.

Q. Okay. And we confirmed that the damages claim for Article 1102 are identical to those for Article 1105 breaches; right?

A. That's correct.

Q. Okay. Let's move on to Article 1106. In Paragraph 1.45, you set out the reasons for why the Procedures contravene Article 1106; correct?

A. Yes.

Q. And these reasons aren't identical to the
reasons provided for why the Procedures contravene Articles 1102 or 1105, are they?
A. No, they're not.
Q. Okay. One of reasons, for example, provided for why the Procedures contravene 1102 or 1105 that isn't provided under Article 1106 is the requirement to be subject to Surplus Testing prior to being granted an exemption to export?
A. That's correct.
Q. Would you agree?
A. Yes.
Q. Okay. But at the bottom of page--that paragraph, sorry, Paragraph 1.46, you state that "We have considered the loss related to Article 1106 to be equal to the loss calculated pursuant to Article 1105 less the fee-in-lieu of payments that are not considered attributable to performance requirements."
So, to be clear, the amount claimed under Article 1106 is basically just the same as the amount claimed under Article 1102 or 1105 with just the fee-in-lieu payment backed out of it; is that
A. That is correct.
Q. And that's about $48,000, I calculated.
A. Yes, that's correct.
Q. Okay. So, this means that the amount claimed under Article 1106 for the breach of prohibited performance requirements includes the entire claim for Past Losses based on the Lost Export Premium claim; is that right?
A. Yes, that's correct.
Q. Okay. And the Article 1106 claim is also made up of Merrill & Ring's claims for costs of compliance, as well. For example, you're familiar with the cost of sales commissions paid to the affiliated party of Merrill & Ring?
A. Yes.
Q. Okay. And it's your position that that's—that's properly included in the quantum of the Article 1106 claim?
A. Yes.
Q. Okay. Can you tell me, is it Merrill & Ring's position that all of the other costs of
compliance included in the claims under Articles 1105 and 1102—I accept the exception of the fee-in-lieu—are properly included in the claim under Article 1106?

A. Just give me a moment, please.

Q. Okay.

(Witness reviews document.)

A. Yes.

Q. That all the other costs of compliance are properly included in the Article 1106 claim?

A. Yes.

Q. Okay. All right. We will just complete the framework.

In your witness Report at Paragraph 1.48, you set out the basis for the expropriation claim, and again the claim for lost export premiums forms part of the amount claimed for breach of Article 1110?

A. Yes.

Q. And the claim for the breach of Article 1110 also concludes a claim for all of the costs of compliance; right?
A. That's correct.

Q. And you also explained earlier today it includes an amount for interest calculated from the date of expropriation?

A. Yes.

Q. Okay. All right. I want to turn to Merrill & Ring's calculation of its claim for Lost Export Premiums.

If you could, turn to Page 35, please, of your Expert Witness Report.

A. Yes, I have it.

Q. All right. Paragraph 4.65, you state that—you state your understanding that there is a general recognition in the B.C. forestry industry that premiums for exported logs relative to B.C. domestic prices have and continue to exist for like-quality logs, and that these premiums exist due to the Procedures.

And you also state here that your view was confirmed through discussions that you had with Messrs. Norm Schaaf, Paul Stutesman of Merrill & Ring, and with Mr. Doug Ruffle; correct?
A. Yes, that's correct.

Q. So, you have a belief of a general recognition there exists an export premium, and you've confirmed this understanding through conversations with Mr. Schaaf, Mr. Stutesman, and Mr. Ruffle, and also you mentioned some other people that you have spoken with this week and people from your office, I believe, as well; correct?

A. That is correct.

Q. Okay. And these discussions confirmed your view that there is premiums for exported logs relative to B.C. domestic prices; correct?

A. Yes.

Q. Okay. And that the premiums exist due to the Procedures?

A. As I indicated, the premiums--the lost premiums, in part, are a direct result of the Procedures, and the premiums are also attributable to the Procedures by virtue of prohibiting or not allowing Merrill & Ring to access the premiums by forcing them to sell in the Canadian market.

Q. Okay. Can you turn to Page 14 of your
Report, Mr. Low. And I'm looking--

A. I have it.

Q. I'm looking at Paragraph 2.19.

Now, here you list the reasons why there

are premiums for logs exported from B.C.; right?

