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

- - - - - - - - - - - - - - - x
In the Matter of Arbitration :
Between:                      :
MERRILL & RING FORESTRY L.P., :
Investor,                   :
and                          :
GOVERNMENT OF CANADA,        :
Respondent.               :
- - - - - - - - - - - - - - - x Volume 4

HEARING ON JURISDICTION AND THE MERITS

Thursday, May 21, 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 9:03 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:

MR. DAVID A. KASDAN
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
B&B Reporters
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903
APPEARANCES:

On behalf of the Investor:

MR. BARRY APPLETON  
DR. ALAN ALEXANDROFF  
MR. MARTIN ENDICOTT  
Appleton & Associates  
International Lawyers  
77 Bloor Street West  
Suite 1800  
Toronto, Ontario M5S 1M2  
(416) 966-8800

MR. GREGORY J. NASH  
Nash & Company  
2333 Three Bentall Centre  
595 Burrard Street  
P.O. Box 49043  
Vancouver, British Columbia V7X 1C4  
Canada  
(604) 669-0735

MR. FRANK BOROWICZ, QC

MS. ASHA KAUSHAL

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. RAAHOOL WATCHMAKER
MR. PATRICK DUMBERRY
MR. SCOTT LITTLE
MS. CÉLINE LÉVESQUE
MR. ERIK LABELLE EASTAUGH
Departments of Justice and Foreign Affairs
and International Trade, Canada
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada
## CONTENTS

### WITNESSES: PAGE

**ROBERT LOW (Continued)**

- Continued cross-examination by Mr. Little 978
- Redirect examination by Mr. Appleton 1025
- Questions from the Tribunal 1049
- Redirect examination by Mr. Appleton 1082

**DOUGLAS A. RUFFLE**

- Direct examination by Mr. Appleton 1088
- Cross-examination by Mr. Watchmaker 1108
- Questions from the Tribunal 1123

**DAVID REISHUS**

- Direct examination by Mr. Little 1129
- Cross-examination by Mr. Nash 1147

**DAVID JENDRO**

- Direct examination by Mr. Little 1162
- Cross-examination by Mr. Appleton 1186

**MIKE BOWIE**

- Direct examination by Mr. Watchmaker 1203
- Cross-examination by Mr. Appleton 1221
- Redirect examination by Mr. Watchmaker 1233
- Questions from the Tribunal 1234
- Further redirect exam. by Mr. Watchmaker 1244
978

PROCEEDINGS

(Confidential session.)
Q. Mr. Low, yesterday we were discussing the issue of Best Market Prices, and I wanted to take just a little bit closer of a look at Best Market Prices in the raft analysis. And, specifically, I would ask you to keep in mind the Best Market Price of $91.89 that we were looking at in the raft analysis yesterday. So, you can keep the raft analysis at hand, and it will be helpful.

A. Yes.

Q. Can you turn to Tab 6, please, of the Core Bundle.

A. Yes, I do.

Q. And what is it?

A. It is a listing of the Log Sale Agreements that were used as reference in the determination of the Target Market Prices.

Q. Okay. So it's--and it's entitled "Best Prices by Species, Sort, Year, and Quarter, Merrill & Ring Log Sales Agreement 2006 and 2007." Correct?

A. That's correct.
980

09:08:00 1

2  out the Log Sale Agreements that were used for the
3  Best Market Prices for specific species and sorts in
4  a given quarter over the years 2006 and 2007?
5      A.   Yes.
6      Q.   Okay.  Could you turn, please, to the
7  second page of the document.
8      A.   Yes.
9      Q.   If you look down 12 lines, there is a
10           highlighted row on the screen.
11           MR. LITTLE:  One more matter,
12  Mr. President.  I'm assuming that the session, as
13  it's continuing from yesterday is a closed session?
14           SECRETARY OBADIA:  Yes.
15           MR. LITTLE:  Thank you.
16           BY MR. LITTLE:
17      Q.   All right.  Looking down then 12 lines on
18  this document, sir, there is a highlighted row
19  commencing with the reference to Log Sale Agreement
20  2040, or 2040, and beside that Okuyama.
21           Do you see that?
22      A.   Yes, I do.
23      Q.   And this line also notes that it relates
981

09:09:38 1

2      A.   Yes.
3      Q.   And the price provided--well, there's a
couple of prices, but the first price is 610 U.S.
dollars Scribner; correct?
4      A.   Yes, that's correct.
5      Q.   And if you take it right over to the last
column, the Canadian dollar cubic meter price to
6  which the $610 converts is $91.89; correct?
7      A.   Yes, that's correct.
8      Q.   Okay. So, this line tells us that the best
9  market price for the fir FH sort for Q4 of 2007 was
calculated at $91.89 per cubic meter Canadian;
10     A.   Yes.
11     Q.   Okay. And it also tells us that this Best
12  Market Price for the FH sort of Q4 of 2007 is from
13  log sale agreement number 2040 with Okuyama?
14     A.   Yes, that's correct.
15     Q.   Okay. If we look back, just looking back
16  at the line in the raft analysis that we were
17  looking at yesterday, would you agree with me that
the line we just looked at in Tab 6 represents the Log Sale Agreement behind the Best Market Price used to calculate the damages in the raft analysis?

A. Yes, I would, yes.

Q. Okay. Can we look to Tab 7, please, of the Core Bundle. This is a Merrill & Ring Log Sale Agreement, sir?

A. Yes, it is.

Q. And it's Log Sales Agreement 2040?

A. Yes, it is.

Q. All right. And it's a sale from Merrill & Ring to Okuyama?

A. Yes, it is.

Q. And I see that there's several boom numbers provided. Three of them relate to the FH sort; correct?

A. Yes, that's correct.

Q. Okay. And the one in the middle is for a price of $610 U.S. Scribner; correct?

A. Yes, that's correct.

Q. Right. And that's boom number SHO-7-1326; right?
A. Yes.

Q. Okay. Would you agree with me that this is the agreement on which the Best Market Price of 91.89 that we looked at in the raft analysis was based?

A. I believe that's correct.

Q. Okay. And on which damages were calculated?

A. Yes.

Q. Okay. And looking at the agreement, it says that the source of the logs in the agreement is listed as Canada; right?

A. Yes, it does say that.

Q. Okay. So the damages for the raft in the log sale--sorry, the damages for the raft in the raft analysis then was calculated on the basis of the Best Market Price for logs that were actually subject to the Regime; is that correct?

A. Just give me a minute because I'm trying to recall these boom numbers. I think that the boom numbers may not relate to Merrill & Ring, but the source says...
Canada, so I'll go along that these came from Canada.

Okay. So, the raft that was used as the Best Market Price in this Log Sale Agreement is a raft that's subject to the Log Export Control Regime; correct?

My only concern is that typically if you see a boom number and it's a Merrill & Ring boom number, it's going to start with an M rather than an SH. And there are booms that are, because they trade or broker, it may not have been a Merrill & Ring raft.

I agree that that is the source of the best price, and I will agree with you that some of the reference data for target market Best Market Prices were obtained from some Canadian rafts that were exported. And the reason for that is that in some time periods, some quarters, those on occasion appeared to be the fair level of price for that particular sort, and the inference that we took from that was that on occasion, even the export Regime system works, and there wasn't damage, and it was a
985

09:16:10 1

2  3  4  5  6  7  8  9  10  11  12  13  14  15  16  17  18  19  20  21  22
9:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20

21

22

09:17:36 1

2 5

3 6

4 7

5 8

6 9

7 10

8 11

9 12

10 13

11 14

12 15

13 16

14 17

15 18

16 19

17 20

18 21

19 22

20
it's not Merrill & Ring's logs that we're looking at
in the example here with Log Sale Agreement 2040;
correct?

A. Well, that's where--well, it gets a little
complicated in that this says source Canada, which
would lead you to believe that these would have come
from Merrill & Ring Canada, but the boom number on
here, when you directed me to this, doesn't look
like a Merrill & Ring boom number. So, at that
point it may not have been sourced from Canada, and
it may not have been even a Merrill & Ring Group
boom, but it is a Merrill & Ring sort going to a
Merrill & Ring customer.

Q. Okay. You mentioned that the raft analysis
was prepared prior to the litigation; is that
correct?

A. Yes. The raft analysis was a document that
had been prepared by the--I'm not sure I've got her
title right--the Controller, was maintained for
periods prior to December 27, 2006, and contained
all of the information virtually other--well, other
than the target market designation, the best price
988

09:20:49 1

988

09:20:49 1

988
989

Q. Okay. So it was--more than one person has prepared the raft analysis?
A. There was certainly a person up to 2005, and then there is--after the claim started there was somebody different because the first person retired, and it was, once the litigation started, to my understanding, under the review of Norm Schaaf.

Q. Okay. So, it was under the review of Mr. Schaaf. Does that mean Mr. Schaaf prepared it?
A. I would doubt that Mr. Schaaf entered the data on a daily or whatever basis of maintaining the raft detail, but he certainly had involvement in the selection of the target market issues and best prices in those target markets.

Q. Okay. But he doesn't mention this in his Witness Statement, does he?
A. No, he didn't--let me think. I don't believe it's in his Witness Statement, but he did give evidence about it while he was in attendance at the hearing.
990

09:23:57 1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. That's my recollection, yes.

Q. Okay. Was the raft analysis used for--before the litigation, what was it used for?

A. It was used, to my understanding, as simply a recordkeeping document of activities out of Merrill & Ring Canada, was maintained on a raft basis, and the data was accumulated so that it was in one spot related to customers, volume, quantities, prices, locations, all of the data that resides there.

Q. Okay. And just to confirm, the person that prepared the raft analysis that retired was not here this week?

A. No, that person is not here.

Q. The columns that state damages in the raft analysis, were those columns there before the litigation commenced?

A. No.

Q. Okay.
991

09:25:11 1

2  this was a historical document in its initial form.

3  It was then amended, as I indicated, to include a
4  determination of the target market or best market,
5  the Target Market Price, the foreign exchange
6  adjustments, the freight adjustment.
7  I mean, those things weren't contemplated
8  in its initial form. It was a business document
9  that has been amended to become a method of
10  calculating the Lost Export Premium in this matter.
11  So, to specifically answer your question,
12  the damages column was obviously added.
13  Q. Okay. Looking back at the line of the raft
14  analysis, Mr. Low, that we were just examining,
15  there's two lines underneath it that are
16  highlighted. Do you see those?
17  A. There are three lines highlighted, yes.
18  Q. Right. We have been looking at the top
19  line that was highlighted, and then below it there's
20  two more; correct?
21  A. Yes, that's correct.
22  Q. All right. Would you agree with me that
23  the Log Sale Agreement that we have just been
09:26:44 1 looking at, number 2040, with Canadian source logs
2 subject to the Regime were also used or--sorry, was
3 also used in calculating damages in these two lines?
4      A.   Yes, that's correct.  They all fall in the
5  same quarter, which was how this was done at that
6  time, in that time frame of 2007.
7      Q.   Okay.  Could we look back, Mr. Low, to
8  Tab 6.  That's the summary of Best Market Prices for
10      A.   Yes.
11      Q.   Now, just a question here:  Is the
12  2006-2007 period the dividing point between when the
13  raft analysis was prepared for the purposes of the
14  arbitration?  Because Canada didn't receive a
15  similar summary for the previous years of Best
16  Market Prices.
17      A.   That's correct.  The litigation commenced
18  December 27, 2006.  My understanding, the person
19  retired at the end of 2005--wait a minute.  Let me
20  get this right.  2005.  So, you're correct.  There
21  is a change in personnel who maintained the raft
22  schedule from pre-the end of 2005 and then 2006, '7,
Q. Okay. Could we look at the port column in the document at Tab 6, please, Mr. Low.

A. Yes.

Q. Would you agree with me that where we see Vancouver as the port, that this means that the Best Market Price was based on an export sale of logs sourced from British Columbia and subject to the Regime?

A. Again, I think that's consistent with my earlier comment, that although the raft that I was referred to doesn't appear to be a Merrill & Ring raft, I would agree these do appear to be Canadian rafts.

Q. All right. And would you agree with me that there is a significant number of Best Market Prices that have a port code of Vancouver in this document, sir?

A. There are, yes.

Q. Okay. In fact, if you turn to Tab 8, sir,
994

09:29:54 1  if you look down in Footnote 53, this is from the Supplemental Affidavit of Mr. Jendro. He provides with respect to this document, which is document 5619 at Appendix C, that out of the 201 Best Market Prices listed in this document, 101 are for logs harvested in B.C., and the remaining one are for logs harvested in Washington.

Now, I'm not going to ask you to count them all up, but would you agree with me that it's probably close to a hundred that are having a port code of Vancouver?

A. If I scan the two pages that are included in Tab 6, I would say it looks like it's not far off 50/50, so I would agree.

Q. Okay. And just to be clear, do you only have two pages? Because there is three pages in my document.

A. Well, I'm sorry. They must have been sticking together.

Q. Okay. So, how do you reconcile the large number of Canadian-based Best Market Prices with your claim earlier that the rafts that were exported...
from Canada suffered damages due to delay or not being able to sort properly or suboptimal cuts and not being able to enter into long-term contracts?

A. The answer to that is that as I had discussed this issue with Mr. Schaaf, that there are times when, as he was reviewing the Market Prices that were entered into this analysis because he was responsible for the initial cut at that analysis, that these appeared to be in the range of the fair reasonable prices for that. And what appears to have occurred is that in those time periods there was less at least on--and I would have to look through here to see on the sort codes, either less blocking, more efficiency, that the--in some of these time periods the Canadian Export Control Regime didn't necessarily harm as much as it did in other time periods.

That coincides a little bit with market activity, so that as the market declines, the losses would become less because there's more volume in British Columbia to serve or result in a surplus. There would be less blocking in all of that kind of
996

9:33:15 1

2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22
some Canadian rafts being used.

Q. And was that testing process done before or after you completed your Report, sir?

A. Oh, it was definitely done before. That was how we satisfied ourselves as to the accuracy of the methodology, the data, the concepts being used in the raft analysis that is the source of all of the Lost Export Premiums.

Q. Okay. So you knew about then the Canadian Best Market Prices before you prepared your Report, sir?

A. I did know about it. I would have to suggest that I didn't realize it was as--from the testing analysis, as visible as it is here, but I did know about it, and I just didn't pick it up properly in the terminology.

Q. When is the first time you saw this document at Tab 6, Mr. Low?

A. It's in the testing binder that was largely prepared by people under my supervision, but I reviewed it. I understood what they did. I monitored their activity as the testing was done,
and so I'd seen this document at that time, which is before this document was written, before my Report was written.

Q. Okay. So, you'd seen this document, but had you looked closely at this document at Tab 6? Did you know what was in the document?

A. I knew what the document was, and I would tell you I had not focused on the extent of Vancouver ports that are listed here. I hadn't particularly focused on that. But in our testing we came across situations where that was the case, and I discussed it with Mr. Schaaf in doing that testing and satisfying ourselves that it was a reasonable conclusion. But I would—in the testing didn't come up an enormous number of times.

Q. Okay. But you did know then about Canadian Best Market Prices before the preparation of your Report; is that correct?

A. I did know it. Yes, I did.

Q. So, why did you write what you wrote in Paragraph B on Page 19 of your Expert Witness Report, Mr. Low?
999

09:37:13 1

A. It's not complete and it's not accurate, and it is a descriptive error in the approach that we took.

Q. Okay, Mr. Low. You mentioned yesterday that in calculating damages, you have not taken an assumption that the Regime is not going to apply to Merrill & Ring. This is your description, your conversation with Mr. Appleton on the but-for. You added that what you have done is to simply determine that if there is a breach of the NAFTA Articles what the Tribunal could award as compensation for the damages done to Merrill & Ring; right?

A. Yes. That is in response to various of Canada's experts that raise this issue of, oh, well, if all of the Regime disappeared, then the analysis is wrong, and that's not the implication. We are not suggesting that Canada is going to change the Regime or that this Tribunal in any way can change the Regime as it exists.

Q. Okay. Well, my question is: What is your reference point in calculating compensation for the damages done to Merrill & Ring? What's the scenario
The scenario that I see is that there are breaches of various articles under NAFTA. Those breaches caused certain things to occur in the way the business of Merrill & Ring was operated, caused Merrill & Ring to not realize Export Premiums that otherwise would have been realizable, and caused them to incur costs that otherwise would not have been incurred.

It's really no different than any other damage claim, whether it be a road closure in front of an automobile store that causes customers not to be able to get into the store, results in a damage of lost sales due to that construction. So, it's an event and a cause resulting from that event.

Q. I assume, then, that it contemplates that Merrill & Ring is free of the Surplus Testing Procedure. Is that correct?

A. Under the articles, one of the breaches as we characterized it and as counsel has also advised us, the breach would be that there are other parties who, for instance, might obtain a standing green or
standing exemption and, therefore, can circumvent some of the impacts of the Notice 102 requirements, or there are other places in Canada where Notice 102 doesn't apply; and, therefore, from that cause, there are consequences, and that's an inability to access the export market.

Q. Okay so, I'm going on repeat my question. Does that mean that your but-for scenario contemplates that Merrill & Ring is free of the Surplus Testing Procedure?

A. It's the terminology that bothers me. I mean, could just say yes to your question, but I don't think that "yes" is really the correct answer. I can't make Merrill & Ring free. All I can do is say that there are consequences that arise, and there is a loss or a cost incurred that's as a result of that, so it's cause and effect.

Q. And what do the consequences arise out of?

A. The consequence of the administration of Notice 102 and the blocking, ransoming, inability to get a standing exemption all result in Merrill & Ring on some of its rafts not being able to access
the export market and, therefore, not obtaining the Export Premium that it would realize had it been able to access that market.

Q. Okay. Does it contemplate that Merrill & Ring is free of the various costs of compliance with the Regime?

A. No. Again, it's a terminology issue. They're not free of it. They will incur it. They are going to continue to incur, the costs, due to compliance with the Regime, but should the breaches of the Article be found to have occurred, then what I'm suggesting is they are to be compensated for those costs. So, they're not free of them. They're just going to be compensated for them.

Q. Okay. Given the approach in the raft analysis that you've taken, is it fair to say that it means that there is no export restrictions whatsoever on Merrill & Ring in calculating damages, and I'm looking at the world in which you calculate damages; i.e., that Merrill & Ring can export all of its logs from British Columbia as if it were exporting, for example, from Washington State?
1003

09:44:07 1

2  A. No, it doesn't contemplate that. There are--there is a significant volume of Merrill & Ring logs that are appropriate to Canadian market and would remain in Canada and stay in Canada, and that's the best target market for them.

3  Q. But you will have to agree with me that the raft analysis presumes that Merrill & Ring can pick the target markets in the raft analysis and that they are all export markets; correct?

4  A. There are certain classifications, certain sorts that are targeted as export markets, that's correct. There are not always losses on every one of those rafts, but there is an expectation that those could be exported, yes.

5  Q. Okay. Every line in the raft analysis does contemplate an export sale--correct?--as the comparator to the sale that the subject logs were subject to?

6  A. Sorry, would you repeat the question?

7  Q. Would you agree with me that in the raft analysis, the comparable transactions to which the transactions that the subject logs were in are
09:45:46 1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
Q. And turning the page over, you've got Actual Market: Canada, Target Market: Asia; correct?
A. Yes.
Q. Then you've got Actual Market: Asia, Target Market: Asia; correct?
A. Yes.
Q. You've got Actual Market: U.S., Target Market: Asia; correct?
A. Yes.
A. Yes.
Q. And you've got Actual Target: Asia, Target Market: U.S.; correct?
A. Yes.
Q. And is that the totality of the permutations in the raft analysis?
A. No.
Q. Okay. Can you explain.
A. There is another category which is Canada-Canada, where there are rafts that are sold in Canada and intended to be sold in Canada that
1. that's the target market.

2. Merrill & Ring.

3. Q. Okay. And where is that in the Report?

4. A. The Report's dealing with damages, and there are no damages where Merrill & Ring is servicing the domestic market because there is no impact from any of this in the domestic market.