A. Yes.

Q. Okay.

A. Well, it's the reasons that the Market

Price is greater or on export than domestic, yes.

Q. Okay. And that "greaterness," if I could

create a word, is the Lost Export Premium; correct?

A. Yes.

Q. Let's look at one of the reasons. You

state in Paragraph C that the Procedures create

ambiguity in the ability to export rafts, thus

precluding Merrill & Ring from entering into

long-term contracts that would command a premium due

to their ability to pride certainty over supply.

So, did you make that determination, or

were you told it by Merrill & Ring?

A. I had discussions with representatives of

Merrill & Ring with respect to that item and
satisfied myself that that was correct.

Q. And Paragraph 2.19(g), you state, "The
delays caused by the Procedures can result in damage
to the rafts that cause Merrill & Ring to give
discounts to customers to compensate for sun damage,
water damage, loss or teredo damage."

Again, did you make that determination, or
were you told it by Merrill & Ring?

A. Again, I had discussions with Merrill &
Ring, with Mr. Ruffle, who was engaged as an
independent expert, and I have some knowledge of
that from other work that I've done that that
happens.

Q. Okay. Were you provided with documentary
evidence or anything of discounts arising from loss
or damage to logs that were sitting there for too
long?

A. There is evidence of discounts in some of
the Canadian invoices that can be attributed to
quality issues due to damage and other items, yes.

Q. Okay. All right. Let's look at the
quantification of Lost Export Premiums.
Now, just to get a general understanding of your approach, you explained it some today but I want to explore it a little bit further. The claim for Lost Export Premiums is based on what’s called a "raft analysis"; right?

A. That was the underlying document, yes.

Q. Okay. If you could look at Tab 2, please, of the Core Bundle, Mr. Low.

What I have done is I have created, I put together—we were provided the raft analysis in a spreadsheet cut in half. I thought it would be easier to put those two pages together so that it’s as if we are looking at one spreadsheet. I provided the two pages that I have put together in the form that they were provided to us, Mr. Low and Mr. Appleton, at the back of Tab 2, but it will probably be easier to look at this larger legal-sized piece of paper.

A. Yes.

Q. Okay. There is three highlighted rows on this page, and I want to just look at the first of the three that begins with the raft number MRR-7-17.
17:00:12 1 Do you see that?
   2   A. Yes.
   3   Q. Okay. Now, the raft analysis sets out the
   4 actual price at which logs of a given sort which
   5 were subject to the Regime were sold in a given
   6 transaction; correct?
   7   A. That's one of the things that it would set
   8 out is the actual transaction amounts, yes.
   9   Q. Okay. I am going to take you through it,
10 so I will cover the other things that maybe you are
11 wondering about whether I should raise or not.
12 So, for the logs that were subject to the
13 rematch, we will just call those the "subject logs"
14 for ease of reference.
15 Okay. Now, the subject logs in this case
16 are represented here by raft MRR-7-17; correct?
17   A. Those three lines or some other lines as
18 well, but yes.
19   Q. Yeah. And just to be clear, I'm looking at
20 the first of the three highlighted lines for what
21 I'm reviewing with you right now.
22   A. I can see them, yes.
Q. Okay. And the price that was paid for the subject logs under the Regime can be seen under the column that is entitled "C$M3," which is cubic meter; is that right?

A. That's a calculated amount. The price that was paid for the raft is the column to the left of the one you've referred me to that's just "C$," so that's the price.

Q. Right, okay.

A. The column you referred me to is the Canadian dollar per cubic meter amount.

Q. That's derived from that ultimate price?

A. That's correct.

Q. Okay. And if we look at the column entitled "Customer," the customer to which this particular raft was sold was TimberWest; correct?

A. Yeah, that's correct.

Q. Okay. And the raft analysis then compares the price on the domestic sale of subject logs which I believe you introduced earlier today as a Fair Market Price. It compares what you call a Fair Market Price for logs that were, say, exported from
17:02:51 1 the United States to this Subject Log Price;
2 correct?
3     A. I'm sorry, would you restate that?
4     Q. Maybe we could go to your Witness Statement
5 because it's going to make it a little bit easier.
6 If you could turn to--turn to Page 19 of your
7 Witness Statement, sir.
8     A. Yes, I have it.
9     Q. Okay. You've got--at Page 19 there is a
10 paragraph beginning B at the top, and it says "Best
11 Market Price." That's, I believe, what you referred
12 to earlier today as the Fair Market Price, but in
13 your Report you call it the Best Market Price, and
14 you state that "this is the price per cubic meter
15 that Merrill & Ring could have received absent the
16 Procedures. This is based on actual selling prices
17 for logs from U.S. properties achieved by the
18 Merrill & Ring Group in the same month (or quarter
19 for sorts sold less frequently), for the same
20 species and sort."
21     So, that's the price that's compared to
22 your sale price of subject logs; correct?
17:04:09 1    A.    That's correct.
 2    Q.    Okay. And it's the price that Merrill &
 3 Ring contends it could have received absent the
 4 Procedures; correct?
 5    A. That's correct.
 6    Q. Okay. Now, looking back at the raft
 7 analysis, Mr. Low, the Best Market Price in the raft
 8 analysis is provided under the column "Best Market
 9 ADJ," which I assume stands for "adjusted." Would
10 you agree with me?
11    A. I'm sorry, you lost me on that one.
12    Q. The Best Market Price to which the price of
13 the subject logs is compared is included under the
14 heading "Best Market ADJ"?
15    A. That's correct. That has the
16 transportation adjustment part of it.
17    Q. Exactly.
18    A. That's correct. That has the
19    Q. And that price is $91.89; correct?
20    A. That's correct.
21    Q. And that's Canadian dollars per cubic meter
22 price; correct?
22    A. That is correct.
Q. Okay. Now, where the price of subject logs is lower than the comparable Best Market Price, this represents the Lost Export Premium; right?

A. Yes.

Q. Okay. And in the line we are looking at, sir, there is a Lost Export Premium because the Best Market Price of $91.89 is greater than the actual selling price of the subject logs of $55. Would you agree with me?

A. That's correct.

Q. Okay. And this difference can be seen in the column entitled "Difference Per Meter Cubed"; correct?

A. There is an amount per meter cubed, and there is an amount, yes.

Q. Okay. And that's $36.90 differential, I believe, in this case; correct?

A. Yes.

Q. Okay. And that differential is multiplied by the volume of the actual sale of subject logs to arrive at the Lost Export Premium; right?

A. Yes.
Q. Okay. And that can be seen under the second column called "Damages," which is right beside the "difference per meter cubed" column; right?
A. Yes.
Q. Okay. And just to be clear, that's the amount of $15,235 on this particular sale.
A. Yes.
Q. Okay. Now, in this sale, damages were based on a domestic sale of subject logs--right?--to divest TimberWest.
A. The actual sale on this raft was to TimberWest in domestic sale, yes.
Q. I'm sorry, that question wasn't very clear. You've actually clarified it for me. And today that you mention that damages were also calculated--sorry, that they were calculated on domestic sales where Merrill & Ring wasn't permitted to export; right?
A. Effectively, if it was a Canadian sale and the target market was an export market, that's correct.
17:07:31 Q. Okay. But there are instances in which Merrill & Ring chooses to make a sale domestically. Would you agree with me on that?
   A. Yes, there are sorts that are intended to be domestic sorts.
   Q. Okay. So, it's not accurate, I think, to say that Merrill & Ring wasn't permitted to export on all of these sales in which you've calculated damages?
   A. No, that's correct, there are damages related to rafts that were exported--I talked about that earlier--that have lesser amounts of damages due to damage during delay, not being able to sort properly, suboptimal cuts, so not being able to enter into contract, those types of issues.
   Q. All right. I was just referring to your statement that Merrill & Ring wasn't permitted to export, and the point I was asking you to confirm with me was that not in every instance is Merrill & Ring not permitted to export. There are certainly instances in which Merrill & Ring chooses to sell domestically. Would you agree with me on that?
A. I would agree with that, but there's two circumstances here, and maybe I'm being anticipatory, but the whole process to this analysis was that certain sorts are intended for certain markets. That is the normal course of events that in this case I believe these refer would be intended for an Asia market. That is typically where that product would go, and so that was the basis on which it was done.