5. Q. Okay. Are these sales, then, that obviously Merrill & Ring is entering into voluntarily and willingly?

6. A. Yes.

7. Q. Okay. They're not forced into them because of the reasons that we've heard earlier this week; correct?

8. A. No. They are a function of, if we can use the analysis, the top third of the tree that is appropriate for pulp, and the best market for pulp logs is the Canadian market, and so as that's produced, it isn't intended for export, that's not the appropriate market, so it would simply use--Merrill & Ring would use the Canadian market the way anybody else would.
Okay. So, there are some logs that Merrill & Ring wants to sell to the Canadian market. For all the logs that Merrill & Ring wants to export, does your but-for approach envision that Merrill & Ring is free to export all those logs?

The but-for approach says either that they can access the export market or that they can access the export market without delay with the appropriate sort and cut.

Okay. So, they can do that free of restrictions; correct?

The way--it depends on which circumstance you're under, but the way others in B.C. or Canada can do it, yes.

You mean in the U.S.?

No, in Canada.

Can you repeat your question--your answer, sorry.

It contemplates that under various circumstances because there is a lot of reasons here and a lot of rationale, that either they can export or that they can export in a fashion that the sort,
1008

09:51:08 1

2  it takes time to cut a tree down and get it to the
3  client, the customer, but the undue delay due to the
4  Procedures would not be there.
5
6  Q. Let's put it another way where the target
7  market in the raft analysis is the export market,
8  you—or the raft analysis, sorry, assumes that
9  Merrill & Ring can export whatever it wants to that
10  target market in order to calculate damages; correct?
11  A. It assumes that the restrictions that come
12  into play and the consequences of the administration
13  of it are not there, and, therefore, they can
14  incur—realize the Export Premiums.
15  Q. Just one more question on that. Does that
16  response take into account that there still can be
17  log export controls, Mr. Low?
18  A. I expect there will be log export controls,
19  and this is simply a consequence of the
20  administration and the effects of how it is dealt
21  with and how the rule causes the market to react in
22  Canada with the blockmailing, forcing Merrill & Ring
to sell logs into the Canadian market that otherwise should have been intended for an export market because of the way the rule works and the ability of a Canadian competitor/customer/mill to enter a block.

And it becomes a tradeoff, one—let's say that Merrill & Ring can make an extra $50 a cubic meter by exporting a log, and that log is ransomed, and it will—in order to release that ransom, it's only going to cost Merrill & Ring $10 a cubic meter on a different raft and log by selling it to a blockmail person. And you know what? They've managed to get 40 out of that system, and that's the consequence. A lot of the losses here that arise are due to the gaming that goes on in the system.

Q. Okay. You're mentioning blockmailing and gaming and ransom. Are you familiar with these practices?

A. I have become familiar with these practices through this process.

Q. Who made you familiar with them or how did you become familiar with them?
I became familiar with them through discussions with Norm Schaaf, Mr. Stutesman, Mr. Kurucz, Doug Ruffle, the forestry consultant who is yet to be heard; partners in my office who deal in the forestry industry in Vancouver, discussions with people, Mr. Ringma at another forestry company. I think that's probably a good summary of the sources of my knowledge of how it works and how it happens.

Q. Okay. One more question on the but-for scenario. You mentioned that your but-for still contemplates that log export controls will exist or do exist. How do those play in or how did you take them into consideration in the raft analysis?

A. Again, it's a but-for, so but for these consequences that arise from the breach, this is what would happen. So, it's not that I or anybody else can make the Procedures go away. It's--I'm trying to think of another example that takes it out of the circumstance.

I mean, the but-for kind of analysis is used virtually in every damages assessment I ever...
1011

09:56:52 1

2  do, so it's--something happens, and so there is a
3  cause and effect, and that's what we are dealing
4  with here. So, but for the cause, we have this
5  effect.
6  I'm not sure I answered your question,
7  though.
8  Q. I guess the question I have is that I don't
9  see that your but-for analysis includes or
10  contemplates that log export controls could still
11  exist. Would you agree with that proposition?
12  A. They exist. These are the consequences of
13  their existence and how they are administered.
14  Q. And in what form do they exist?
15  A. Notice 102 exists, will continue to exist.
16  It's just that because of the preferences given to
17  others, the administration of the system and the
18  resultant blockmailing activities that go on, the
19  company will continue to not earn what it otherwise
20  could.
21  Q. Okay. Let's move on. I just have a few
22  more questions regarding your responses to the
23  questions on cedar and alder rafts which I will try
Now, yesterday you noted that the price selected as the Best Market Price was not intended to be the highest price; correct?

A. That's correct. If a transaction, an actual transaction, was affected by market aberration, one of these--excuse me, market opportunities such that it was not perceived to be a normal market transaction, so in other words we heard, okay, a mill is going to run out of logs, and they want to keep the mill running, well, that's an anomalous situation. They may pay more in the marketplace because of that need.

So, those kinds of transactions were avoided. So, it became a normal market transaction.

Q. So, the highest transactions were avoided?

A. The—anything that was believed to be anomalous had special situations in it, yes.

Q. Okay. And you also stated your view that an M&R or Merrill & Ring sort code was refined enough so that rafts of the same sort code are not significantly different from one another; correct?
Q. And, therefore, that in comparing the rafts of the same sort code, you're comparing apples to apples; correct?
A. That is correct.
Q. Okay. Could we go back to Tab 6 that we have been looking at this morning.
A. All right. 21 lines down, I won't ask you to count it, but there is Agreement 258.
Q. Yes.
Q. That's Log Sale Agreement 258.
A. And if you look across the line, it provides that the Best Market Price for the cedar sort, which we talked about yesterday, and in respect of the conclusions of Mr. Jendro which you disagreed, the cedar sort Quarter 2 of the year 2007, the price was $1,500 U.S. Scribner; correct?
A. Yes.
Q. And that's the Best Market Price on cedar for that quarter in that year; correct?
A. That is correct.
Q. Okay. Can we turn, please, to Tab 15,
10:01:40 1

Mr. Low. Tab 15 is at the back of your Core Bundle.

A. Oh, sorry. It was hiding under other tabs.

Q. You can leaf through the first three pages, and can you identify that document, please.

A. Yes.

Q. It's Log Sale Agreement Number 258?

A. Yes.

Q. So, it's the agreement that we were looking at in the listing of Best Market Prices; correct?

A. Yes.

Q. Okay. Now, looking at this Log Sale Agreement, we can see a number of logs that were sold to TMI Forest Products; correct?

A. Yes.

Q. There is spruce and there's red cedar; correct?

A. Yes.

Q. And within the red cedar sort under the column sort, you can see there is a spruce heading, and then there is a red cedar heading; correct?
10:03:02 1

2      A.   Yes.
3      Q.   And you can see there the Best Market Price
4  of $1,500 that was noted in the summary of Best
5  Market Prices; correct?
6      A.   Yes.
7      Q.   And this Best Market Prices for logs of 36
8  to 40-foot lengths; correct?
9      A.   Yes.
10     Q.   Can you tell me, Mr. Low, if the
11   1,500-dollar price is the low price, a medium price,
12  or the highest price for the cedar logs in the sort
13  in this Log Sale Agreement?
14      A.   This particular agreement specified
15  different prices by length rather than an average
16  price over a number of lengths.
17      Q.   Okay.  Can you tell me, is the 1,500-dollar
18  price the low price, a medium price, or the highest
19  price for the cedar logs in the sort?
20      A.   It is the high price on this Log Sale
21  Agreement because it is the longest logs.
22      Q.   Okay.  It's the highest price?
23      A.   Yes, it is the highest price because it is
Q. Okay. So, you're agreeing with me then also. Because it's for the longest log, it fetches the highest price; correct?

A. Yes, within that sort code. Once you break the sort code up into lengths, you get some variation in prices, yes.

Q. Are these lengths all within the same sort code?

A. Yes.

Q. Okay. And these--this length, 36 to 40-foot, $1,500, was the logs that was used for the Best Market Price in Quarter 2 of 2007; correct?

A. That's correct.

Q. Okay. Let's go back to Tab 6. If you go down three lines on this page in Tab 6, Mr. Low, you can see a reference to Log Sale Agreement Number 201.

A. Yes, just let me get something to--yes, I have it.
10:05:32 1 alder, the alder AS sort for Q3 of 2006; correct?
A. Yes, it does.
Q. And the price provided in the price column is $850 U.S. Scribner; correct?
A. Yes.
Q. Okay. Are you aware that the raft analysis only uses one sort, the AS sort, to compare all subject logs?
A. Yes, I am.
Q. Okay. Can we look at Tab 15, and it's the second Log Sales Agreement in Tab 15, Mr. Low. And that's Log Sales Agreement number 201; correct?
A. Yes.
Q. And that's the agreement that we just looked at in Tab 6; right?
A. Yes, it is.
Q. And in this agreement we can see a number of alder logs that were sold by Merrill & Ring to Northwest Hardwoods; correct?
A. Yes.
Q. And we can see the Best Market Price of $850 U.S. Scribner; right?
A. That's correct.

Q. And can you tell me, is the $850 price the low price, a medium price, or the highest price for the alder logs on this Log Sale Agreement?

A. Again, this is based in this particular instance on diameters and in--as the largest diameter, it has the highest price.

Q. Okay. So, the $850 price relates to the largest diameter logs in the Sale Agreement?

A. The way this is written, yes.

Q. Okay. And these largest diameter logs fetch the highest price because they're the largest logs in the sort; correct?

A. When the sort is spread out on this kind of a basis rather than--alder typically is sold as camp-run, but, yes, that's true.

Q. Okay. And the 12-inch diameter, $850 U.S. Scribner price, that was the price that was used as the Best Market Price for the AS sort in Q3 of 2006; correct?

A. Yes.
10:08:28 1  down four lines in the page that we were looking at,
2  you can see Log Sale Agreement Number 1933; correct?
3      A.   Yes.
4      Q.   And it's a sale to Port Angeles Hardwood?
5      A.   That's correct.
6      Q.   And it provides a Best Market Price for the
7  alder AS sort for Q4 of 2006; right?
8      A.   Yes.
9      Q.   And the price in this instance is 950 U.S.
10  dollars Scribner; correct?
11      A.   Yes.
12      Q.   Okay.  Can we look at Tab 15, please, and
13  I'm looking particularly at the third Log Sale
14  Agreement in Tab 15.  This is Log Sale Agreement
15  number 1933; correct?
16      A.   Yes.
17      Q.   It's the one that was referred to in the
18  listing of Best Market Prices; right?
19      A.   Yes.
20      Q.   And looking at this Log Sale Agreement, we
21  can see a number of alder logs that were sold by
22  Merrill & Ring to Port Angeles Hardwoods; correct?
A. Yes.

Q. And that's alder logs of the AS sort; right?

A. That's correct.

Q. And the AS sort is the only sort for alder that's used in the raft analysis; correct?

A. That's correct. There is just one sort.

Q. Okay. And we can see that the Best Market Price of $950 was taken for the logs of the AS sort; right?

A. Yes.

Q. Okay. That's at the top of the listing of alder; right?

A. That's correct.

Q. Can you tell me, is the $950 price the low price, a medium price or the highest price for the alder logs of the AS sort in this Log Sale Agreement?

A. On this particular agreement that, again, is indicated by diameters. It's a larger diameter when split out of the sort, and it is the higher number.
Q. It's the highest number; correct?
A. It's the highest number.
Q. And it relates to the largest logs; correct?
A. Yes.
Q. Okay. And again, this was the price, $950, that was used for the AS sort Best Market Price in the raft analysis for this quarter in this year; correct?
A. That's correct.
Q. Okay. Thank you. Those are my questions, Mr. Low.
A. I would like to offer an explanation at least on one of these. I can't offer it on all of them.
Q. Okay.
A. With respect to the first one--
Q. The cedar?
A. --the Log Sale Agreement 258, which was for cedar, this particular one--and as I indicated, we performed a test of the log--of the raft analysis. The test was done on the basis of the largest losses
plus a sample, random sample of the balance of the rafts. And that was done on a statistically valid basis of having a 95 percent certainty that the data was correct. As we went through that, this particular Log Sale Agreement came up, and the reason I know that is because I have seen it. The other two I would tell you I haven't seen. This particular agreement came up and was flagged as being perhaps an issue. The issue was discussed, and we had determined that the price that should have been picked up in the analysis should have been something in the 13, 1,400-dollar range to be applied to those. The error that resulted was calculated, and all of the errors that were accumulated because the sample that we did in the end sampled 60 percent of the losses by virtue of taking the largest ones in the sample of the balance, and the—while there was an error on this one in our view, the accumulation of the errors that were both positive and negative through the analysis yielded a difference or an error factor that was within the limit of the
And, accordingly, the conclusion from that was that the raft analysis was accurate for the purposes of the loss determination. It doesn't indicate that we looked at every document because we didn't, and we said we didn't, but there is a statistical validity that the raft schedule is accurate within a sufficiently valid statistical limit. There are, in this kind of analysis, always going to be an element of error plus and minus. There's—without going into the other ones that may go the other way.

The determination of damages in a case such as this are the best estimate that one can come to. And unless you were there and you tracked every single thing that happened, which you can't do—I have never seen in any case anybody can do—you do the best analysis that's possible and to the highest
10:16:15 1

So, are there some errors? Yes. Did I actually see one of them and find one of them? Yes. Is it a consistent systemic error in what we have done? Absolutely not. And are the sort codes and the methodology underlying that sufficient to compare rafts? I absolutely believe so.

Q. Nothing of what you told me changes the conclusion that in this particular Log Sale Agreement the Best Market Price that was used in the raft analysis was the highest price; correct?

A. That does not change that. It was slightly too high, and I agree with you it was.

Q. Thank you, Mr. Low. Those are my questions. Mr. Watchmaker has a few questions for you on the cost of compliance calculations.

(Pause.)

PRESIDENT ORREGO VICUÑA: Mr. Watchmaker, please.

MR. WATCHMAKER: Thank you, Mr. President.

BY MR. WATCHMAKER:
10:25:15 1

Q. Good morning, Mr. Low.

A. Good morning.

Q. Mr. Low, I would like to discuss some of your incremental cost calculations now. Could you please ensure you have your Report with you.

A. I have it.

Q. According to Paragraph 3.11 of your Report, you claim that Merrill & Ring incurs, I believe, it's eight additional costs to comply with the Regime; is that right?

A. Yes.

Q. And you go on to say in Paragraph 3.12 that you only included the incremental portion of those costs; is that right?

A. That's correct.

Q. Okay. Now, I would like to take you to Paragraph 4.36 of your Report, sir.

Here you say at the third sentence that each year there is a premium charged by Progressive for rafts that are intended for export as they recognize that additional work is required to fulfill these obligations. We are talking about
2      A.   That's right.
3      Q.   "Absent the procedure, Merrill & Ring's logs would only be subject to the lower rate charged by Progressive."
6           Do you see that, sir?
7      A.   Yes, I do.
8      Q.   And you further say that, "As per Norm Schaaf's Witness Statement dated December 12, 2008, we understand that in the absence of the Procedures, the fee paid to Progressive would be reduced by one dollar per cubic meter for export rafts."
11           Is that right?
14      A.   That's correct.
15      Q.   And further down the page you say that you applied this one dollar and you applied it for all the years from 2004 to 2016 in your evaluation; is that right?
19      A.   That's correct.
20      Q.   So, when you wrote your Report, Mr. Low, was it your understanding that the difference between the fee your client pays Progressive for
10:27:01 1  export logs was one dollar per cubic meter higher
2  than what they would otherwise have paid?
3      A.   That is my understanding, yes.
4      Q.   Okay.
5      A.   Or should I say, it was my understanding.
6      Q.   And it's your understanding that this was
7  the difference that was due to the Regime?
8      A.   That's correct.
9      Q.   Okay.  Sir, I would like to turn to
10  Mr. Schaaf's testimony on this matter earlier this
11  week.
12           You were present for Mr. Schaaf's
13  testimony, were you not?
14      A.   Yes, I was.
15      Q.   Okay.  Now, in response to a question I
16  posed Mr. Schaaf as to whether this alleged
17  incremental cost was a premium, as you say in your
18  independent Report, he said that it was not.  Do you
19  recall that?
20      A.   I frankly don't recall term premium, no.
21      Q.   Okay.  Well, you did think it was a premium
22  when you wrote your Report, though; is that right?
A. I think it is an incremental cost due to the Regime.

Q. And at Paragraph 4.3.6 of your Report, you say each year there is a premium charged by Progressive; is that right?

A. Premium costs due to the Regime, that's the word that was used, yes.

Q. A premium above the domestic fees charged by Progressive?

A. It is a premium due to the administrative costs relative to the Regime. That's what it is.

Q. And the difference of that one dollar is because of the Regime, and you wouldn't have to pay that but for the Regime?

A. That's correct.

Q. So, on domestic logs you would be paying something one dollar less; is that right?

A. This is an interesting point, actually. When Mr. Schaaf gave his evidence and I listened to it and I spoke to him afterwards, the one dollar in the manner in which they charge actually applies consistently to all rafts,
irrespective of whether they are domestic or export sales. That's simply the way it gets charged for convenience.

In my damage analysis, I took the one dollar and applied it in determining the incremental costs solely to the raft's volume that we believed were damaged or attributable to the Regime, so 400-some-odd thousand cubic meters out of 577,000. I may have that numbers wrong. I'd have to look at the report.

But in effect my calculation of loss is actually too small because of the way it's charged, but it's one dollar per cubic meter of cost that is attributable to the cut and sort monitoring that Mr. Kurucz does, monitoring the transportation, and the paperwork involved in preparing for advertising, all of those things.

Q. And that explanation, that's not in your Report, sir?

A. The explanation of the characterization of it isn't. The dollar is, and that it relates to costs due to the Regime is.
10:30:53 1

Q. And that explanation is not in Mr. Schaaf's written statement, is it, sir?

A. I believe—I would have to go back and look. I know the dollar is there, and he talks about it being due to—whether it refers to the administration of the Regime or not, I'm not sure. I'd have to look at it.

Q. Well, let's see what Mr. Schaaf did say the other day. He said at Page 203, Lines 11 to 13 of the official transcript that, "It's not a premium that we pay. It's a part of the fees that we pay to Progressive in the contract that we have with them."

That's your recollection, sir?

A. Yes.

Q. Okay. Mr. Schaaf continued that there are two forms of contracts dealing with these fees. He said, "One of the most recent contracts has the same fee, regardless of whether the logs are sold in the export or domestic market."

Do you recall that?

A. Yes, I can see that here.

Q. And he continued that previous contracts...
10:31:54 1  had a slightly larger amount of fee paid for export sales as an incentive to Progressive to help get export sales through. Do you recall that?

A. Yes.

Q. He then stated at Page 204, Lines 11 to 16, that under the contracts in 2004, '5, and '6, Progressive would earn slightly more for export logs than domestic logs, and sometime thereafter the contract was changed, and the same fee was applied. Do you recall that testimony, sir?

A. Yes.

Q. Okay. Now, I understand that you used the same one dollar per cubic meter charged for the entire past and future Loss Periods; is that right?

A. That's correct.

Q. Okay. Sir, you referred at Paragraph 4.3.6 of your Report to the contract with Progressive. Do you see that?

A. Yes.

Q. I would like to take you to the only contract we were able to find in the materials you
You will find it at Tab 12 of the Core Bundle.

Is this the contract you looked at in preparation of your Report, sir?

A. Just give me a moment, please.

A. This is one of the contracts. Just give me one moment, please.

A. Sorry, I thought I might have been able to find some other contracts, but this appears to be the one that you've had, and I have seen it, so I presume--I know we had it.

Q. I believe it's the only contract of its kind on the record actually. Can you confirm that for me?

A. With the extent of the record here, I can't confirm whether it is or not.

I will agree I have seen this one. What I was doing was I went to Mr. Bowie's Report because he talks about this; and you're right, he refers to one contract, but he had details of other
Q. Okay. Now, this is a contract between Progressive Timber Sales, Mr. Kurucz, and Merrill & Ring. It's titled, "Management Services Agreement." Could you turn to Page 2 of this agreement, sir.