The--there then can be a couple of reasons why it was sold domestically. One is that a--approval was not given under the surplus testing, and the other is that these particular rafts would have fallen into the "been advertised but subject to blockmail" category where they weren't exported.

Q. Okay. All right. Well, we have got damages being calculated on domestic sales, but the raft analysis also calculates damages on logs from British Columbia that were subject to the Regime and that were sold for export; right? You've confirmed that; correct?

A. That is correct.
Q. Okay. And it does so on the basis of the fact that there exists a higher Best Market Price on an export sale of logs of the same sort from Merrill & Ring's lands in the United States to Asia, for example?

A. That could be, yes, yep.

Q. Okay. The raft analysis basically presumes that the Log Expert Control Regime in B.C. causes damages and loss on export sales of B.C. logs; right?

A. That's correct.

Q. Okay. When parties are negotiating over a sales of goods, would you agree with me that both the buyer and seller have different ideas of what the best price is?

A. They certainly could.

Q. Well, buyer typically wants to pay a lower price than what the seller is offering?

A. Typically, the seller wants the highest price and the purchaser wants the lowest price.

Q. Okay. So, it's fair to say that given factors like differences in the quality of goods...
being sold that it would be unrealistic for a seller
to assume that it can achieve its desired highest
price a hundred percent of the time? Would you
agree with that statement?

A. That would depend upon how you are
characterizing the highest price, and in this
case—and I think it's very important in this
analysis to not use the term "highest price." What
we have done is picked the target market. It was
referred to when Merrill & Ring first prepared these
schedules as the "Best Market," and for my purposes
I tried to change that to "target market" because I
think that's a better description of it. And the
price that was selected was not intended to be the
highest price that was ever sold for that product.
It was intended to be the price in that target
market that was fair and attributable to a contract
that Merrill & Ring could sell into.

Q. Okay. Could you turn to Tab 3, please, of
the Core Bundle, sir. Keep the raft analysis at
hand, though, because we are going to go back to
that. You can turn over the front page. This is
the Witness Statement of Mr. Reishus--his
Supplemental Expert Affidavit, actually--and I'm
looking at Paragraph 13. At the end of the
Paragraph 13, Dr. Reishus states, "Absent unusual
information, it is economically inappropriate for a
seller to assume it would consistently realize an
above-average price in the market, just as it would
be economically inappropriate for a buyer to assume
it consistently could realize a below-average
price."
Would you agree with that statement?
A. From an economic point of view, that's a
pretty fair statement.
Q. Okay.
A. From the point of view of the approach that
has been taken here, I think it's inapplicable.
Q. Okay. Now, the raft analysis you mentioned
was prepared by Merrill & Ring and not by yourself;
correct?
A. The raft analysis was prepared initially by
Merrill & Ring, that's correct.
Q. Okay. Can we turn to Page 13 of your
Report, sir.

In Paragraph 2.16 at the bottom, you state that "We have verified the data contained in the raft analysis against Merrill & Ring and Merrill & Ring Group documents on a test basis and are satisfied as to its accuracy for the purpose of our Report."

Right?

A. Yes.

Q. Okay. Now, while you verify the data contained in the raft analysis, you didn't examine the total population of Log Sale Agreements from which a Best Market Price for a given sort and in a given month was drawn, did you?

A. No, we did not.

Q. Okay. And you didn't verify how the size and quality of the logs chosen for a Best Market Price compared to the size and quality of logs in other Log Sale Agreements from which potential Best Market Prices could have been drawn, did you?

A. Yes, we did.

Q. You--
A. We did that on the basis of the sort categorization that Merrill & Ring uses that is a very defined sort, that while there may be aberrations between one or two sorts over a number of sorts, they will fall into an acceptable category that their customers are prepared to commit to pay for in advance based on the sort.

Q. Based entirely on just the sort--could we refer to it as a sort code?

A. Sort code, yes.

Q. All right. Well, let's turn to Page 37, then, of your Report because you just hit on something I want to review with you.

In Paragraph 5.6, you state: "Using the Market Price methodology as set out herein, all rafts are compared using Merrill & Ring sorts and grades, and the Market Price is provided from a Log Sale Agreement, including rafts of the same or similar species, sort and quality."