A. Yes.

Q. I would like you to just quickly review Section 2 of the contract, Mr. Low. It's titled "Engagement by Merrill & Ring."

A. Yes.

Q. Just let me know when you've had a chance to review it.

(Witness reviews document.)

A. Yes, I've read it.

Q. Okay. Sir, would you agree with me that with the exception of subparagraph (c), it's reasonable to conclude that the work described here would apply to logs sold domestically and logs sold into the export market?

A. No, I don't.

Q. Why not?

A. If you look at 2(a), and I will read it,
Progressive will assist in the supervision of the contractors working on the lands and in the quality control with respect to the timber harvested from the lands. In my discussions with Mr. Kurucz, the scaling requirements and the log sort requirements under Notice 102 require significantly more effort in monitoring than would be required under— an ability like a standing green where you could cut and sort and ship it as you desired, and because of the different sort codes that are used that you must comply with in order to meet the requirements of Article 102. So, there is time and effort spent there.

Q. Perhaps I wasn't clear. With the exception of subparagraph (c), would you agree with me that all of the other work described here would apply to both domestic and export logs?

A. The administrative effort that is incurred would be with respect to the Export Permits. There is no doubt about that. But in (e) also with respect to accounting functions, that would relate to inventory requirements and the additional
Q. My apologies. I'm not being clear.

Subparagraph (c) states Progressive will assist Merrill & Ring marketing personnel to obtain Export Permits with regard to as many logs as possible.

A. Yes.

Q. That would not apply to domestic log, would it?

A. No, it would not.

Q. Okay. Let's turn to Page 3 of the contract under the title "Compensation.

Mr. Low, you will note that the export sales in 2004, the fee was $1.75 per cubic meter and for domestic sales it was $.50. Do you see that?

A. Yes.

Q. And you will agree with me the difference between these amounts is 25 cents; is that right?

A. Yes, I agree.

Q. Now, just below the rates the contract says
Export sales will be defined as any volume which leaves Canada in log form.

Do you see that?

A. Yes.

Q. Sir, do you recall criticizing Mr. Bowie’s conclusion—sorry, Mr. Bowie’s exclusion of volumes for so-called ransomed logs from his incremental cost calculations yesterday?

A. Yes.

Q. And allegedly ransomed logs, Mr. Low, do they stay in Canada or do they leave Canada in log form?

A. They stay.

Q. Allegedly ransomed logs are not export logs as defined by this contract, are they, Mr. Low?

A. That’s correct.

Q. Therefore, they would not incur these costs, would they?

A. The ransomed log would not incur that 25-cent cost. They would incur all of the costs related to Progressive’s monitoring of the export control system, and that speaks to exactly what I
10:40:20 1

said, that the ransomed logs are logs that have entered or been advertised. The incremental volume that I talked about from my analysis compared to Mr. Bowie's analysis relates to the volume of logs that entered the export control system.

Q. Right.

A. And--I'm sorry. Go ahead.

Q. And those ransomed logs are not export logs as defined by this contract, are they, sir?

A. No, that's correct.

Q. Okay.

A. And what that means and why the difference between Mr. Bowie's analysis and my analysis in this regard in that what he does is pick up 25 cents as the difference, and I don't do that. I pick up a dollar.

And the reason for that, I think, is absolutely consistent with what you're saying. The--Progressive, in the to the degree they could assist in arranging an export sale, was paid an extra 25 cents. It was an incentive for them to assist with selling export.
But that is not the cost that we are calculating here. The cost we are calculating is an administrative cost. It's not a sales incentive cost, and they were two different things. They were always intended to be two different things.

That explanation is not in your Report, is it, sir?

It is, actually.

Could you please take me to it.

Sure.

In Paragraph 4.3.6, I talk about timber management services and that there is an amount charged by Progressive related to or intended for rafts intended for export, as there is additional work required to fulfill these obligations. That's exactly what I'm saying. It's not sales work. It's administrative work.

Okay. Let's turn back to Section 2 of this contract, sir. This is the sum total of work under the contract with Progressive Timber Sales for timber management.
Now, you agreed with me that subsection (c) is the only subsection that could exclusively apply to export sales; correct?

A. Yes, I do agree with that.

Q. And if we turn the page, you agree with me that the difference between the fees charged by Progressive on their export—on Merrill & Ring's export sales compared to the fees charged on domestic sales is 25 cents, not a dollar; is that correct?

A. That's also correct. That was a sales incentive fee and had nothing to do with an administrative fee. And it is the administration that we were determined or were determining as the incremental cost.

Q. And the breakdown of these administrative fee system not in Section 2, is it, sir?

A. No. It is part of Section A. It is all of Section C, and it is part of Section E.

Q. And neither you nor Mr. Schaaf—

A. And whatever else in D would apply.

Q. And neither you nor Mr. Schaaf actually
10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1

10:44:23 1
10:45:41 1

1  Sir, I would like to take to you the 2004 row under the rate column. You will note the figures are exactly the same as the numbers in the contract we just looked at; isn't that right?

2  A. Yes.

3  Q. And that the figures are the same for 2003; is that right?

4  A. Yes.

5  Q. And for 2005 the figures are $2 for export sales and $1.50 for domestic sales; is that right?

6  A. Yes.

7  Q. And that difference is 50 cents, not a dollar; is that correct, sir?

8  A. That's true.

9  Q. And then in 2006, as Mr. Schaaf said in his testimony the other day, the rate is the same; is that right?

10  A. That's also correct.

11  Q. Now, Mr. Low, you didn't use any of these figures in your calculations as you said. You used the one dollar that Mr. Schaaf told you about because it represented certain administrative fees;
is that right?

A. I used all of these figures in my analysis, and the dollar is a portion of each of those numbers on this page.

And, in fact, if you look at 2006, you have a two-dollar number, whether it's export or domestic, and what you're suggesting is that would imply there is no cost to all of the administration with respect to the Regime, the monitoring of, the sorting, the monitoring of the transportation, the paperwork, all of that, and that would not make any sense at all.

So, there is far more inherent logic in the dollar being applied to all years as being consistent than the approach that you're trying.

The intent of these incentives when they were there was solely a sales incentive, not an administrative incentive.

Q. Sir, did you or Mr. Schaaf explain this inherent logic in your independent Report as to how to apportion these costs, in particular in 2006, where the fees are apparently the same to the
10:47:39 1
2      A.   We have--I have described exactly in my
3  Report what it refers to and that we are talking
4  about administrative costs, and I relied on
5  Mr. Schaaf's Witness Statement with respect to the
6  dollar.
7      Q.   Okay.  I would like to discuss with you one
8  more item.
9           You said the other day in direct testimony
10  that you suggested that the Tribunal should use an
11  interest rate if it found interest was warranted for
12  the Investor's Articles 1102, 1105, and 1106 claims,
13  and you suggested that the appropriate interest rate
14  would be 6 percent and that that was a commercially
15  reasonable rate.  It's the one that you applied in
16  your Article 1110 analysis; is that right?
17      A.   That's correct.
18      Q.   Would you go to Paragraph 4.6.4 of your
19  Report, please.
20           You say here that you apply the prevailing
21  Bank of Canada Prime Rate at December 27, 2006; is
22  that right?
A. Yes.

Q. And that was a rate of 6 percent at the time?

A. Yes, it was.

Q. That rate's changed considerably, hasn't it?

A. To today, yes, it has.

Q. Okay. Just one final question or area of questions.

I understand that you calculated alleged incremental costs associated with certain sales commissions your client pays to affiliated companies for alleged shared marketing expenses; is that right?

A. That's the wording that is in the Report, yes.

Q. And I further understand that your client claims it to be able--claims it be able--it would be able to market such logs directly if it were not for the Log Export Control Regime; is that right?

A. That is certainly the description that's in
10:49:49 1

Q. Okay. And according to Paragraph 3.24 of your independent Report, you say that it is your understanding that your client incurs an additional one dollar U.S. per cubic meter for export logs; is that correct?

A. Sorry, Paragraph Number?

Q. I believe it's 3.2.3.

A. Oh, 3.2.3, sorry.

Yes.

Q. I believe Mr. Schaaf in his Reply Witness Statement comments that one dollar of certain overhead and staffing costs are attributable to sales commissions; is that right?

A. I would actually like to, if you don't mind, I would like to see the Witness Statement because I think we had tried to clear up--there was an issue over what this really relates to that I know he talked about in his evidence and I thought was in his Witness Statement.

Q. Well, certainly. It's his Reply Witness Statement at Paragraph 5, if we could bring that to
It should be at Tab 11 of your Core Bundle.

A. Thank you.

Q. You see the third sentence, sir?

A. Yes. You're correct.

Q. Okay.

A. The characterization here is--calls it a sales commission. I believe in Mr. Schaaf's evidence and my discussions with him the cost, while it's buried into a component of a fee that's charged, the intended cost is again an administrative cost relative to monitoring inventories and transportation of the rafts during the--that are believed to be incremental to what would be normal. So, the descriptions are wrong, but it's certainly been--would have been difficult for you to reply to that based on that description.

Q. Now, Mr. Schaaf also said the other day in response to a question from me that there was a contract on the record that explained these services and sums.
A. I don't recall him saying that, and there's always a confusion between Progressive and the U.S. affiliate. I don't believe I have seen a contract. I have seen evidence of the charges and how they're calculated, but I don't believe I have seen a contract.

Q. So, you have only relied on Mr. Schaaf's statement, then?

A. No. As I said, I have seen a document where there are charges being levied.

Q. Yes, you referred to a document that's at Exhibit 15 of the Core Bundle. Is that the document you mean?

A. Exhibit 14, actually, Tab 14 of the Core Bundle.

Q. Yes, that's right.

A. Yes.

And it's here again called a marketing fee, which is why that characterization probably got carried through, and part of it is marketing, but it's the portion that's incremental is believed to
Q. Okay. Well, Mr. Schaaf did say that there was a contract, and he believed that it was on the record, but what I would like to know, sir, is, did you ask to see a contract?

A. Again, I would have to see Mr. Schaaf's evidence given here to assess whether I thought he was talking about Progressive or the related company. I have not seen a contract, and I'm not aware that a contract exists.

Q. Okay.

MR. WATCHMAKER: Mr. President, those are my questions. Canada reserves the right to do some recross, if necessary. Thank you.

PRESIDENT ORREGO VICUÑA: Thank you, Mr. Watchmaker.

MR. APPLETON: That won't be necessary.

PRESIDENT ORREGO VICUÑA: Right. Thank you.
QUESTIONS FROM THE TRIBUNAL

ARBITRATOR ROWLEY: I have some questions, Mr. Low, but I'm asking for a chart to be put up on the screen in front of us because my eyes are such that I can't read the written version. I note that you have glasses, but I don't know whether they're for distance or short.

THE WITNESS: They are for distance, but I must agree with you. There is a lot of documents here that are close to illegible.

ARBITRATOR ROWLEY: What I'm hoping to have put in front of you is Page 17 of the Bowie Report. That's it.

THE WITNESS: Yes.

ARBITRATOR ROWLEY: And yesterday, as I understood your testimony, you said the Regime caused an inability for Merrill & Ring to access the export market, and bear that in mind.

Have a look at this document in front of you. It's the Bowie Supplemental Report at Page 17, at Paragraph 49. And if you look at the descriptive wording in the left-hand column, the second line...
10:57:23 1 reads: "Alleged Lost Export Premiums, net of costs to export, retrospective past harvest," and it's 4.9 million that you have assessed to be the damages there—I'm rounding down under Articles 1102 and 1105.

THE WITNESS: Yes, sir.

ARBITRATOR ROWLEY: And upon what evidence, if any, did you base your conclusion that Merrill & Ring, but for the Notice 102, would have exported that harvest at that time?

THE WITNESS: The evidence on which I'm relying in order to determine the volume of logs in the retrospective past harvest arises from the evidence of Mr. Schaaf and the Report of Douglas Ruffle, who is the forester who assisted and prepared an independent Report with respect to the Harvest Plan.

ARBITRATOR ROWLEY: Mr. Ruffle is an expert in these proceedings?

THE WITNESS: Yes, he is. I believe he is the next witness.

ARBITRATOR ROWLEY: Yes, but he is not a
1051

10:59:07 1  person who could tell us whether or not Merrill &
2  Ring would have done something had the Regime not
3  been in place. Do you agree with that? He might
4  say that it would have been a good idea that they
5  might have done so, but he's in no position to say
6  that's what they wanted to do or would have done had
7  it not been in place?
8           THE WITNESS: That's I think a fair
9  characterization, so that the reliance then in that
10  regard would go back to the management of Merrill &
11  Ring.
12           ARBITRATOR ROWLEY: And what did the
13  management of Merrill & Ring tell you that they
14  would have done, and when did they tell you that?
15           THE WITNESS: The management of Merrill &
16  Ring told me that they would have done that as
17  we--only since my own involvement in this matter,
18  and it would have been sometime in the couple of
19  months preceding the preparation of my Report as to
20  when that issue came forward as we were trying to
21  assess the but-for scenario and what would have
22  happened in that, and it came up as a concept that
11:00:52 1 was believed to be appropriate that with
2 particularly the time periods that some of that
3 is involved in, there was, to my understanding,
4 relatively extensive blocking and blockmailing going
5 on in that the market was--
6 ARBITRATOR ROWLEY:  You don't know that?
7 THE WITNESS:  Well, this is through my
8 discussions.
9 Because of the activity in the market at
10 the time, it was--if you go back into 2004, '5, '6
11 particularly, the market was very active and lots of
12 demand, and so it was more prevalent then.
13 What Mr. Schaaf has maintained is that they
14 harvested everything they believed they could, and I
15 believe Mr. Stutesman referred to this as well, that
16 when blocking became a significant issue and they
17 were having lots of problems, they would simply push
18 off the harvest and not do it rather than face the
19 consequences, and I think that's what is being
20 thought of here.
21 ARBITRATOR ROWLEY:  Do we have that
22 testimony that you just gave in a witness statement
11:02:19 1  from anybody at Merrill & Ring in these proceedings?

2           THE WITNESS:  Let me just look at one
3  thing.
4           It is, sir, referred to in Mr. Schaaf's
5  December 12, 2008 Witness Statement that is
6  contained at Tab 11 of the Core Bundle that I was
7  provided with this morning, and is contained in
8  Section 3--I haven't read the whole thing, but at
9  least in Paragraph 6, and I think there is
10  discussion in Paragraph 7 and 8.  That section, I
11  think, is attempting to discuss this issue with
12  respect to the retrospective past harvest.
13           ARBITRATOR ROWLEY:  So, it says we would
14  have pushed up our harvest?
15           THE WITNESS:  Yes.
16           ARBITRATOR ROWLEY:  And we heard testimony
17  yesterday from Mrs. Korecky that 98 percent of all
18  logs for which a surplus application was sought was
19  granted.  Does that--how does that evidence, if you
20  accept it--and I would ask you to accept it for
21  assumption purposes--how does that sit with your
22  suggestion that some five million extra or dollars'
1054

11:04:46 1

worth of damage might flow from Merrill & Ring's
failing to harvest? Because, just so you take what
I'm considering that testimony for, it seems to me
that if 98 percent of the logs you seek surplus
designation for you get, then as a businessperson I
might say, well, if I want to make more money, I'll
take more harvest because maybe I will have to sell
2 percent, keep 2 percent back, but I can get
98 percent out.

THE WITNESS: Yes, sir, I understand your
question.

And as the first part of an answer, I would
tell you that I believe, based on what I have seen
and heard, that Ms. Korecky's statement, whether
it's 96, 7 or 8 percent, is correct; that the
Surplus Letter is given. What we have seen as well
in the evidence is a significant difference between
the volume that receives a Surplus Letter, whether
it be Merrill & Ring or otherwise, and the volume
that is exported in fact.

ARBITRATOR ROWLEY: Is there less exported
than logs for which there are Surplus Letters?
11:06:22 1

THE WITNESS: Yes, significantly less.

If we start at a hundred percent of logs that apply for the Surplus Letter, and let's say it's 98--we will use that, 98 percent receive a Surplus Letter, my recollection of the numbers is that somewhere in the order of 60 or 70 percent actually receive an Export Permit.

So, somewhere between receiving the permission to export and what actually gets exported, there is a significant drop.

ARBITRATOR ROWLEY: All right. Now, let me ask you a question about that.

THE WITNESS: Yes.

ARBITRATOR ROWLEY: To me, the most logical explanation of that having regard to all the other testimony we've heard about the value of the international market compared to the Canadian market is that it doesn't make sense not to export if you have the permit unless you have a better offer domestically.

THE WITNESS: That--

ARBITRATOR ROWLEY: Is that illogical?
1056

11:07:42 1

2       THE WITNESS: No, it's a logical statement.
3  The issue, though, as I have come to understand it,
4  is the issue of blockmailing and trying to get as
5  much volume out that you can and having to give up
6  volume into the domestic market to do it by virtue
7  of people saying we will block your logs if you
8           don't give us some portion of them.
9           So, let me try to cite an example. A raft
10  comes forward, enters the advertising period, and
11  let's say an offer is put on it. And the offer is
12  either--well, let's say there is an offer put
13  on it. So, at that point that raft has to go to
14  FTEAC for Federal Lands. Sometime in that two- to
15  four-week time period from the end of the
16  advertising period when the offer must be in and the
17  FTEAC meeting, there are these negotiations that we
18  hear that go on. And with the number of rafts as I
19  understood the evidence to go in front of FTEAC is
20           minimal.
21           So, somewhere between the end of the
22  advertising period and the FTEAC meeting, a
23  significant number of offers are withdrawn, and I
I think that's the negotiation process that's going on, and at that point the letter, Surplus Letter, is given. So, there's lots of Surplus Letters, but at that point the raft has been diverted to the Canadian market or another raft.

ARBITRATOR ROWLEY: Well, without your going through too much your analysis of that process, you will agree that the logic that I've put to you, that if there are Surplus Letters, and if there is a right to apply for an Export Permit, then if you have the logs, you'll apply and send them out of the country unless you have a better market in the country or some other good reason not to do so.

THE WITNESS: I think it—and again, that should be—absent Notice 102 and the Surplus Test should be what happens. And the only business rationale that I can imagine that comes up with that is simply a trade-off that Merrill & Ring or others that are subject to this, because the numbers seem to be pretty consistent, try to get out the very best that they can and sacrifice some others in order to do that.
And it's because of the ability to block, because, as you recall, as soon as you block, as soon as you put an offer on a raft, that offer only has to meet the Canadian Market Price. It doesn't have to meet an export price, so as soon as there is an offer, you've lost that difference, whatever it is, because at that point provided that offer is within 5 percent or equal or slightly above the Vancouver log market as determined by FTEAC, you're going to get a domestic price, not an export price.

ARBITRATOR ROWLEY: Anyway, I will try again.

THE WITNESS: I'm sorry.

ARBITRATOR ROWLEY: Do you agree with my logic?

THE WITNESS: I agree with the logic, that absent that ability to block by giving an offer and forcing that raft into a domestic market where everybody—I think there's knowledge that the export prices are higher—that it forces it into the domestic market, and what companies like Merrill &
1059

11:12:42 1

2  Ring are doing is a trade-off of trying to prevent
3  as much of that as possible.
4  
5  ARBITRATOR ROWLEY: You're explaining
6  Merrill & Ring's conduct, and that's not really what
7  I'm asking about. And I did say assume that they
8  had the logs, they would export them if they had a
9  surplus designation and an ability to get a permit
10  unless they preferred to sell them domestically. I
11  said assume they have the logs.
12  
13  THE WITNESS: Merrill & Ring has the logs,
14  and they have an Export Permit because that happens
15  98 percent have--sorry, they don't have an Export
16  Permit. They have a Surplus Letter. Somewhere in
17  that process what I'm suggesting is a
18  dysfunctional thing that goes on that results in
19  because I have to agree with you. If you've got a
20  Surplus Letter, why aren't you exporting? And
21  you're not because you have been blackmailed into
22  not exporting.

23  ARBITRATOR ROWLEY: I'm sorry, you're not
24  listening to me. I said assume you have the logs
25  with which to export.
THE WITNESS: Yes.

ARBITRATOR ROWLEY: And you have the surplus status and you can apply for an Export Permit, but that you don't.

THE WITNESS: Right.

ARBITRATOR ROWLEY: The only reason I can assume in those circumstances is that there is a preference to sell them domestically. And if you can't accept my assumption, don't. I will move on.

THE WITNESS: I believe--I have to agree with you absent what goes on in the marketplace that the Surplus Letter ends up being delivered because of a deal that's been done that's prevented the offer from coming--from being presented at the end.

ARBITRATOR ROWLEY: Can you tell me why your valuation of loss in the column entitled in front of you on the Bowie Supplemental Report, the column entitled Article 1102 and 1105, is exactly the same?

Let me help you. Are you just assuming that consequences of breach of 1102 are precisely the same as a breach of 1105?
THE WITNESS: Yes.

ARBITRATOR ROWLEY: Now, I'm going to ask you to make an assumption. I'm going to ask you to assume that it is perfectly lawful for Canada or, indeed, any State to have a Log Export Regime, so make that assumption that it's perfectly lawful.

THE WITNESS: Yes, sir.

ARBITRATOR ROWLEY: Make the assumption for the moment because this is just theoretical, a Tribunal asking an expert witness an opinion. Make the assumption that there is no breach of 1102, 1106, or 1110. All right?

THE WITNESS: Yes, sir.

ARBITRATOR ROWLEY: So, the only possible breach is a breach, for our discussions, of the minimum standard of treatment of aliens under international law?

THE WITNESS: Yes.

ARBITRATOR ROWLEY: But that it is lawful for Canada to have an export Regime and that it is lawful to base Export Permits on there being a surplus of logs to domestic need. So, you are with...
11:16:57 1

2          THE WITNESS:  Yes, I believe so.
3          ARBITRATOR ROWLEY:  All right.  In those
4  circumstance, how do we deal with your damages?  Are
5  they still 16.8 million?
6          THE WITNESS:  I believe that they are, and
7  the reason for that belief falls into a number of
8  areas.
9          Sorry, let me just gather my thoughts for a
10  second.
11          (Pause.)
12          THE WITNESS:  The--
13          ARBITRATOR ROWLEY:  Let me give you a
14  thought to think to to either help or hinder you.
15  I'm not intending to hinder you.  I'm trying to get
16  your real assessment of this.  But on this
17  assumption that I'm putting to you that a Log Export
18  Regime based on surplus is lawful and that there is
19  no other breach.  Then if there is a breach of NAFTA
20  in the application of such a regime by Canada or by
21  British Columbia, it suggests that that breach will
22  have to do with the number of the items that have
been listed as concerns to Merrill & Ring about the Regime.

I understand. I was trying to make sure that I wasn't going to drop back into 1102 arguments in my response, so that was the delay. I wanted to try to get it clear in my mind.

Might it help to you have your own Report Page 8 in front of you.

And at 1.40 and following you deal with the international law standard of treatment.

Okay. As I looked at this and began to understand the administration of this Notice 102, there is a significant amount of either lack of definitive information, misunderstanding, secrecy, just uncertainty in the process that I
1064

11:19:54 1

2  think ends up putting you in the same nature of
3  damages and not being able to deal with your
4  business. So, just as some of these,
5  Paragraph 1.41-A, we've at least heard a lot about
6  there being no definition of what remote is, and so
7  that has an impact--
8  ARBITRATOR ROWLEY: Well, let me deal with
9  that because let us say it were found that that, the
10  vagueness of dealing of the definition of
11  "remoteness" was a breach of the international law
12  standard, what's the consequence--what's the loss
13  from that breach? What's the loss that flows from
14  that breach? Because what is required from being in
15  a remote standard is that you raft in a certain way,
16  perhaps an uneconomic way compared to the way you
17  would otherwise wish to raft, but is that not the
18  loss that flows from that complaint?
19  THE WITNESS: That's correct. The loss
20  that would flow specifically from that one would
21  relate to incremental costs probably to a greater
22  degree than Lost Export Premium because you have--
23  ARBITRATOR ROWLEY: Say that again. I
1065

11:21:33 1 didn't understand that.
2           THE WITNESS:  Well, if that were the sole
3  breach of--
4           ARBITRATOR ROWLEY:  I'm not suggesting it
5  is.  We are just discussing it.
6           THE WITNESS:  No, but you were looking for
7  a tie-in to damages.
8           ARBITRATOR ROWLEY:  Well, I'm looking for
9  proximate causation actually.
10           THE WITNESS:  Yes.
11           ARBITRATOR ROWLEY:  I'm looking for breach
12  causing a loss.  And if there is a breach based on
13  inadequate description of what remoteness is, I want
14  to know your view about what damage that causes.
15           THE WITNESS:  Right.  And certainly what
16  that causes in the case of remoteness is incremental
17  towing and storage costs as an absolute minimum
18  because that's the consequence of that where instead
19  you could advertise at the location rather than to
20  having to move them and store them.
21           ARBITRATOR ROWLEY:  And have you done a
22  calculation of loss that is directly attributable to
11:22:36 1

It's not the--the damages have not been segregated into each component as for the most part, like that one happens to be a fairly simple one.

But what about the requirement to scale all logs metrically? That should be relatively simple.

That one also is relatively simple, sir.

And the requirement to cut and sort timber from their federally regulated properties to normal market practices, that's to boom in accordance with the Vancouver Log Market or the local log market as opposed to boom in accordance with a preferred export log market, is it not?

Yes, it is.

Again, easy to calculate.

No, that one is where it
1067

11:23:39 1

2  begins to get much fuzzier because you have not only
3  incremental costs due to that, but you begin to get
4  into the issues of Lost Export Premium, and the
5  ramifications of is the cut and sort significant
6  enough to prevent an export sale or solely to
7  denigrate an export price, and it becomes difficult
8  to determine which piece that is.
9           ARBITRATOR ROWLEY:  The difficulty is we
10  have no evidence before us as to when sorting in a
11  certain way makes an export sale impossible or how
12  much it affects price.
13           THE WITNESS:  Strictly on sort and cut,
14  that's true.  It gets blended into the Lost Export
15  Premium.
16           ARBITRATOR ROWLEY:  And the requirement to
17  remit the fee-in-lieu on Provincial rafts that are
18  exported?
19           THE WITNESS:  That's very identifiable.
20  It's a single number, and in this case it's
21  relatively small, $48,000 or something.
22           ARBITRATOR ROWLEY:  And that is the cost
23  attributable to the British Columbia Government
11:25:11 1

2  saying this is the tax you have to pay. Am I right?

3 THE WITNESS: I'm sorry, actually.

4 Oh, on 1105?

5 ARBITRATOR ROWLEY: Yes.

6 I don't see how that comes into 1105.

7 THE WITNESS: I'm sorry, sir, just give me a moment.

8 (Pause.)

9 THE WITNESS: At the moment I'm having difficulty myself.

10 ARBITRATOR ROWLEY: Well, I don't--it's difficult, and I don't want to put you on the spot.

11 Let me move to another area. Your raft analysis, I don't think I have the full thing in front of me. How many pages is the raft analysis?

12 THE WITNESS: It's--on a sufficiently blown-up form where it's legible, it's probably 30 pages.

13 ARBITRATOR ROWLEY: Now, it incorporates every raft that Merrill & Ring put together and sold either in the domestic or export market for the period that we are looking at; am I correct?
11:27:22 1

THE WITNESS: That's correct.

ARBITRATOR ROWLEY: So, it would then be possible to look at it and identify each raft that was advertised.

THE WITNESS: That's correct.

ARBITRATOR ROWLEY: And it would then be possible to identify each raft for which a surplus letter was not issued providing the application for the Surplus Letter was not withdrawn.

THE WITNESS: There is a column on the raft analysis that includes what has been referred to as the clearance state, which is the end of the two-week advertising period, so that would be the column where we would--that's an indication that that raft was advertised.

ARBITRATOR ROWLEY: Is it possible to identify on that raft analysis all logs which were denied surplus status as a result of Notice 102?

THE WITNESS: I don't recall that there is a column there.

ARBITRATOR ROWLEY: There may not be a column there, but--
THE WITNESS: But I believe that Ms. Korecky has provided detail in that regard of what rafts were denied surplus status. So, I mean, the information's available. I don't--I just don't recall that there is a tick mark on the raft schedule that deals with that.

ARBITRATOR ROWLEY: But if you had a list of rafts that were denied surplus status--

THE WITNESS: Yes.

ARBITRATOR ROWLEY: --and there were a breach for which damages flowed, one could readily look at the rafts which Merrill & Ring were unable to export and apply your best price analysis to those rafts.

THE WITNESS: One could certainly--

ARBITRATOR ROWLEY: I'm not saying you think that's a good idea. I'm asking if it can be readily done by you.

THE WITNESS: One could correlate the two lists and determine what damages arise from those particular rafts. That could--that calculation could be done.
ARBITRATOR ROWLEY: And would it be difficult for you to do it?

THE WITNESS: I don't believe it would be difficult to do.

The larger consequence here from just off the top of my head is due to the blockmailing type of activity rather than all the way through the process and a denial being given.

ARBITRATOR ROWLEY: The blockmailing issue, to the extent that it is an issue, is a matter for us. I'm just asking you about calculation.

THE WITNESS: I was just saying in relative consequence, that's the larger issue. But, yes, we could, if you requested us to do that, we could do that calculation for you.

ARBITRATOR ROWLEY: One of the difficulties I had this morning, intellectual difficulties, was squaring the concept that the best price is generally in the international market with the fact that just over 50 percent of the best prices you used in your damage analysis was based on sales into Canada. Can you help me there.
THE WITNESS: I think that's a misunderstanding. It's not that they were based on sales into Canada. They were based on export sales out of Canada, so they were all based on export sales.

ARBITRATOR ROWLEY: Forgive me, out of Canada through the Regime, so that goes to whether--how much the Regime affects the ability to export?

THE WITNESS: Yes.

ARBITRATOR ROWLEY: We are nearing the end. We are dealing here with potential losses suffered by Merrill & Ring in Canada. Does Merrill & Ring account for its sales and revenues on a Canadian basis? I don't mean accounting with any particular body, but is there an internal summing up how it does in Canada?

THE WITNESS: Yes, sir.

ARBITRATOR ROWLEY: And are you able to tell us what the profits of Merrill & Ring were for its Canadian operations for the period in question for your past damages analysis?
11:33:37 1

THE WITNESS: I believe so. Just give me a moment, please.

A simple source of a very summarized analysis can be found at Section 8, Page 88 of the Bowie Report. And if you want to look at the nature of the damages that we have calculated relative to the numbers that are in this summary, they're more in the nature of a gross profit within the incremental expenses than they are the net profit because--the Lost Export Premium really is a margin issue, if you're going to look at--

ARBITRATOR ROWLEY: What years were your calculation for lost profit?

THE WITNESS: The principal years because there is only a little stub period here in 2003, are 2004, '5, '6, '7, and '8, and I see that Mr. Bowie's summary here includes 2004, '5, '6, '7.

ARBITRATOR ROWLEY: And it shows us what the gross and net profits were.

THE WITNESS: Yes, it does.

ARBITRATOR ROWLEY: Can you just read those into the record.
THE WITNESS: Certainly.
The gross profit in 2004 was 4--satisfactory if I round a little bit?
ARBITRATOR ROWLEY: Yes.
THE WITNESS: $4,100,000.
2005, the gross profit was $6.3 million.
2006, the gross profit was $5 million.
2007, the gross profit was 4.4, and they provide a total of 19.9 million for the four years.
ARBITRATOR ROWLEY: Thank you.
THE WITNESS: There was--may I go back to one of your first questions where you were asking about the retrospective past harvest?
ARBITRATOR ROWLEY: Of course, yes. The loss that we have calculated there is not based on an assumption that the entire harvest incurred losses. Our analysis of the actual past indicates that there were losses either of an entire Export Premium or a denigration of premium on about 30 percent of the volume of total rafts, and it's that portion that flowed through into the retrospective past harvest, so it's not as if every
11:37:26 1  single tree in the past--in the retrospective
2  portion would have incurred damages. We took the
3  same kind of relationship in calculating the damage.
4           ARBITRATOR ROWLEY: Well, that's the
5  30 percent. Am I right that of 1.3 billion cubic
6  meters--I may have my numbers wrong--300,000 were
7  subject to being sold domestically that we heard
8  earlier. Is that the same sort of proportion? If
9  not--
10           THE WITNESS: I'm not sure of that
11  particular analogy.
12           ARBITRATOR ROWLEY: Tell me why 30 percent.
13  Is it 30 percent because they would be held back for
14  ransom? Is that it?
15           THE WITNESS: There is a combination.
16  They're either were prevented from being exported,
17  or there is a significant portion of volume where
18  the delay issue has caused damage or the sort issue
19  has caused not to be able to realize the quantum.
20  The amount that is actually not exported is smaller.
21  The damage piece in volume is bigger. The
22  denigrated piece.
One last comment, the retrospective past harvest has two components to it, one being the Georgia Basin lands and the other being the—balance of the properties are owned by Merrill & Ring, and Mr. Bowie's Report comments on this. If it were determined that the retrospective past harvest on the owned lands wasn't going to occur in the past, if that was your determination, then all of that flows forward into the future period. It's not like it would disappear. The trees are still intended to be harvested by 2016. The Georgia Basin is a slightly different issue because Merrill & Ring doesn't have the right to harvest there anymore.

ARBITRATOR ROWLEY: Thank you.

THE WITNESS: Thank you, sir.

PRESIDENT ORREGO VICUÑA: Thank you.

I have two very simple questions. The first concerns the question of breaking down all the complaints about a breach, which is, of course, ideal one by one, and ending up with, say, a figure for the whole.

Is it technically different to say, look,
I'm going to look at the aggregate and come up with a conclusion of whether as a result of all these elements there has been a loss or not? Does it matter technically, financially from where that loss or difference arises, does it matter whether it's Line 1, 2, 3, 4 or 5, or at the end it comes out to a loss that otherwise would not have been there? How do you see that?

THE WITNESS: If I understand your question, there are certain breaches as they have been identified that have fairly specific consequences, such as the Provincial fee-in-lieu has a very specific cause and effect. Some of the other breaches are far more difficult to segregate into it's specifically this or this. It kind of blends through and has multiple impacts, so some of them are identifiable purely on cause and effect and therefore, quantum, and others are far less discreet, and therefore by the time we said here is all of the breaches under a certain article, we came to a conclusion on a total loss and cost scenario.

PRESIDENT ORREGO VICUÑA: But that's
1078

11:42:29 1

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

If you can identify a line or two, it's perfect, ideal; but to the extent that you cannot do that with all the specifics, is it technically fair to come up at the end and said look, all of this, however, it arises from Line 1 through 5 ends up here, and that is the figure one would have to take into account, how do you see that? Or put it another way, does the final figure only emerge from the individual lines, because to the extent that there are specifics, that's fine, but to the extent that there are areas where it's difficult to establish which is the precise impact, but still, if you look at the end, there is an impact.
then I get this amount. Others, for instance, the requirement, the cut and sort, have cost consequences and they have Lost Export Premium consequences, but I'm not able to identify which rafts suffered because of that. I can't say, well--we just don't have the background information to say, well, the Asian customer didn't take this raft because the logs were too short--I'm just using examples--and therefore it got sold domestically, and therefore the--it became a lost premium. Or they were too short, so they only paid something less. So, I'm not able to really segregate into, you know, is it a complete loss or a portion of a loss from that, for instance, where I went--it's the wrong market versus--the wrong market or it's the right market with damages with denigration of the price, and that's where I had difficulty segregating it out, and then some of them kind of trickled through a lot of the cost and the Lost Export Premium in addition.

PRESIDENT ORREGO VICUÑA: Okay. Now one last question. In your discussion with Mr. Little
and Mr. Watchmaker, you came to the conclusion that there were a few items that were about what would have been your intention because the way they were presented or so.

THE WITNESS: Yes, sir.

PRESIDENT ORREGO VICUÑA: Would you say, taking into account all of that, would you say that there is a marginal error that any such estimate would have, in any event, because of that or other reasons that would have to be taken into account and say, well, look, this is the best figure I can come up with, but I must accept that there is a margin of error which is X, and that has to be factored in. Is that something that you would have a figure for?

THE WITNESS: The margin of error that you referred to, I think, exists in almost any damage quantification or a valuation analysis, and would vary depending on the circumstances. Let me break down the claim as it's here. With respect to the costs attributable to the Regime, I think that the margin of error there, it is very small. Perhaps--I'm getting ahead of
11:47:32 1 myself. Let's say in a technical sense plus or minus 1 percent. What you have to determine, for instance, since some of their questions were about the nature of, for instance, the Progressive fee and whether the 25 cents is correct or the dollar is correct, once the determination is made that the 25 cents is correct or the dollar is correct, then I think the margin of error is de minimis, so that's on the expense side. I think those simply are what they are. They're easier to calculate. They're more definitive.

In the area of Export Premium, Lost Export Premiums, our testing analysis was done to a confidence level of 95 percent, which would suggest on a statistical basis that there is a potential of an error of plus or minus 5 percent on that analysis. So, that's probably the best evidence that I have of what the margin of error would be in that, in that that raft analysis was the derivation of the numbers.

PRESIDENT ORREGO VICUÑA: Right. Well, the 5 percent sounds very familiar at this stage.
THE WITNESS: That's why I was hesitant to talk about it actually, but no, I could say it's less than that, but I'd have no basis for saying that, and that's a test that we did, and that was the confidence level that it had.

PRESIDENT ORREGO VICUÑA: Okay. Well, thank you so much, Mr. Low--

You have some?

MR. APPLETON: Yes, I do.

PRESIDENT ORREGO VICUÑA: Oh, I see. how long do you envisage that we will take with you?

MR. APPLETON: I expect to be very short. I have a question arising out of the questions of the Tribunal.

JUSTICE: Just because of the--

MR. APPLETON: I will be very mindful of the time.

REDIRECT EXAMINATION

BY MR. APPLETON:

Q. Mr. Low, do you recall Mr. Ringma's evidence regarding the use of low value wood for
11:50:01 1 which he had an export permit to liberate higher value wood? We have an exhibit on that. At the request of Mr. Rowley, we reduced it. I believe it's been given to the Members of the Tribunal, and it's called Exhibit 1.

Do we have the large version of it? Could you hold it up?

I'm going to use a live demonstration model here. Could you just hold this up for a moment so the witness could see it.

So, this is Exhibit 1 as everyone can see.

All right. So you recall Mr. Ringma's evidence and Mr. Ringma's discussion about this exhibit.

Was this part of the explanation that you had in mind when you were trying to answer Mr. Rowley's question?

A. Yes, it was, where it's a trade-off issue of if the process allows a forcing into the domestic market where you're not going to have a choice because an offer at the Domestic Market Price absolutely results in a domestic offer, lack of a
Surplus Letter or non-Surplus Letter being delivered, then what you would try to do is to trade off the low margin product as against the high margin in order to maximize your return.

Q. So, that would be a situation where you would have an Export Permit, but you would trade your Export Permit wood off for some other reasons; is that correct?

A. That's correct.

Q. Would you agree--this is dangerous for this question. Then I'll make sure that we're very clear.

ARBITRATOR ROWLEY: I'm sorry, that's not what I understood him to say. What I understood him to say was he would trade off low value wood, and he would make the export of high value wood; is that correct?

THE WITNESS: As to what I said?

ARBITRATOR ROWLEY: Yes.

THE WITNESS: In answer to your question?

MR. APPLETON: You mean what Mr. Ringma said, sir.
ARBITRATOR ROWLEY: I thought you were mischaracterizing what the witness said.