And then you say, "After discussion with Mr. Doug Ruffle, a Registered Professional Forester, and Mr. Norm Schaaf, we believe that the grades and
sorts have been adequately matched in this analysis."
Right?
A. That's correct.
Q. Okay. So, I asked you to keep at hand the Tab 2, the raft analysis, if we could just look back at that.
So, I take it that what you mean in Paragraph 5.6 and what you just told me is that the matching of sort codes for the logs representing the Best Market Prices and for the subject logs was sufficient for the exercise carried out in the raft analysis; correct?
A. Sorry, would you--I just need to hear the question again, please.
Q. From what you say in Paragraph 5.6, the matching of sort codes for the logs representing the Best Market Prices and for the subject logs was sufficient for the purposes of the comparative analysis that you have done in the raft analysis.
A. Yes, I believe that to be correct.
Q. Okay. So, looking at the lines we were
reviewing in the raft analysis, the sort code representing the Best Market Price of $91.89 adequately matches up to the sort code representing the subject log sale price of $55; correct?

A. The sort code you're asking me here is adequately matched up to what was sold?

Q. Well, I'm asking if the sorts represented by the sale price of the subject logs and the Best Market Price, I'm asking you to confirm that you are comfortable that they were adequately matched up for the purposes of this analysis.

A. Yes.

Q. I.e., that you were comparing apples to apples.

A. That is my understanding and based on my test, yes.

Q. Okay. But you didn't dig into a sort code and verify how the size and quality mix of logs within a sort code may have compared to one another in this analysis? You based it entirely on the sort codes, is what I'm saying.

A. I based it on the sort codes, and that was
the purpose of the discussion with Mr. Schaaf and Mr. Ruffle, was to obtain an understanding of whether that was sufficient. And with the testing that we did and the testing that we have done in response to these Reports, I still believe that to be the case.

Q. Okay. The raft analysis calculates damages on many rafts of logs. Would you agree?
A. Yes.

Q. Okay. Would you agree with me that a large proportion of the damages claimed in the raft analysis can be attributed to the fact that many of the Best Market Prices were for logs of larger size and higher quality than the subject logs to which they were compared?
A. No.

Q. Have you reviewed the Supplemental Affidavit of Mr. Jendro in its entirety?
A. Yes, I have.

Q. Okay. Can you turn to Tab 4 of the Core Bundle, please. That's an excerpt from Mr. Jendro's Affidavit from Page A-30. And at Paragraph 2.1.4,
17:19:51 1 Mr. Jendro states that--I'm about four lines
down--"The Best Market Prices selected by M&R to
compare with subject cedar CX sort rafts were not
transactions of CX sort cedar logs. Instead, the
prices used by M&R as benchmarks for the subject CX
sort rafts were taken from sales including much
larger sized and more valuable cedar logs,
primarily, if not exclusively, cedar CD sort. This
error accounts for virtually all of the $408,597 in
price shortfall claimed by Merrill & Ring/Low on the
subject red cedar rafts."

Do you consider this conclusion with
respect to the damages calculation on the subject
red cedar rafts to be fair?

A. No.

Q. Okay. Mr. Jendro makes other findings in
his Supplemental Affidavit regarding the comparison
in the raft analysis.

Can you turn to Tab 5. At the top of
Tab 5, Mr. Jendro writes, "In choosing its Best
Market Prices for alder, M&R/Low take no account of
particular size and quality mix of each raft of
subject alder logs. M&R/Low selected benchmark prices from among the top prices obtained from the
M&R Group for the best and highest quality of its alder logs sold to Washington sawmills. M&R/Low then compared those high-range prices to the actual prices for subject alder rafts without adjustment for differences in the size and quality mix of M&R's B.C.-sourced alder logs. As a consequence, their analysis alleges price shortfall even for those alder rafts that were sold on the export market to hardwood sawmills in Washington State."

Do you agree with the statement that M&R used the best and highest quality of its alder logs to use its Best Market Prices, Mr. Low?

A. No, I don't. I believe that M&R has consistently used and as verified by me a Log Sale Agreement with a sort code that is refined enough and includes enough characteristics that the raft within that sort code will not be significantly different than another draft--sorry, another raft with that sort code.