MR. APPLETON: Which witness, sir? You mean Mr. Ringma's testimony or do you mean Mr. Low?

ARBITRATOR ROWLEY: Mr. Low.

MR. APPLETON: All right, let's make sure. We will come right back to the beginning.

BY MR. APPLETON:

Q. My question was, do you recall what Mr. Ringma said?

A. Yes.

Q. And my question then is, was the evidence of Mr. Ringma what you were trying to refer to or—let's put it this way. In light of Mr. Ringma’s evidence, would you like to restate your answer to Mr. Rowley’s question? And the specific question about would it be irrational to not export wood that you have an Export Permit for?

A. The Export Permit isn’t the right test here. It’s the Surplus Letter. Once you have an Export Permit, I can virtually guarantee you are going to export because nobody can do anything at
that point. It's the question of when a Surplus Letter is issued, there is a bunch of things that have happened up to that point. And to the degree that a buyer can suggest to you that we are going to block this one unless you give us this one, and it may have a Surplus Letter on it, but they still want it, and this has lower margin than this one, then the trade-off would be done, and you would get the higher margin one out, and you wouldn't get the low margin one out.

Q. I just want to make sure, Mr. Rowley, does that clarify?

ARBITRATOR ROWLEY: It didn't clarify. It was what he said before. You just stated, I thought, a different way, and that's what I was seeking to clarify.

MR. APPLETON: Okay. Well, then I'm through with my redirect question on that, and will no doubt have an opportunity to talk about those matters elsewhere.

PRESIDENT ORREGO VICUÑA: Okay. Thank you very much, Mr. Low, for having attended this long
11:54:46 1

THE WITNESS: You're very welcome, sir.

(Participants acknowledge and comment on the next agenda item.)

PRESIDENT ORREGO VICUÑA: And now we will break what? 15 minutes and we will resume with Mr. Ruffle; is that right? With Mr. Ruffle.

Of course, there won't be much time before the lunch break. Do you have any suggestion about how to organize time in respect of Mr. Ruffle?

MS. TABET: I'm sorry, may I ask Eloïse to give us a time count, please.

SECRETARY OBADIA: Give me two minutes.

MR. APPLETON: In the interim, I'm certain that if we come back quickly on the break, that we will finish the direct of Mr. Ruffle and be even in the position perhaps to start the cross-examination before lunch, but it may be at that point a convenient point to take the lunch break.

PRESIDENT ORREGO VICUÑA: Okay. Let us be back not quickly but promptly.

MR. APPLETON: I thought I should give you a good indication, yes.
DOUGLAS A. RUFFLE, INVESTOR'S WITNESS, CALLED

PRESIDENT ORREGO VICUÑA: Good afternoon, Mr. Ruffle. Could you please read your Witness Statement.

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. Appleton will direct the examination now.

MR. APPLETON: Thank you very much, Mr. President, Members of the Tribunal.

DIRECT EXAMINATION BY MR. APPLETON:

Q. Mr. Ruffle, I asked you to prepare a report for these proceedings which has been filed with the Tribunal. The Report and your exhibits are set out in the binder that is in front of you.

A. That's correct.

Q. Your Report has several appendices that are attached to it. Appendix 6 has your curriculum
12:15:48 1 vitae. I put a slide of it up on the screen and the monitor before you.

A. Right.

Q. Mr. Ruffle, you have a bachelor's of science in forestry from the University of British Columbia.

A. That's correct.

Q. You also have an MBA from the University of British Columbia.

A. Yes, I do.

Q. You're a Registered Professional Forester in British Columbia, and your special expertise is in forest land appraisals?

A. That is correct.

Q. What the main aspects of forest land appraisals, Mr. Ruffle?

A. The main aspects of forest land appraisals are getting out--

Q. Mr. Ruffle, can you just speak more loudly or closer to the microphone so that we can all get a good recording, and I think they might ask you to speak a little more slowly?
A. The main aspects of forest land appraisal in terms of valuing a property are to get a handle on the timber inventory, and the timber inventory is an estimate of the volume of standing timber on a property. Other aspects of it are developing the Harvest Plan.

Q. Now, Mr. Ruffle, I asked you to do a review of the second set of Mr. Schaaf's harvest projections which he prepared for these proceedings. Now, Mr. Schaaf prepared an earlier set of harvest projections which he then revised, and I asked you to review his revised harvest projections; is that correct?

A. That is correct.

Q. Now, the results of your own analysis of harvest volumes are shown on Page 32 of your Report, and they're reflected in Figure 6.5. I'm going to put a summary, I'm going to put that up on the--if you wish to turn to that in your Report, and I will have it up here on the screen.

MR. APPLETON: Oh, excuse me. We have to
12:17:45 1 stop right now. Are we in open session? No? Okay. Good. I just want to confirm that we have to stay in restricted session. I didn't see it in the transcript, so, okay. Fine. So, we are in the right session, in the right place.

BY MR. APPLETON:

Q. So, Mr. Ruffle, you're here the we are here, the party is going to go on. Could you now, sir, at Figure 6.5. And could you explain to the Tribunal what this summary means. And I'm going--do you want a laser pointer, or do you want to describe? What would you like?

A. Laser pointer, if you have one.

Q. We have all the toys.

A. Figure 6.5 is a graphical, graphical representation and summary of the Harvest Plan, and along the horizontal axis is the plan showing the years from 2004 through 2016. And by the year 2016 the forest inventory on the Merrill & Ring properties will have been depleted as the inventory is drawn down.
The vertical axis shows the volumes, and we measure volumes in cubic meters. And just to give you an idea what a cubic meter is, these columns behind us here, they’re approximately about three cubic meters. And if you see a logging truck, in British Columbia a logging truck carries about 35 to 45 cubic meters. And in terms of the inventory on the Merrill & Ring property, there is approximately 1.4 million cubic meters, and as it grew over time and through the Harvest Plan, the Harvest Plan includes a volume of about 1.5 million cubic meters.

The projections above are broken into two parts. The dark green part is the actual harvest, and the light green part is the projected harvests.

Q. Thank you. I will never think about these walls in the same way again.

A. Well, I obtained the Merrill & Ring revised Harvest Plan as of November the 19th, 2008, and I assumed that represented what Merrill & Ring was
1093

12:20:10 1

I then reviewed that plan, taking a look at what I thought was operationally possible on the properties, made some adjustments taking into account that I felt the growth rates that they were using within the Harvest Plan were slightly too high.

I also made adjustments for the operability, and that is the volume of timber that could be harvested I felt was too high as well.

Q. Did you undertake any site visits in order to prepare your Report?

A. Yes, I did. I went out onto the field, took a look at the properties, and that was in a two-stage process. The first was to fly out and do an aerial overview, and that is to get a sense of what's on the property and it's a fly by, and what we're looking at or what I'm looking at is the areas looking at the timber stands, checking to see if they look reasonable based on the information that was provided to me by Merrill & Ring as a visual check, areas, timber species, volumes per hectare, an overall check of what they're providing me,
then we follow that up with a ground inspection, and the purpose of the ground inspection was to get out, get into the timber stands, and confirm the volumes, the stocking levels, species distribution, the age, more or less a smell test to see if what they provided me was reasonable.

And there was also a time too to discuss with management their harvesting plan, what they saw going forward in terms of their harvesting practices, road building, utilization of equipment, environmental concerns. The issues that come into play when developing a harvesting plan, and it was really to get a sense of what was out there, could it be operationally achievable as what was in the Merrill & Ring plan, and how they are about to do it.

Q. All right. Thank you, Mr. Ruffle.

I would like to draw your attention to the Table 6.3 that's at the bottom of this projection. This is the past projected harvest volumes from your Report, and you said these are the volumes that Merrill & Ring could have realized if the Export
The Control Regime was not in effect. I'm going to point it out here so we know what we are looking at. It's the bottom of the slide.

Would you please summarize for the Tribunal your results.

A. Table 6-3 is the past projected harvest volumes for the three properties that are owned by Merrill & Ring located at Menzies Bay, Squamish, and Theodosia, and I inspected these properties, looking at whether or not they could have harvested this volume, looking at the operational constraints, the environmental constraints, and the projection goes forward from 2004 through 2007.

Q. Now, you also prepared an Executive Summary of your Report in the binder that starts at the beginning around Page 1. I'm going to ask you to actually turn to Page 2 of the Report, and you will see in the Executive Summary on this page, Page 2, there are two tables that compare your past harvest projections, both past and future, with Mr. Schaaf's harvest projections both past and future. I have set these out here on the slide for you.
The comparison between your Harvest Plan and Mr. Schaaf's Harvest Plan projections are shown in Paragraph 1.4 which I've put on the side, and this shows a difference of some 37,000 cubic meters out of 1.5 million cubic meters of wood. Could you please explain to the Tribunal the significance of this difference.

A. Overall, the significance is immaterial.

Q. So, let's then return to the Report itself. Would you explain to the Tribunal how your Harvest Plan is developed, Mr. Ruffle.

A. The Harvest Plan is developed based on the Merrill & Ring November 19, 2008, Harvest Plan. I take that as the assumption that Merrill & Ring knows what they do in their business, and I'm looking at examining that from the harvest perspective whether or not they could operationally take that volume from their woodlands, looking at their inventory to see that it could support those projections, taking a look at their growth to see if that adds to the inventory, looking at the rates of harvest from the perspective of can they accomplish...
Q. Based on your knowledge, how would you describe the quality of Merrill & Ring's timber?

A. When I began this project, one of the issues highlighted by Mr. Jendro was the growth rates that Merrill & Ring were reporting in their inventories, and I was surprised, too, at that as well. So, when I did my site inspection, that was one of the first things we looked at was the timber stands, and going into the timber stands, it became fairly apparent that they do have apparently some exceptionally good wood. It's fast growing, good sites, quite impressive timber.

Q. Mr. Ruffle, I understand there are two minor corrections that you would like to make to your Report. Could you please explain what those are to the Tribunal.

A. Yes, there's two properties that have minor corrections in terms of the operable timber, the timber that would have been harvested, and that's at East Thurlow, which is one of their properties, and it's approximately 3,400 cubic meters should come
12:26:34 1

Q. And do these changes affect your conclusions in any way?
A. Not overall. It's a very minor volume.
Q. And that's based out of 1.5 million cubic meters?
A. That's right.
Q. Okay, just to make sure I get it all in the right perspective.
A. Okay.
Q. Now. Mr. Ruffle, you also reviewed the Report of Mr. Jendro that has been filed in these proceedings. This is set out in Tab 4 of the binder that's before you.
A. Yeah, correct.
Q. Just get that organized for you. Give you a minute. It's a big binder, sir. Sorry.
Do you have any general observations about Mr. Jendro's Report as it relates specifically to
A.  Looking at the Jendro Report, it was a very lengthy Report, very thorough Report. In general, I would say I felt that there was some criticism in regards to my Report that I felt that was a little bit effective issues that were either immaterial or irrelevant, and giving you an example of it, Mr. Jendro prepared his Harvest Plan, compared it to my Harvest Plan, and calculated the differences, and he cited in one case—pardon me. In the case of six properties of the nine properties held by Merrill & Ring that Merrill & Ring and Ruffle inventory errors, excessive harvest rates, and other factors were significant. But if I look in the Report of his, the differences only added up to about 10,000 cubic meters on a total harvest plan of about 1.5 million. However, there are significant differences in regards to other properties. And those differences relate to the Georgia Bay (sic.) Holdings properties where Merrill & Ring has the harvesting rights. Mr. Jendro deducted approximately 150,000 cubic meters out of my harvest
There was also issues regarding the properties at Waiatt Bay and Unwin Lake. Mr. Jendro deducted approximately 25,000 cubic meters at Waiatt Bay because he looked back at a 2005 Report that Merrill & Ring had done, and at that time Merrill & Ring thought they could sell the Waiatt Bay property to the Provincial Government with approximate--having to retain, though, 25 percent of the timber on the property because the property was going to be included in a park.

My understanding was that that transaction never took place and that in the 2008 Harvest Plan for Merrill & Ring, that volume is included, and I believe it should be included.

The other issue is with property at Unwin Lake where Mr. Jendro took out approximately 75,000 cubic meters under the assumption that or the belief that the helicopter logging distance was too far. It was not economical to fly this timber from Unwin Lake to the other properties of Merrill & Ring. Unwin Lake is a rather unique property in that it
12:30:24 1

1101

12:30:24 1

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
seriously. They provide riparian areas to protect fish habitat. Their Harvest Plan is over a 13-year period at Theodosia. And I just get a sense that Merrill & Ring people realize what's involved there. I think they can deal with the First Nations issues by offering employment to them.

And in terms of the regulatory environment regarding private lands, I think it's important to recognize that a private landowner of timberlands has very strong property rights. They can harvest their timber at any time and to any extent. There are no regulations in British Columbia that specify or restrict the timing or extent of harvesting other than some what they call the private managed forest land regulations which just specify certain key aspects, but they don't regulate the speed or timing of the harvest.

Q. You know those regulations because you're a registered forester in British Columbia?

A. That's correct.

Q. Now, just coming back to the answer that you just gave, I just want to clarify the transcript.
12:33:14 1

2  on two points.

3           The first is you referred to a company
4  called Georgia Bay Holdings.  Did you possibly mean
5  Georgia Basins?
6      A.   Yes, Georgia Basins.
7      Q.   And you said that the period of the harvest
8  would be 13 years.  Was that what you intended to
9  say is 13 years?  Because my understanding of your
10  Report was that it was 16 years.  I just want to
11      A.   I'll check.
12      Q.   In any event, it's fair to say--
13      A.   13 to 16 years, yeah.
14      Q.   All right.  It's a long time?
15      A.   Yes.
16      Q.   Or at least in my perspective.  All right.
17           Now, Mr. Ruffle, you said in your Report at
18  Page 5 that Merrill & Ring was a price taker.
19           What do you say about Mr. Jendro's
20  suggestion that Merrill & Ring is a price taker--I'm
21  sorry, price setter.  Mr. Jendro said they are price
22  setter.  You say they're a price taker.  What do you
12:34:29 1

2      A. No, I don't believe Merrill & Ring has the
3  market volume, the presence, the power to either
4  affect their prices or change the Market Prices of
5  other participants in the market. They're a very
6  small company, and these harvest volumes are very
7  small, given the size of the log markets in British
8  Columbia and the Pacific Rim.
9           I think other day Norm Schaaf was here and
10  looking up at the map of British Columbia, and he
11  mentioned that their properties wouldn't even show
12  up. And in terms of a participant in the log
13  market, they're very small.
14      Q. Now, Mr. Jendro suggests that the inventory
15  adjustment for Charles Bay calls into question the
16  inventory numbers for all of the Merrill & Ring
17  lands. What do you have to say about that, sir?
18      A. No, I would disagree with that. That was a
19  onetime inventory adjustment that Norm Schaaf
20  explained the other day, and it has no effect on the
21  Harvest Plan.
22      Q. Mr. Ruffle, I would now ask you to please
12:35:38 1

1105

12:35:38 1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

1105

refer again to your own Report, and turn specifically to Page 9. I would like to look at Paragraph 4.6.4. You see that we have it on up on the screen. I'm going to go to the last sentence of the paragraph at the top of Page 9 where you say that, "The logs harvested in the Wet Belt in terms of species and size are very similar and could be interchanged with those produced by Merrill & Ring and other producers of second-growth logs on the Coast."

Could you please explain the significance of that statement to the Tribunal, sir.

A. Yes. Merrill & Ring operates on the Coast of B.C. within a rain forest, and the major species that Merrill & Ring produce are western red cedar, western hemlock, and Douglas-fir.

And there is a distinct difference between the Coast of B.C. and the Interior of B.C. in general. However, there is a location in the Interior B.C. called the Wet Belt or the Interior rain forest, and the tree species in that Interior Wet Belt, include western red cedar, western
This is because the log export regulations create a wall across the border that prohibits the north to south flow of logs. These regulations apply across all of British Columbia, affecting exports from both the Interior and Coast. Occasionally, minor volumes of logs have moved north from the U.S. Coast to B.C. Coastal mills (mostly pulp logs for pulpmills), but the reason why most logs would flow from the north to the south is because U.S. sawmills pay higher prices for logs than B.C. mills. The log export regulations thereby benefit sawmills and other log consumers in British Columbia by limiting cross-border competition. Log prices in B.C. are lower than they would otherwise be, creating a loss for B.C. log producers.
Would you please explain to the Tribunal the significance of that statement, Mr. Ruffle.

A. Yes. Initially when I was reviewing Mr. Jendro's Report, he was focusing on log flows generally moving from the west to the east, but I think the reality here is that logs flow from north to south, and the logs would naturally, I guess economically flow from areas of low value to areas of high value, and the log export regulations prevent or disrupt that natural economic flow, and it's a north to south flow, both on the Coast as well as the Interior of British Columbia.

Q. Thank you, Mr. Ruffle. Counsel for Canada may have some questions for you now, sir.

PRESIDENT ORREGO VICUÑA: Thank you.

PRESIDENT ORREGO VICUÑA: Who is going to cross-examine?

MS. TABET: Mr. Watchmaker will.

PRESIDENT ORREGO VICUÑA: We would have to break a few minutes before 1:00, and then you can resume after the break, if you need that.

MR. WATCHMAKER: I'm hopeful that I could finish cross-examination by 1:00.
PRESIDENT ORREGO VICUÑA: Okay. Thank you.

CROSS-EXAMINATION

BY MR. WATCHMAKER:

Q. Good afternoon, Mr. Ruffle.

A. Good afternoon.

Q. I would like to ensure that you and the members have Canadian's Core Bundle.

Now, I understand that with respect to your statement that you were asked by the Investor to respond to certain issues in the Affidavit of Mr. David Jendro; is that right?

A. That's correct.

Q. And that you were also asked by the Investor to prepare an independent Harvest Plan that would provide a reasonable estimate of the harvest volumes by species and year from 2004 through 2016; is that correct?

A. That's correct.

Q. Now, Mr. Ruffle, I see at Paragraph 3.1 of your statement that you say that Mr. Jendro and Mason, Bruce & Gerard both state that M&R is a price taker in the export market. You go on to say that,
"Both experts have independently concluded that log export sales from Merrill & Ring cannot have a material effect on the price of logs," and then you adopt their conclusions.

Is that right?

A. That's correct.

Q. But you don't actually refer to where in Mr. Jendro's original Affidavit he makes that statement, do you, sir?

A. No, I don't.

Q. Now, sir, I've reviewed Mr. Jendro's original Affidavit, and I can't find any statement by him that Merrill & Ring is a price taker. In fact, Mr. Ruffle, if you turn to Page--sorry Tab 1 of the Core Bundle that you were just given, this is the sum total of what Mr. Jendro said in his first affidavit about the price taker issue. Could you review it very quickly for me, sir. My question is: Do you see a statement by Mr. Jendro here that Merrill & Ring is a price taker?

(Witness reviews document.)

A. I would have to go through his Report again
12:42:39 1

because I got the general feeling from it that Merrill & Ring's production was so small that it didn't have an effect on the Market Price for logs.

Q. Well, let me ask you this: Assuming that is the sum total of what Mr. Jendro says on the price taker issue, does he say there that Merrill & Ring is a price taker or a price setter as Mr. Appleton suggested to you a few minutes ago?

A. No, not in this section of the Report.

Q. Okay. Well, Mr. Jendro does take up this issue in his Supplemental Affidavit. Could you turn to Tab 2 of the Core Bundle, please. And to Paragraph 7.1.5, sir. You'll note that he defines price takers as, "firms in a perfectly competitive market in which they are unable to influence the Market Price of their product by altering their level of output." And at the end of that paragraph he cites Thomas Webster's "Managerial Economics" for this definition.

You agree that that's a reasonable definition of a price taker, sir?