The problem with Mr. Jendro's analysis--and
it is throughout his conclusion--all of his
calculations--his sole determinant is the diameter
of a log, the sole thing he compares to over and
over and over again. And Mr. Schaaf gave evidence
and Mr. Stutesman gave evidence that that is not the
sole determinant of value, and yet it is the single
determinant in all of these analyses that has been
done by Mr. Jendro. It's just not appropriate.

Q. Okay. Would you agree that it is a
determinant of value, Mr. Low?

A. It is a component, but it is only one.

There are many other quality characteristics that go
into these sort codes that M&R uses.

Q. When you said it's a component of the
determining value, does that mean that it's a
determinant of value? That's what I asked you.

A. It is not the sole determinant that
Mr. Jendro's analyses would lead you to believe. It
is far from the most significant.

Q. Okay. But it can have an impact on value,
sir?

A. I would not go so far as to say that
17:24:11 1 diameter does not have an impact.
2 Of course. It is a determinant of value, a
3 component of it.
4 Q. Can you explain why you didn't accept
5 Mr. Jendro's conclusion with respect to the red
6 cedar rafts that we just reviewed at Tab 4.
7 A. I would have to go back to all of the
8 underlying detail. I did at one point look at most,
9 if not all, of these comparisons and discussed them
10 with Mr. Schaaf or Mr. Stutesman, and our analysis
11 was that there were other factors other than the
12 diameters that would have impacted each of these
13 diameter analyses that Mr. Jendro has undertaken.
14 Q. So that they would negate the impact of the
15 diameter analyses that Mr. Jendro undertook?
16 A. Effectively, yes.
17 Q. Okay. But you didn't prepare any revision,
18 or you didn't address this basically in your
19 testimony earlier today? No?
20 A. No, I did address it. I indicated that the
21 primary determinant is the sort code, and the sort
22 code is refined enough and deals with many
characteristics being diameter, length, taper. And
I'm going to get some of the words wrong. The
amount of curvature in the log, the number of knots
in the log, the--so, in other damage issues relative
to a pure tree.
And all of those are considered within the
sort codes that are used by Merrill & Ring such that
you cannot solely rely on diameter.
Q. So, are all of those factors consistent
within a sort code, Mr. Low?
A. They are blended into a sort code such that
over a raft or a series of rafts there is
commonality among them such that they are
comparable.
MR. LITTLE: Mr. President, I'm not done,
and this might be an appropriate point for me to
break off today.
PRESIDENT ORREGO VICUÑA: Yes, that's
correct, because we have to break now.
So, we will meet tomorrow at 9:00; is that
right? And you continue your examination.
MR. LITTLE: Okay.
PRESIDENT ORREGO VICUÑA: And we go on to the other experts that are lined up.

Thank you, Mr. Low. Tomorrow at 9:00.

Thank you very much.

MR. LITTLE: Excuse me, Mr. President.

(Tribunal conferring.)

MR. LITTLE: I have one request. We distributed our Core Bundle which obviously contains some of our mapping for our cross-examination, and I think it would be appropriate if the Core Bundles that were distributed could be returned to Canada for the purposes of this evening.

PRESIDENT ORREGO VICUÑA: That's correct.

That's right.

MR. LITTLE: Thank you.

PRESIDENT ORREGO VICUÑA: Now, Eloise will have for you the time. And this is becoming a bit pressing because you will have to try to fit the rest of the experts tomorrow and to have just Professor Howse on Friday morning. Right?

So, Eloise, what's the situation?

SECRETARY OBADIA: We have nine hours and
17:29:50 1 57 minutes for the Claimant, and three hours and 51
2 minutes for Canada.
3 MR. APPLETON: Mr. President, before we go, there is one practical problem with respect to the
4 request that has been made by Mr. Little, which is that I have made some annotations on the Core
5 Bundle, so I'm going to ask if the Secretary could receive them in that way, if we could facilitate
6 that? Thank you very much.
7
8 (Whereupon, at 5:31 p.m., the hearing was
9 adjourned until 9:00 a.m. the following day.)
CERTIFICATE OF REPORTER

I, David A. Kasdan, 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.

_____________________________
DAVID A. KASDAN