A. Sorry, I must have the wrong page.
Q. It's Paragraph 7.1.5.
A. Oh, sorry. Wrong page.
Q. Yes, that would be fairly accurate.
Q. So, just to repeat my question, is that a reasonable definition of a price taker?
A. That would be a reasonable definition.
Q. Okay. Is the market in which Merrill & Ring operates perfectly competitive, sir?
A. Yes, it is.
Q. It's perfectly competitive?
A. I would think it is.
Q. Could you please explain how.
A. There is quite a few buyers and sellers that would fall into this definition. It's a large number of buyers and sellers, none of which are large relative to the total output.
Q. Okay. Well, Mr. Webster, in "Managerial Economics," as Mr. Jendro goes on a little further, cites some conditions of a perfect market. They include the presence of a homogeneous or commodity-type product, purchase decisions are based entirely on selling price, and that market entry and
exist is easy. So let's take them one by one, sir.

So, your position that all logs in the
subject market are homogeneous, Mr. Ruffle?

No, logs wouldn't be homogeneous.

Okay. And they won't be homogeneous I
assume because logs are a differentiated product,
are they not?

Yes, they are a differentiated product.

And that's why buyers have to consider much
more than price when purchasing logs, don't they,
sir?

They consider other factors, yes.

And, indeed, Mr. Ruffle, isn't it true that
even log graphs of the same particular grade or sort
are capable of having significant differentiation in
quality?

There can be a range in the product quality
within a log raft, that's right.

What about ease of entry and exit,
Mr. Ruffle? It seems to me that there are
considerable investments that need to be made to
enter the market. You did the nature of the good,
Isn't there? You can't really grow trees overnight, can you, sir?

A. Well, you can enter the log market fairly easily. In British Columbia we have a program called the B.C. timber sales, and it's intended to provide harvesting opportunities to small business entrants, and the intention of the B.C. timber sales is to put more logs onto the market so that they could better establish Market Price. And operators of timberlands can also easily move in and out of the log market, depending on the conditions, depending on price.

Timber is a rather unique commodity, and I'm talking standing timber, which is different than logs, and I think that's important to realize. The logs are a product of timber, and the log market is different than the timber market. And timber owners such as Merrill & Ring, if the Market Prices are not what they want, they can simply store the timber on the stump, and so people can come in and out of the market fairly easily.

And I mean the log market.
1: Nevertheless, sir, you did agree that logs are not a homogeneous commodity-type product; correct?

A. Yes.

Q. And buyers don't make their decisions based entirely on price, do they, sir?

A. No, that's right.

Q. Okay. Now, having assessed Merrill & Ring's harvest so closely, Mr. Ruffle, I assume that you assessed its ability to actually sell the increased past and future volumes you've included in your Harvest Plan, have you?

A. No, I was looking at the Harvest Plan itself.

Q. So, you haven't assessed their ability to actually sell the increased harvests?

A. No, no.

Q. Okay. If they were to sell those increased harvests, would they be able to sell them entirely to their existing customers or might they have to find new customers for that volume, sir?

A. I think given the small volumes of timber...
12:49:00 1  that Merrill & Ring have, they could find a home for
2  that wood, yes.
3      Q.   Okay.  Now, I would like to discuss with
4  you briefly your conclusions on what you call
5  interregional log flows.
6           Now, as I understand it, it's your general
7  opinion that the timber grown on the B.C. Coast and
8  the B.C. Interior is different; is that right?
9      A.   That's correct.
10      Q.   The question was it's general opinion that
11  the timber grown on the B.C. Coast and the B.C.
12  Interior are different?
13      A.   General opinion, looking at the Coast in
14  general and the Interior in general, yes.
15      Q.   And that again in general the B.C. Interior
16  mills do not normally compete with B.C. Coastal
17  mills because the regions "produce lumber from
18  different species"?
19      A.   That's correct.
20      Q.   For different lumber markets; correct?
21      A.   That's right.
22      Q.   And I take from this, then, again generally
the mills in the Interior and the mills on the Coast are built to consume different types of logs; is that right?

A. For the most part, although there are exceptions.

Q. Okay. And as I understand it, the B.C. Coastal market is also separated from the B.C. Interior market because of transportation distances and related costs?

A. That's right. Moving wood from the Coast to the Interior is generally expensive. You're looking at trucking.

Q. Okay. And you would agree with me that the typical B.C. Interior logging operation has a much smaller area into which it sells than the typical B.C. Coastal logging operation?

A. The trucking distance does limit the area that they can haul economically into, yes.

Q. Right due to proximity of mills?

A. That's right. The Coast industry benefits from a very low cost transportation system using water, such as barge and rafting.
Q. Okay. And in the normal course of a Coastal logging company, you would have to absorb the costs of water transportation plus more expensive Inland truck or rail transportation if the Coastal producer was trying to sell into the Interior; is that right?

A. There would be additional costs to get wood from the Coast up to the Interior, that's right.

Q. Okay. Could you turn to Paragraph 4.6.1 of your statement.

A. Go ahead.

Q. 4.6.1 you say, "Long transportation distances and high trucking and rail costs usually make it uneconomical to move logs from west to east across the mountains in both B.C. and the U.S. The sawmills in the U.S. Inland and B.C. Interior therefore source only small volumes of logs from the B.C. Coast."

Is that right?

A. That is correct.

Q. And yet also in your discussion with Mr. Appleton, it's your contention that the Interior
Wet Belt is an exception to this general rule; is that right?

A. That is correct.

Q. And in particular to Merrill & Ring’s properties have similar timber to the Interior Wet Belt?

A. They do.

Q. And you say at Paragraph 4.6.2, you say that the future will “hold much more promise for higher volumes of interregional log flows in a west to east direction; is that right?

A. That is correct.

Q. Okay. Now, you claim that we will see this transition in the B.C. log processing industry because of the link between B.C. Coastal second-growth logs with B.C. Interior mills that are tooled for these smaller diameter second-growth logs; is that right?

A. That is correct.

Q. And particularly this would certainly be the case for the type of Douglas-fir and hemlock that Merrill & Ring produces?
A. That is correct, yeah.

Q. Okay. And then you say that you claim that due to the impact of the mountain pine beetle in the Interior that you would expect many more logs will be transported from the Coast to the Interior in the next three to five years; is that right?

A. There is a good possibility that Interior or Coastal logs will move to the Interior because there will be a definite supply shortage in the Interior caused by the decimation from the mountain pine beetle.

Q. Okay. Sir, can you cite any studies that you've attached to your Report suggesting that the harvest in the Interior will drop off as sharply as you've predicted?

A. Not to my Report, but to Mr. Jendro's Report I could.

Q. Okay. But you didn't reference them in your Report?

A. No, I didn't.

Q. Okay. I also note that you suggest because of the mountain pine beetle epidemic, significantly
1120

12:53:47 1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Significant timber supplies were going to be available throughout the Interior; is that right?
A. That's correct.
Q. ... mountain pine beetle, it would only affect pine trees; is that right?
A. ... And pine trees are a substantial inventory within the Interior industry.
Q. And the Interior Wet Belt, though, there isn't much pine there, is there?
A. No, there is a component of pine in the Interior Wet Belt.
Q. Do you know what proportion, sir?
A. I'm going to--approximately 40 percent.
Q. Okay. You mentioned in questions from Mr. Appleton that the difference between your Harvest Plan and Mr. Schaaf's Harvest Plan that was given to you was immaterial?
A. That is correct, yeah.
Q. Okay. And you also said that you took this plan as your client's assumption that they knew what...
Q. Okay. Now, there was also some discussion of the retrospective harvest, I believe. And by my count, the retrospective harvest makes up some 426,000 cubic meters of your Harvest Plan?

A. That's right.

Q. Compared to 550,000 cubic meters of what was actually harvested by Merrill & Ring in the Past Loss Period; is that right?

A. I will just have to check. That sounds about right.

Q. So, that's about 70 percent roughly what of they harvested in the past?

A. That's right. It's quite a substantial increase in terms of Merrill & Ring. However, in the overall picture of the Coastal industry, it's not a large figure. And what I was looking at was whether or not they could operationally increase the cut, their volumes, which to Merrill & Ring is a significant amount. However, they have the ability to do that.
Okay. Now, you did say that—Mr. Appleton said that the Harvest Plan gave you was prepared for this litigation; is that correct?

That's correct.

Okay. Did you ask your client for a business or a Harvest Plan that was made in the normal course of business, sir?

No, I did not.

Okay. And it's still your testimony that you presented an independent Harvest Plan?

An independent Harvest Plan from the perspective that Merrill & Ring had presented a Harvest Plan that ties into what they thought their business would be doing.

So, it's based on Merrill & Ring's assumptions?

It's based on Merrill & Ring's assumptions, with my observations in terms of what could be operationally possible and adjustments made—and adjustments made because of my feelings on terms of the operable inventory and the timber growth factors.
MR. WATCHMAKER: Mr. President, those are my questions. Thank you.

PRESIDENT ORREGO VICUÑA: Thank you very much, Mr. Watchmaker.

MR. APPLETON: I have nothing further.

ARTITRATOR DAM: I have one question.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR DAM: You mentioned that the natural flow is from north to south in this region. And is that because of the nature of the supply, or is that because of the nature of the demand? What is--why is that so?

THE WITNESS: It's really the nature of the price differential.

ARBITRATOR DAM: The price differential is basically because of what's demanded, say, south of the border?

THE WITNESS: No. Well, in terms of the logs, yes. They pay a higher price for logs in the U.S.
ARBITRATOR DAM: I'm just trying to get why that is so. Is that in the nature of consuming industry?

THE WITNESS: Well, the U.S. sawmilling is at a competitive advantage to the Canadian one, particularly on the coast of B.C. They have lower labor costs. They don't have the 15 percent lumber tariff. They're closer to their end markets, they have lower transportation costs, and I think most importantly is that they've retooled their sawmills. They went through a significant timber supply shortage in the early 1990s when the Spotted Owl environmental restrictions on Federal harvests came in, and it was a substantial reduction in timber supply primarily from old growth forests, and many mills were shut down in the U.S. Pacific Northwest. Since that time, second-growth forests have come on stream, and the industry rapidly developed down there to build super mills, very efficient sawmills, particularly along Puget Sound. They had water access, and they had water access also to Canadian logs. So, if you manage the B.C. Coast, I
mean, the logs can sort of keep coming down, and if it wasn't for the 49th parallel, they would just keep going, and those mills were quite a competitive advantage compared to our mills up here. On the Coast of B.C., I can't recall any mill being retooled or rebuilt to the extent they have done down in the U.S. In fact, the B.C. Coast is almost—you almost hate to say it, but a basket case in terms of milling technology.

ARBITRATOR DAM: Thank you very much.

PRESIDENT ORREGO VICUÑA: Fine. There are no more questions, Mr. Ruffle. You are excused now.

(Witness steps down.)

PRESIDENT ORREGO VICUÑA: And we will resume with Mr. Reishus in the afternoon, shall we say, please today 2:15? Is that right?

(Discussion off the record.)

PRESIDENT ORREGO VICUÑA: Okay. Thank you.

(Whereupon, at 1:00 p.m., the hearing was adjourned until 2:15 p.m., the same day.)
AFTERNOON SESSION

PRESIDENT ORREGO VICUÑA: Good afternoon,

Mr. Reishus.

DAVID REISHUS, RESPONDENT'S WITNESS, CALLED

PRESIDENT ORREGO VICUÑA: Would you please read the witness statement.

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. Reishus.

You will be examined by Mr. Little.

MR. LITTLE: Thank you, Mr. President.

And if I may, this session is a public session.

PRESIDENT ORREGO VICUÑA: Is it public or--

MR. LITTLE: Well, the Affidavit of Dr. Reishus was designated as restricted, but in Canada's view there is really no restricted or confidential information that's going to be disclosed in the context of Mr. Reishus's direct.

PRESIDENT ORREGO VICUÑA: Well, if you
don't have any problem, then we could leave it 

14:24:51 2 public. Is that all right?

3 MR. APPLETON: We don't have a problem. We 
4 are just wondering whether or not that means they 
5 are reclassifying the document.

6 MR. LITTLE: Maybe to be fair, I will say 
7 there will be some discussion about the raft 
8 analysis, so I will leave it to Mr. Appleton as to 
9 whether that is something he wants considered 
10 confidential because it was in this morning's 
11 session.

12 MR. APPLETON: Just be specific up front.

13 The raft analysis is the private business 
14 information of our client, so that part would have 
15 to be confidential. But other than that, feel free 
16 to do whatever you would like to do.

17 PRESIDENT ORREGO VICUÑA: Let us open up 
18 the session except for the moment in which you come 
19 to that particular section.

20 MR. LITTLE: Yes, I guess we will be 
21 acknowledging or discussing the existence of the 
22 raft analysis, but no specifics as to its contents
or substance.

MR. APPLETON: We will see how it goes.

PRESIDENT ORREGO VICUÑA: Okay. Thank you.

(End of confidential session.)
Q. Again, good afternoon, Dr. Reishus.
A. Good afternoon.
Q. Dr. Reishus, could you briefly describe your background for the Tribunal.
A. Sure. I have a Ph.D. in economics from Harvard University.
Since 1990, I have been a consultant, work specializing in the operation and organization of markets typically in the context of some government policy intervention in a number of different industries. In practice, this consists of market analysis, market design, and valuation.
Q. And have you ever worked on the economics of log or lumber markets before this proceeding, Dr. Reishus?
A. Yes, quite a lot. I started working on the economics of B.C. log and lumber markets back in 1992, and since then I have spent thousands of hours studying log and lumber markets in B.C., North
I've submitted testimony in the long-running softwood lumber dispute between United States and Canada on behalf of the Governments of Canada, British Columbia, and on behalf of private timber interests and processing interests in British Columbia.

I have also consulted on matters involving timber and log markets unrelated to the softwood lumber dispute.

And I have presented in an academic setting on the economics of B.C. log export controls.

Q. Thanks for the overview.

Now, what were you asked to do in this proceeding, Dr. Reishus?

A. I was asked by Canada to look at issues of market economics raised by Merrill & Ring and its experts. I have focused on the raft analysis and damage methodology of Mr. Low and Merrill & Ring.

Q. And can you summarize your understanding of the approach taken by Merrill & Ring and Mr. Low in the raft analysis.
1131

14:27:50 1   A. The raft analysis, as I understand it, is
2 their attempt to determine the price and premium
3 that would be received for their B.C. logs absent a
4 log, an economically relevant log export controls on
5 Merrill & Ring. The way they do this is by
6 comparing actual sales transaction prices on actual
7 rafts sold in the past, which have been referred to
8 as "subject rafts," to purportedly comparable prices
9 in transactions that are not subject to log export
10 controls.
11 It's fundamentally an attempt to value the
12 subject rafts through a use of comparable
13 transactions.
14 Q. And can you please summarize--
15 MR. APPLETON: I just want to make sure
16 that my friend knows that the minute we get into the
17 rafts themselves, we are going to close; correct?
18 MR. LITTLE: Sure.
19 MR. APPLETON: I want to make sure that you
20 and witness know and don't wonder into there
21 accidentally.
22 MR. LITTLE: Are you comfortable with where
we are now?

MR. APPLETON: Where we are right now is fine.

MR. LITTLE: Then we will stay.

MR. APPLETON: Oh, then no problem. When the witness said "I am going to talk about that," I wanted to make sure we are all very clear.

MR. LITTLE: Okay.

BY MR. LITTLE:

Q. Dr. Reishus, can you please summarize your main findings with respect to the raft analysis.

A. Well, my primary finding is that the raft analysis is not based on sound economics, and that the resulting value and price premiums are unreliable and overstated.

Q. Okay. You say that the price premiums are unreliable and overstated.

What's the basis for this opinion?

A. Well, there are three related reasons. First, the methodology for choosing the comparable transactions leads to an overvaluation.

Second, the Merrill & Ring and Mr. Low zero
out transactions for which the purported Best Market
Price is less than the actual price.

And, third, they attribute any Export
Premium to the log export controls. This ignores
differences in quality between domestic and export
markets and the existence of Log Export Premiums in
jurisdictions that have no log export controls.

Q. Okay. Let's go through those in order.

The first of your three points involves
overvaluation as a result of the method by which
comparables were chosen. Can you explain how that
works.

A. Sure, but I think it's useful to have a
brief overview of the economics and markets for logs
from the B.C. Coast.

Timber logs in the B.C. Coast are subject
to substantial variation in quality, and the way
transactions occur on the B.C. Coast are through
bilateral negotiation among a network of log buyers,
sellers, and brokers, and these transactions are
individually negotiated. As such, the prices struck
in these transactions are--reflect the idiosyncratic
1134

characteristics of those transactions such as the
quality of the raft of logs and the preferences of
buyers and sellers. These transactions occur in an
environment in which there is no log exchange.
There is nothing like a Stock Exchange. And as a
result, there is not a single price for similar or
even identical logs transacted in this market.
Instead, you get a substantial variation in prices
actually struck.

Q. Okay. You've talked about logs. Much of
the discussion in the hearing thus far has been
about rafts. Does this apply to rafts as well,
Dr. Reishus?

A. Yes, rafts are how logs are marketed on the
Coast, so logs are bundled into rafts based on the
physical attributes of the logs. The rafts are
assigned a sort code which may be proprietary or
based on public standards, and in some manner
reflects the physical attributes of those logs,
attempts to summarize that information.

Q. And does the sort identifier alone capture
all the relevant information about logs?
No, it does not. There is substantial physical variation in the logs that make up a raft, even with the same sort code. You observe on the B.C. Coast that buyers typically take the time and expense to inspect rafts of logs prior to making an offer or purchasing these logs. If the sort identifier was sufficient to identify the relevant economic value of the raft, then you wouldn't have to go through the trouble of inspecting them.

Q. Is the economics of markets for B.C. Coastal logs unusual, Dr. Reishus?
A. No, not really. There are a number of markets in which goods of different qualities are traded through a network of buyers, sellers, and brokers. This is particularly true for commodities and what I referred to as "natural goods." Unlike manufactured goods which, you know, come off identical off an assembly line, logs--one log is not like the one next to it.

Q. Okay.
A. Actually, as a result of that process and
the complex quality nature of Coastal logs, it's very difficult for someone who is not a participant in that market to directly observe the price and value of those logs in a timely manner.

Q. Okay. How do the market characteristics of B.C. Coastal logs affect the Merrill & Ring and Mr. Low raft analysis?

A. Well, in my opinion, the raft analysis does not properly account for the quality of the rafts. In general, high-quality, high-priced rafts will tend to get a higher price; and low-quality, low-priced rafts will tend to get a low price, and that's going to be true even within a sort code. So, on average, you would expect an average quality raft to get a price that looks like an average for similar rafts in the marketplace. That's not what the raft analysis does.

Q. Okay. How did Mr. Low develop the comparable transactions and for the subject rafts?

A. Well, as you've heard, Mr. Low didn't. Mr. Low was provided the Best Market Prices and subject to minor verification by Merrill & Ring
Q. Okay. How were the comparable prices used on the raft analysis then determined?
A. Well, they appeared to have been drawn from the top or the top part of the range, excluding what had been referred to as "aberrational circumstances," of transactions involving logs of the same sort identifier as those in the raft and of the actual subject rafts.

Q. Okay. You said earlier that the premium was overvalued and overstated. What would a valid method have been to avoid that result?
A. Well, let me give an example using houses, which may be more familiar to us than logs.

If I wanted to figure out what my house was worth, I would tend to look at other comparable transactions, so if I have a three-bedroom house, I would start by looking at the sale of other three-bedroom houses in the neighborhood, and then I would want to go measure the measurable, verifiable qualities of these other houses to adjust for their prices. Examples would be size of the house, size
of the lot, age of the house.

And then I might engage in some sort of inspection to consider other factors, attributes that affect the value of these comparable transactions, such as the quality of the maintenance, the landscaping, the quality of the neighboring homes.

And after I have done all of that, I would have an adjusted comparable price for each of the comparable transactions.

And at that point, if I wanted to get a fair or unbiased estimate of the value of my house, I would tend to take something that reflected the central tendency of the range of adjusted prices I would have gotten from these comparables, something like an average. Because even after doing the adjustments, there are still going to be typically some range of a price dispersion among the comparable transactions.

What I wouldn't want to do is take some extreme value from the adjusted prices because if I consistently took the high price, I would tend to
overvalue my house. And if I took the high
unadjusted price, I would tend to even more
significantly overvalue my house.

Q. And how does the house analogy apply to
logs?

A. Well, the economics of logs and houses
share some characteristics. There are significant
quality variations, some of which are only partially
reflected in simple summary information such as the
number of bedrooms or the sort code.

Like houses, if I select the highest
three-bedroom house sale in my neighborhood, I'm
likely to overvalue the price of the average
three-bedroom house. Likewise, if I take the
highest transaction price for a log of a particular
sort code, I'm going to overvalue the average logs
of that sort code.

Q. All right. The second major concern you
had with the raft analysis was zeroing that you
mentioned earlier. Can you explain what you mean by
zeroing, Dr. Reishus.

A. Well, zeroing is the process in the raft
analysis when if the Best Market Price assigned to a
subject raft by Merrill & Ring management is below
the actual price for that raft, then that price
difference is set to zero.

Q. And what's the implication of zeroing for
the raft analysis?
A. Well, the implication is that you are going
to, for significant sections of the rafts in the
raft analysis, that they're going to be overvalued.

Q. Could you use an analogy or an example to
show how it results in the overvaluation.
A. Sure. I will talk about houses again.
The--suppose I have sold a bunch of houses
and I want to figure out if I'd sold them for fair
market value or not, and I develop some fair
comparable method for evaluating whether these
transaction prices are fair or not. So that, on
average, the comparable valuation is equal to the
Fair Market Price.

But for any given house, my comparable
valuation is going to be tend to be either above or
below. So, if I throw out those cases in which my
comparable valuation is less than my transaction price, I will discover that on average for these group of houses that the comparable value is above the price at which they actually sold at, and I would come to the erroneous conclusion that I had sold these houses below the fair market value determined by the comparables. The same process works in the raft analysis.

Q. Okay. And what's the effect of zeroing? Which direction does it take damages?

A. Well, zeroing in this case can only go in one direction, which is to lead to an overstatement of the value of the rafts.

Q. All right. And is this effect important in this proceeding?

A. Yes, it is. For a significant portion of the subject rafts, eliminating the effect of zeroing eliminates most of the premium claimed on those rafts. In the period before 2006 which, given the different ways the raft analysis was put together in the two periods, the period before 2006 is the only
time which we can quantify the effect of the  
zeroing.

And in that period, roughly half of the  
premium claimed is on rafts that were actually  
exported. If you control for the zeroing, most of  
that premium disappears and the remainder could be  
the result of other adjustments such as quality.

Q. All right. Let's turn to your third major  
point. You said that even with a finding of a Log  
Export Premium in the raft analysis that it cannot  
be attributed to the log export controls. Why is  
this?

A. Well, there is a couple of reasons. First,  
Log Export Premiums are observed in jurisdictions in  
which there are no log export controls. For  
example, as I discussed in my First Report Chile has  
a timber industry based on tree plantations where  
they have planted a nonnative tree and grow them and  
produce relatively uniform logs. And even with  
these relatively uniform logs, there is a  
significant Export Premium observed, a difference  
between the export and domestic prices in Chile.
And this is true in other jurisdictions.

Q. And what's your other reason?

A. Well, in economics there is an economic regularity in which the exports out of a producing region tend to be of higher quality than those that remain behind. This is known in the economics literature as shipping the good apples out, where when you're producing in the region and there is a spectrum of quality, you tend to ship out the good apples. This is a result of the fact that the costs of preparing for export, transportation, and marketing into an export market are more easily absorbed by higher quality, higher priced goods.

Q. And what's the implication of what you referred to as shipping the good apples out?

A. Well, I believe a similar issue happens here, and one thing you will see is that the average quality in the domestic market is not the same as the average quality in the export market. In fact, it tends to be lower.

So, in some sense they're not the same good.
And, therefore, even if the markets—same pricing system, you would expect to see an apparent Export Premium in which the price for the exports exceeded that for the—that in the domestic market.

Q. Okay. And how does shipping the good apples out point relate to your analysis of comparables?

A. Well, it further stresses the necessity of doing proper quality adjustments. So, not only is it the case that the—as the case basically that the average export price will tend to overstate the value if you take a domestic of a good that would have been sold domestically and sold on the export market. If you take the highest price in the export market, you are just going to exacerbate that overstatement.

Q. All right. Dr. Reishus, do you have any other findings that you haven't already discussed?

A. I have a few, but there is one I would like to mention. Mr. Low and Merrill & Ring, as part of their damage analysis, have used an additional
hypothesical harvest known as a retrospective past harvest. And I look to see if that retrospective past harvest was consistent with what's known about log supply.

Q. Okay. And what did you find?

A. Well, I basically asked what would be the effect of the removal of the log export restrictions, and I looked at Mr. Low's claims on the price and revenue effects from the Export Premium, which as I've argued has overstated that, and then compared that to the quantity change claimed by Merrill & Ring management. And that quantity change as you saw was large, more than 70 percent of the actual harvest.

Q. Okay. Finally, we heard Mr. Low today discuss his statistical sampling of the raft analysis. Do the representations and staying away from anything that's proprietary information, but do the representations regarding the statistical sampling impact on your conclusions regarding the raft analysis?

A. No, not at all. I think it's important to
understand what that statistical sampling actually consists of. As I reviewed his sampling methodology, he stated he looked at 131 invoices, which I now come to believe probably corresponds to 131 lines in the raft analysis and actually looked at Log Sale Agreements.

And what he did was look at the Log Sales Agreements that have been identified by Merrill & Ring management and seen if the entries in that raft analysis correspond in some way to the entries in those Log Sales Agreement. So, essentially data verification methodology. That has nothing to do with the types of errors I've discussed about.

What needed to be done from a sampling perspective was to look at the whole population of Merrill & Ring transactions, and looked at the sample for representative transactions that reflected a representative or average price consistent with the quality of the logs in the rafts, in the raft analysis. There is no evidence that any of that was done.

Could I come back to a question you had
Q. Sure.
A. You were talking about the retrospective past harvest, and I wanted to say what I had also
done was compared the response assumed by Ring management to what was seen in the economics
literature that has looked at the economics of log supply. And what I discovered was that the assumed response to the price change by Merrill & Ring's management is grossly disproportionate to that which has been observed in North American log supply. It's somewhere between seven to a hundred times larger in response to prices than what has otherwise been observed.

Q. Okay. Thank you very much, Dr. Reishus.
A. You're welcome.

PRESIDENT ORREGO VICUÑA: Now the cross-examination, Mr. Nash, please.

MR. NASH: Thank you, Mr. President.

CROSS-EXAMINATION
BY MR. NASH:

Q. Dr. Reishus, did you write your Report
Q. From beginning to end?
A. I had some help drafting some of the background section, but I then rewrote it.
Q. And who helped you write the background section?
A. Members of my staff.
Q. Okay. In-house?
A. Yes.
Q. Is it fair to say that a B.C. log supplier would have an incentive to export higher quality logs? Do you agree with that?
A. I believe if they could achieve a--they would have the incentive to sell their log into whatever market they could achieve the best net back given all the costs and other considerations they may have.
Q. I didn't understand that. Maybe I will just repeat the question. Is it fair to say that it would be the B.C. log suppliers would have an incentive to export
their high quality logs?
A. In general, the economic forces would tend
to encourage, if there were to be exports, that they
would be of the higher quality logs.
Q. And would it then be economically rational
to export higher quality high value logs?
A. Well, since I believe value tends to be
correlated with quality, I would agree with that.
Q. You agree with that.
And Japan has no import restrictions on
B.C. logs; correct?
A. I would have to review. At one point they
did have some tariffs, but I believe the tariffs
were on lumber, not on logs, so I would agree with
you at this point.
Q. When did Japan take off tariffs on B.C.
logs--not lumber. Logs.
A. I don't recall. I don't believe it's
relevant during the period under consideration here.
Q. So, you're pretty certain that tariffs were
taken off B.C. logs in Japan prior to 2004?
A. I don't recall. My memory is better with
respect to the lumber, so I just don't recall.

Q. You can't recall, okay.

If you could turn to Page 92 of your Report.

A. Which one?

Q. The first Report.

And just for clarification, you either swore or affirmed that Report on May 9, 2008?

A. I don't know. I have the affirmation page, but I believe so.

Q. Okay. All right. That's fine.

If you go to Paragraph 158.

A. Yes.

Q. You say there that in the middle of the Paragraph, "The B.C. Forest Act Part 6, however, requires that logs from private lands within B.C. be scaled using the metric system. This requirement does not depend on whether the harvested timber is used domestically or exported, and is unrelated to any export control process."

My question is: Did you read Part 6 of the B.C. Forest Act before you wrote that?
A. Yes, I did.

Q. Did you read Section 94, subsection 5?

A. Without looking at it, I couldn't tell you.

Q. Okay. That subsection says the Regional Manager, District Manager, or a forest officer authorized by either of them may exempt timber from this section and may attach conditions to the exception.

And Section 94 is about the scaling.

Do you recall reading that?

A. I don't recall, but it wouldn't surprise me if I did.

Q. So, do you understand that an exemption can be granted to a log supplier from the provisions of that section?

A. Based on what you've said, yes.

Q. Okay. And that would, of course, change your conclusions if the log supplier could be exempted from the requirement to scale a metric if the log supplier wanted to export and wanted to scale only in Scribner; correct?

A. Well, if that supplier received an
exemption, that would be true.

Q. Right.

I would like to consider for a moment if you're a house builder, not just an ordinary house builder, a high quality house builder, and you build a lot of houses, and they're generally of high quality but they have different options. Some may have very high end kitchen, some middle end, perhaps some lower econo kitchens, but still of high quality for their class. You may have different landscaping on the house in-house. You may have different characteristics of a house, but you're known, you have a reputation for building high quality houses, and you deliver them consistently. You build on time, you have good relationships with your customers, and your customers know you by reputation. And you have a steady flow of customers, and your customers want more of your high quality houses.

Would that not tend to have the price go up in relation to the competition?

A. Well, if you're doing those things better
than the competition, then I would agree with that.
If the competition is doing those same things that
you're doing, I wouldn't expect to see on average a
difference.
Q. But if you're doing it better than the
competition and because of that you have a good
supply of customers and the suppliers--the customers
are saying I want more of your houses, give me all
the houses you can give me because you deliver them
on time, you're a good, reputable supplier, and all
those other things, wouldn't that suggest that you
would fetch a higher price?
A. Well, you may not necessarily fetch a
higher price as opposed to be essentially among a
set of preferred suppliers, so that it is true that
good customer relations means that you're more
likely to use a supplier with which you have a good
relationship than with one you have a bad
relationship with.
Q. And if you could become a preferred
supplier because of the qualities of your house and
the characteristics of them, that would tend to
increase the price that you would be able to fetch
for your houses because of those relationships;

isn't that fair?

A. I would say the value of that relationship
could be captured in a number of different ways, and
price could be one of them.

Q. In which case the price could go up and may
even tend to go up; isn't that fair?

A. That's one possibility, yes.

Q. For the purpose of your Report, did you
assume that Merrill & Ring was a major private
landowner on the Coast?

A. No, relative to the private landownings on
the Coast, it's not one of the two major landowners.

Q. Who are the two major landowners?

A. TimberWest and Island Timberlands.

Q. And would you agree with me that those two
major landowners would have a greater flexibility to
deal in the marketplace under the current Regime
than Merrill & Ring would because of the fact of
their size and the volume of their production?

A. They're clearly producing a greater flow of
volume at any given time. I'm not sure that gives
them proportionally more flexibility than Merrill &
Ring would have.
Q. It's a possibility, though, isn't it?
A. Yes, it's possible.
Q. And if in the current Regime they had
Provincial wood that would assist them in being more
flexible in their operations to be able to navigate
the Regime, would you agree with that? Provincial
wood of the same species quality or comparable
species quality and price.
A. I believe if they have comparable
Provincial wood, that gives them some flexibility,
yes.
Q. A little bit more flexibility? And I'm
thinking of the fee-in-lieu, the export fee-in-lieu.
They don't have to pay the fee-in-lieu on that
Provincial wood; right?
A. Yes, it's true. The Provincial Regime
imposes a fee-in-lieu that's not paid under the
Federal Regime.
Q. So, that would give the larger suppliers
14:58:56 1 like Island Timberland, for example, more
2 flexibility in navigating the system? Wouldn't you
3 agree with that?
4 A. Given the way you've posed it, I don't
5 think it's a matter of size, but would be the
6 proportionality of Federal and Provincial wood the
7 way you've set it up.
8 Q. So, if a supplier in your scenario had
9 25 percent Provincial wood, they would have a lot
10 more flexibility than a supplier that had five or
11 10 percent; correct?
12 A. Well, first I would characterize it as your
13 scenario, but I would agree with that.
14 Q. Under my limited scenario?
15 A. Yes, I would agree with that.
16 Q. Fair enough.
17 Do you know in 2007 how many million cubic
18 meters of private federally regulated wood logs were
19 exported from British Columbia?
20 A. My memory--well, I can look it up, but just
21 from memory I think it's somewhere between two and
22 three million cubic meters.
15:00:06  Q. Do you know how many million or how many
2 cubic meters Merrill & Ring exported in 2007?
3   A. Again, I could look it up, but it's
4 obviously much less than that, in the tens or low
5 hundreds of thousands.
6   Q. Probably in the tens of thousands in that
7 range?
8   A. In 2007, that's probably true.
9   Q. Out of somewhere between two and
10 three million cubic meters overall?
11   A. I could confirm that, but yes.
12   Q. If you could turn to your Affidavit--is it
13 an Affidavit or is it a Report? You sworn to it or
14 affirmed it, but how would you like to have it
15 referred to? A Report?
16   A. Either one.
17   Q. Let's call it an Affidavit.
18 And go to Page 16, Paragraph 33, and then
19 if you could also look at Ms. Korecky's Affidavit--I
20 may have said Page 15, and if I did I misspoke.
21 It's Page 16.
22   A. Okay. Unfortunately, I see it in my
Q. First of all, did you review Ms. Korecky's Affidavit before you wrote your Affidavit?

A. No.

Q. Did you speak to Ms. Korecky before you wrote your Affidavit?

A. Yes, I did.

Q. What did you speak about?

A. I spoke about understanding the process of the details of the Federal process for exporting logs in B.C. as well as trying to understand what sort of data might be available out of the export division.

Q. And did you rely upon her for opinions in that regard in coming to your conclusions?

A. I would say she informed me about the process. I don't think there are any that I--unless I've identified them, I relied solely on her.

Q. Okay. If you could turn to Ms. Korecky's Affidavit at Page 6, Paragraph 25 and compare it, if you will, at the same time to your Paragraph 33. I must say that they're strikingly similar
language in these two paragraphs, not all identical
although some identical.

She says in her first sentence, "British Columbia forests are divided into two economically
distinct regions separating"--sorry--"the Coast and
the Interior."

You say, "British Columbia forests divided
into two economically distinct regions," and then
there is another phrase, "with the Cascade summit
line traditionally," and then you say "separating
the Coasts from the Interior."

You go on to say that, "The distinction
between Coast and Interior derives from differences
in geography, the forest ecosystems," and then you
say in brackets, "which are reflected in the
species, size, quality, and diversity of timber
supply, timber harvesting methods, and costs and
transportation alternatives."

Ms. Korecky says in the last sentence of
her Paragraph 25, "The distinctions between the
Coast and the Interior derive from differences in
geography, the forest ecosystems, timber harvesting
methods and costs, and transportation alternatives."

Did you write Paragraph 33?

Yes, I did.

So, if those words in Ms. Korecky's

Affidavit are written tracking yours, she did not

write them; is that right?

No, I couldn't come to that conclusion.

You wouldn't come to that conclusion? The

last sentence is identical word for word.

Actually, I don't believe that's true,

but--

Other than the bracketed part, second to

last sentence.

Yeah. Her last sentence is similar to my

middle sentence in that paragraph except for the

line long parenthetical.

It's identical to yours, is it not?

Except for the line long parenthetical,

yes.

Right.

And Paragraph 33 are your words.

I believe so, yes.
Q. Okay. Thank you very much. Those are my questions.

A. Thank you.

PRESIDENT ORREGO VICUÑA: Thank you.

Redirect?

MR. LITTLE: We have nothing further.

PRESIDENT ORREGO VICUÑA: Thank you. There are no further questions, Mr. Reishus, so you are, in fact, excused.

THE WITNESS: Okay.

(Witness steps down.)

PRESIDENT ORREGO VICUÑA: And then we will proceed to hear our next witness, who is Mr. Jendro, please.

DAVID JENDRO, RESPONDENT'S WITNESS, CALLED

PRESIDENT ORREGO VICUÑA: Would you please read the Witness Statement, please.

THE WITNESS: Yes. 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. Jendro. You will be now examined by Mr. Little.
MR. LITTLE: Thank you, Mr. President.

DIRECT EXAMINATION

BY MR. LITTLE:

Q. Mr. Jendro, let's start by summarizing your qualifications. I understand that you're a forest management economics and policy consultant with the firm of Jendro & Hart located in Oregon.

A. That's correct.

Q. And you hold degrees in forest management and business administration?

A. I do, yes.

Q. And I should say that we are going to be focusing entirely on confidential material in this session, so the hearing should be closed.

(End of open session. Confidential business information redacted.)
Q. My apologies for not noticing that.

For the Tribunal's benefit, Mr. Jendro, could you please provide us with a brief summary of your professional background.

A. Yes. Since 1977, I have worked as a consultant, focusing on the areas of valuation and appraisal of timber and timberlands, development of forest management strategies, market studies, price evaluations, antitrust and trade issues, including disagreements between the United States and Canada over the importation of softwood lumber into the United States, as well as the forest management evaluations and impact analyses all for a variety of clients.

Q. And what type of clients, Mr. Jendro?

A. Well, for example, Forest Products companies ranging from large to small, Indian Tribes, native groups, trade associations, Government agencies, as well as individuals.
Q. Mr. Jendro, what were you asked by the Government of Canada to do in this litigation?
A. I was asked to review and evaluate certain of the Investor's claims as well as the work product of Mr. Low and Mr. Ruffles in order to determine the appropriateness of their methodologies, their data and analyses, and in light of the facts established in this case, whether or not the conclusions they reach were, indeed, correct.
Q. Okay. Let's discuss Mr. Low's Report first.
Do you agree that Merrill & Ring suffered the Lost Export Premiums as a result of the Log Expert Control Regime in British Columbia?
A. No, not in my opinion. I don't believe that the losses that Mr. Low alleges were suffered by Merrill & Ring.
Okay. And what are your reasons underlying this conclusion.

Well, on the price side, I believe there are three major errors that Merrill & Ring and Mr. Low made, the first being the use of an overstated Best Market Price or benchmark price. And this is important we keep this in mind because Mr. Low, Merrill & Ring's analysis, entire analysis, is predicated on this comparison or the comparison of overstated benchmark price of logs compared to Merrill & Ring logs sold subject to the Log Export Regimes or, as I call them, the Procedures, which are the--I call the subject logs or subject rafts.

Any other major errors? You mentioned three.

Yeah. The second one being Dr. Reishus talked about it in his testimony just before me, that being methodological errors such as the zeroing that he talked about.

And the third major error on the price side being attributing 100 percent, virtually all of any observed difference between these overstated
15:10:53 1

2  benchmark price and the Subject Log Prices to the

3  log Export Procedures when, in fact, there are many,

4  many factors that can and do affect log prices and

5  can explain these conferences.

6      Q.   Okay.  At the outset you mentioned that on

7  the price side you had certain problems.  Is there

8      A.   Yes, the volume side, and my concern on the

9  volume side is that Mr. low relied on Mr. Ruffle's

10  Harvest Plan, which I believe is overstated.

11      Q.   All right.  Well, let's start with the

12  price side of the analysis.  You mentioned that the

13  Best Market Prices are overstated.  Can you explain.

14      A.   Yes.  But I think it would be helpful for

15  the Tribunal if we went to what I believe is Tab 1

16  to the Core Bundle for this direct examination.

17      Q.   We'll just let the Tribunal open their

18  copies.

19           Okay, at Tab 1 I'm seeing a flow chart.

20  What is this flow chart, Mr. Jendro?

21      A.   This is a flow chart from my Affidavit, my

22  second Affidavit in this case.  I don't have a
Q. Sir, we will get you the laser pointer. It might help.

A. It's Figure 3.2-one from my second Affidavit. And what this does is to illustrate the steps taken in the Merrill & Ring raft analysis for the period November 2003 to December 2005. The methodology changed somewhat for 2006, 2007, and 2008, but I believe for purposes of illustration this will suffice. And I might suggest it might make it easier if this were to be kept handy during the course of the questions, that would just be easier.

Q. Okay. Can you please take us through this flow chart.

A. Yes. What this flow chart does again is take steps that were taken in the raft analysis. It starts with a selection of a Best Market Price for a particular sort and month. Often, not always, as we heard this morning from Mr. Low, the Best Market
Price is expressed in U.S. dollars per thousand board feet Scribner. That being, it was taken from a market not subject to the log export restrictions, and ostensibly from Merrill & Ring's sales in the neighboring Washington State.

What is then done with that, first you had the Best Market Price in U.S. dollars for MBF Scribner, a series of two conversions and one adjustment are made to it to get it from U.S. dollars to Canadian dollars, a currency conversion, and from MBF, thousand board feet Scribner to B.C. metric scale, the domestic scale in British Columbia. And that's what we see here in this fifth line, Best Market Price, Canadian dollars per cubic meter.

Next, an adjustment is made or is attempted to be made by Mr. Low, Merrill & Ring, in the event that the Best Market Price selected was at a location that required some additional transportation for the subject logs, so they attempt to make a transportation adjustment here resulting in Line 7 is an adjusted Best Market Price in...
Canadian dollars per cubic meter.

Now, I should add at this point my analysis revealed that Merrill & Ring and Mr. Low made significant errors in applying the conversion factors for currency and for scale, and, at times, also for transportation.

Having gotten to this level here, line 7, in Canadian dollars per cubic meter, Best Market Price, that's compared then to Merrill & Ring's actual price for the subject logs or subject log rafts. In the event that the Best Market Price was higher, higher than the actual price, a positive difference, that difference was then multiplied times the volume sold in the raft, and the alleged log export premium or what I call the shortfall is indicated.

However, in the event that the Best Market Price was lower, lower, than the actual price, a negative difference, that difference was just ignored or zeroed out, as Dr. Reishus has spoke about.

Q. All right. Thank you for the overview.
Now, back to where we started. Can you explain why Best Market Prices are overstated.

A. Well, the Best Market Price is based, on my review of the Merrill & Ring and Mr. Low's raft analysis, tended to be based if not on the absolute highest price for a given log sort in a given time period, at least amongst the highest prices instead of relying upon a price that reflects the attributes of the subject logs.

Q. Can you provide an illustration for the Tribunal.

A. Yes. I think if we went to Tab 2.

          What Tab 2 relates to--and this is again from this my second Affidavit, Figure 1.2-2, this has to do with the selection of the Best Market Price used for Douglas-fir FC sort for the month of September 2004. I believe that Merrill & Ring produced nine Log Sale Agreements for the month of September 2004 that had FC sort Douglas-fir in it. That's summarized in my Appendix D to my Affidavit with the individual Log Sale Agreements very much posted in Appendix J, should you wish to look at
But what I have done here on Figure 1.2-2 is to array the FC sort prices from those nine Log Sales Agreements from highest to lowest, and I know from my review that the Best Market Price selected for this month for FC sort Douglas-fir was $850. Now, you can see here the very top price, in Log Sale Agreement 1675 sold from Merrill & Ring to Sumitomo was sold at $850.

Q. Just make sure that you continue to speak into the microphone.

A. Hit you in the eye, sir. It's interesting to note in that same Log Sale Agreement 6775, there were other sales of FC sort logs at different prices ranging down to as low as $505 per thousand board feet Scribner or some 40 percent less than the top price. And remember it's the top price that was selected as the Best Market Price.

And, you know, the 850 is no more representative of the valuation of the subject logs than the 505. It's simply the highest price.
Okay. And the 850 or the 505 all of these agreements Merrill & Ring Log Sale Agreements?

This is in the same Log Sale Agreement, yes, of Merrill & Ring's.

Sorry, that example was in the same Log Sale Agreement?

Yes.

But there are other Merrill & Ring Log Sale Agreements on arrayed on this diagram; correct?

All for Douglas-fir FC sort for the month of September 2004.

And they are Merrill & Ring agreements?

I'm sorry, yes.

Okay. Why would different rafts of different FC sorts logs sell to the same buyer on the same date for a different price?

Well, contrary to Mr. Low's assumption and the assumption on which the raft analysis he relies on is based, not all FC sort logs or FC sort rafts are of the same quality. They differ substantially by quality and therefore by price.

What should Merrill & Ring have done in...
15:19:48 1

2  selecting the Best Market Price in this instance?

3      A.   Well, again, they should have selected a

4  benchmark that's reflective of the log, physical

5  log, attributes of the subject timber, subject rafts

6      Q.   All right.  In your Affidavit, Mr. Jendro,

7  you also spent a considerable amount of time on the

8  errors that were committed in volumetric conversion;

9  that is the conversion from Scribner to metric;

10      A.   That's correct, yes.  In the state of

11  Washington or when a sale is sold out of British

12  Columbia to an Asian buyer, say, the scale, the most

13  predominant scale is thousand board feet Scribner

14  log scale, whereas a domestic sale in British

15  Columbia is scaled in what's known as British

16  Columbia metric scale.

17      Q.   All right.  And how does the conversion

18  factor impact the comparison in the raft analysis?

19      A.   Well, since the comparator, the export sale

20  is often in a different scale, Scribner, as opposed

21  to the subject raft sale in metric, they have to be
And converting between Scribner and metric is not at all like converting between quarts and liters or miles and kilometers. There's no direct correlation between the scales, so every log or every assemblage of logs, rafts, would have its own unique conversion factor, and these conversion factors differ by species, differ by log size, by length, taper, quality, and they can vary substantially.

Q. So, how did Merrill & Ring apply conversion factors?

A. Merrill & Ring used by species and sort one common conversion factor for the whole period of time being November 2003 through December 2008. In other words, they assumed that every raft of a given sort was identical throughout this whole period of time which, of course, is impossible.

Q. All right. I believe at Tab 3 of the Core Bundle you provide an illustration of what Merrill & Ring did.

A. That's correct, yes.
Q. Can you provide an illustration of the sensitivity, then, of Best Market Prices which were the comparators to variations and conversion factors?
A. Yes. Mr. Low calculated a shortfall of some $4.2 million dollars as he put up earlier today or yesterday for the period November 2003 through December 2008. That's based on the actual harvest, not any retrospective harvest.

If he had used or Merrill & Ring had used conversion factors that were just 10 percent higher, just 10 percent higher instead of 5.43 for that sort it would be something like six, he would have resulted — or it would have resulted in a shortfall half, 48 percent of what he calculated half of the 4.2. So, it's very sensitive to change in conversion factor.

Q. All right. Mr. Jendro, you also mentioned that you had difficulties with the practice of zeroing. Can you illustrate for the Tribunal the problems caused by zeroing.

A. Yes. I share what Dr. Reishus said this morning about that, but maybe if we could go to Core Bundle Tabs 4 and 5.

Q. Okay.
This is a little hard to read. What Tab 4—there you go. Tab 4 is Table 3.2-1 from my second Affidavit, and essentially what this is is what's in the raft analysis for hemlock HL sort for December 2003. As you can see, for this month, for this sort, there were three rafts, three subject rafts, the first one being in a sale to Seattle's Snohomish mill Company. I believe they're located in Everett, Washington. And the second and third rafts were one sale, a common sale to Louisiana Pacific in Takoma, Washington.

Going to the fourth column over here, it says M&R selected Best Market Price—now, this is already in Canadian dollars per cubic meter at this point—this is compared in the First Instance to the average selling price, actual selling price, excuse me, for the Seattle Snohomish Mill Company raft, 5771, which was very close but 28 percent lower—28 cents lower than the Best Market Price, and the second raft was sold 4272 or $15.26 lower than the Best Market Price.

Those differences were multiplied by the
15:25:58 1

volume of the rafts and results in damages calculated in the amount of about $8,000. This is what was actually done.

If we move now to the Tab 5, here is what would have happened if they hadn't zeroed in this particular instance. They had left--these are the same date as on Tab 4, but the third raft sold as part of the same sale to Louisiana Pacific in the second raft and constituting over half the volume in that sale of HL, sold for $73.11, more than the Best Market Price selected, and had they used that, not zeroed it out, you can see that they would not have indicated or resulted in any indicated damages, in fact, as it would have been a negative.

Q. Okay. Let's take the third major source of error associated with log prices. You mentioned the attribution of a hundred percent of any difference between the benchmark price and the actual price to the Log Expert Control Regime.

A. Well, again, there are many, many factors that affect log prices, and Mr. Low adjusted for
about one of them, in some cases that being transportation.

Q. Okay. Can you provide us with a few quick examples of factors affecting log prices within a sort.

A. Yes. As I’ve said, log size certainly makes a difference. It’s length, it’s diameter, it’s taper, log quality, the type of defect, the amount of defect certainly makes a difference.

Q. All right. Can you point the Tribunal to illustrative examples of how the raft analysis didn’t consider the size and quality mix of the subject logs.

A. Yes. I think in the interest—my Affidavit is replete with these examples, but in the interest of time I’d point you to Appendix A for red cedar which starts at about A-28, or you could go to Hardwoods Alder, which is another easy one to see, and I believe that starts at A-40 or A-41, appendix of my Report.

Q. Okay. I believe that at Tab 6 you’ve got some mention of your findings with respect to the
1180

ARBITRATOR ROWLEY: What you have up on the screen does not appear to be what is at Tab 6.

THE WITNESS: That's correct.

MR. LITTLE: Okay.

THE WITNESS: I believe this was an exhibit that was shown to Mr. Low this morning. This has to do with the red cedar sort prices from Sale Agreement 258 to TMI Forest Products, March 28, 2007. And what this shows is that this sale was selected as a benchmark or a Best Market Price for cedar of this sort, although it ended up comparing to another sort, to CX, for the second quarter of 2007. The Best Market Price selected was $1,500 per thousand board feet Scribner. And, of course, as talked about in Mr. Low's examination, that reflects the highest quality within that sale of that sort at that time, logs that were 36 to 40 feet in length. They commanded a significantly higher price than logs of shorter length.
15:30:39 1

15:30:39 1

Q. Okay. At Tabs 7 and 8 there is further examples regarding the hardwood claims, but in the interest of time perhaps we will leave those and we'll move on to just another area, but before doing that, are the errors that you highlight regarding the red cedar and the hardwood subject rafts limited to these two species?

A. No, not at all. That type of error was pervasive. Every sort, time period I examined had these types of errors. I shouldn't say everyone. A lot of them did, be it Douglas-fir or hemlock or whatever. This is just illustrative of the problem or the issue.

Q. Mr. Jendro, in your opinion, what proportion of the alleged shortfall damages alleged by Mr. Low did you find were attributable to causes other than the Log Export Control Regime?
A. My analysis resulted in an estimate of at least 79 percent. I believe this is in Tab 9 to the Core Bundle.

Q. Okay. And can you explain what the table at Tab 9 illustrates.

A. Right. Again, this is out of my second Affidavit at Table 3.15-1. And what this is essentially a summary of what I found from examining the seven sorts that accounted for some 87 percent of the alleged claims shortfall by Mr. Low.

For example, the Merrill & Ring sort FH, Mr. Low claims a shortfall for the period November 2003 through December 2008 on actual harvest of some $916,000. It's my findings that at least 75 percent and perhaps as much as all of it can be explained by causes other than the log Export Procedures.

Q. All right. One further question. To what do you attribute the remaining 21 percent of losses?

A. Well, without more data, data regarding such things as the log scale information for the
15:33:12 1

Best Market Prices selected by Merrill & Ring, information they likely have but did not produce, I'm unable to attribute the remaining difference, the unexplained difference, to any specific factor, but it could be well due to factors other than the log Export Procedures themselves.

Q. Mr. Jendro, you mentioned at the outset that on the volume side of the analysis, Mr. Low's analysis is flawed because it relies upon Mr. Ruffle's Harvest Plan which overstates harvest volumes. Can you provide a further explanation?

A. To repeat, I think you've heard this here today that Mr. Ruffle alleged damage shortfall for the past period is made up of two components that being the actual harvest and then what he calls a projected past or the retrospective harvest, that which he says would have been harvested absent the Log Expert Control Regime being in place.

Q. And what is your concern with the retrospective past harvest?

A. Well, to begin with, as late as January of 2008, Merrill & Ring was of the opinion, as stated
in Affidavit or a witness statement of Mr. Schaaf, that absent the log Export Procedures that Merrill & Ring would have harvested another 32, another 3,300 cubic meters of wood, of logs. However, what's being claimed now is an extra 447,000 cubic meters of logs absent the Regime or an increase of 70, 80 percent, 77 percent, I think is what was said.

And I might point you to Tab 10 of the Core Bundle at Paragraph 41—this is from Mr. Schaaf's February 2008 Witness Statement. The numbers in Paragraph 41 and Paragraph 41 can—derives the extra 32 or 3,300 cubic meters to which I refer.

Q. All right. And do you have any other concerns about the retrospective past harvest?

A. Well, frankly, it seems contrived to me because looking at other documents of Merrill & Ring such as the 2005 document, a description and analysis Report, I believe Mr. Schaaf said that he authored. This is also, I believe, Exhibit 24 to Mr. Ruffle's Report to Affidavit.

Let's take Theodosia. This is the largest single property of Merrill & Ring's on the B.C.
I believe at 2005 it probably held some 50 percent or more of Merrill & Ring's merchantable timber inventory. Merrill & Ring in that 2005 Report expressed concerns about the rate of harvests that they were proposing at that time for Theodosia, indicating that they might attract the unwanted attention of local Tribes, native groups, bands, Government officials, or individuals such that they could be even shut down in the worst case scenario. They even talked in that Report about selling and parceling out this merch timber there so as to avoid this problem.

Mr. Ruffles chose to either ignore or not validate that concern which I think was valid of Merrill & Ring's, and projects a harvest in some years in 2004 to 2007 that's double or more what Merrill & Ring thought was already too high in 2005.

Q. And what's the impact of the retrospective past harvest?

A. Well, it has several impacts. First, it said it moves 447,000 cubic meters of logs that were still standing out there in 2008 and may still be...
149,000 cubic meters of Georgia Basin wood, which Merrill & Ring lost the harvest rights to or they expired on December 31, 2006, into the past period.

And three, it moves all of this into a period of very, very high log demand and log prices.

Q. And what is the conclusion to be drawn from these impacts, Mr. Jendro?

A. Well, in my opinion, like other aspects of the raft analysis that I looked at, the retrospective past harvest claim simply exaggerates alleged shortfalls.

Q. Thank you for your testimony, Mr. Jendro.

PRESIDENT ORREGO VICUÑA: Thank you, Mr. Little.

MR. APPLETON: Do we have a binder, please.

CROSS-EXAMINATION BY MR. APPLETON:

Q. Mr. Jendro, you agree that both size and quality characteristics affect log value?

A. I do.
And you also agree that quality characteristics includes various factors like diameter, length, ring count, taper, and other factors?

Mr. Jendro, may I refer you, please, to Appendix A of your Supplemental Affidavit. It's in the binders before you. I'm also going to put up—actually, what I'm going to do is I'm going to put up a picture from your Report, but just to situate things, you mentioned Theodosia, and I would like to talk about Theodosia and Unwin Lake, and just to show you where they're located on the map. They're located here. Theodosia, as you mentioned, is one of the larger properties, on the Merrill & Ring you believe it's the largest of the Merrill & Ring properties, and Unwin Lake is located very nearby, so if we could turn then, sir, to your figure—look at Section 6.4 of your Supplemental Affidavit, and let's turn to Figure 6.4-1 which I put up here on the screen so you could look at your monitor.
A. Just one clarification, sir. The earlier map you had out there was not from my Report.

Q. No, no, I just wanted to give an idea just to situate. I didn't want to suggest that this is from your Report other than I've shaded something. Thank you very much.

So, this is your map on which you show helicopter flying distances between Merrill & Ring's Unwin Lake property, which is located here in the top section of the map. Make sure you're following me, sir.

A. I'm following you, sir.

Q. No problem. And you've set out the distance over from that property over to Merrill & Ring's Theodosia property, which is located here in the bottom section of the map. Do you see how it's outlined?

A. I do.

Q. Very good.

Now, you conclude in your Report that the most economical way to harvesting Unwin Lake is by helicopter logging; is that correct?
I concluded in my Report that if the Unwin Lake property were to be logged, in my opinion, it would be logged via helicopter.

Q. All right. Now, on Figure 6.4-1 you're looking at?
A. Yes.

Q. You showed the distance between Unwin Lake and Theodosia for the purpose of helicopter logging to be an average of 2.9 to 3 kilometers; correct?
A. I'm just checking, sir. I don't believe 2.9 or 3 is correct. 3.1 to 2.64.

Q. Well, let's take the--you have two different ways of adding it. Let's take both on one area, and we will use this area here. Could you look at the big map with me, Mr. Jendro.
A. Yes.

Q. So we could add this section here, and could you just tell me what that distance is.

ARBITRATOR ROWLEY: Can you put that on the transcript what you're talking about.

BY MR. APPLETON:
Q. Yes, I'm sorry. I'm going to look at the
15:42:12 1  top dotted line. Thank you, that's my fault this time. I'm looking at the top dotted line you have drawn.

Q. Is that your handwriting on this exhibit, sir?

A. I believe it is, yes.

Q. Okay. So, there is a number in there that says something kilometers. Could you tell us what that number is, sir.

A. That number there is 1.64.

Q. Excuse me. Mr. Jendro, I would like you to look at the exhibit when you answer my question, okay? Now, I would like you to look at the top line, sir, okay? Are you looking at the line?

A. I am now.

Q. Very good.

Q. Now--and that goes to a point?

A. It does.

Q. Very good, excellent.

Q. Now, can you please tell me what you have written in your handwriting on that top line, sir.

A. 2.12 KM, kilometers.

Q. Very good, excellent.
Q. Yes. And then from that point south shall we call it below, you see there is another distance towards the Merrill & Ring Theodosia property; correct?

A. Correct.

Q. And what is that number, sir?

A. 1.64 kilometers.

Q. I don’t believe that’s correct, sir. Can you please follow me. Mr. Jendro, please follow me, sir. Look at the map in front of you, sir, okay? This shouldn’t be—this is the easy part, okay? Can you look at the line that goes directly down. I believe it’s south on this legend. Can you tell me what that number is, sir.

A. You refer me to the line that says 1.10?

Q. I believe that is correct.

A. Okay.

Q. Yes. Now, that takes us to the Merrill & Ring Theodosia property; correct?

A. It does.

Q. Yes. Now, could you please add those two numbers together, sir.
A. 3.22 would be the sum of those two numbers.

Q. Mr. Jendro--3.22 kilometers?

A. Kilometers.

Q. Very good, yes. So, that is the distance you have calculated here?

A. Yes.

Q. All right. Now, let us look at the other number, okay?

A. Yes.

Q. The other route that you have calculated. So, now we are going to do the more southerly route from Unwin Lake.

A. Yes.

Q. What number is handwritten there, sir?

A. 1.64 kilometers.

Q. And then you've added it to another distance; correct?

A. Correct.

Q. And then what is the total, then, of those two distances?

A. 2.74.

Q. Kilometers?
So, now we will come back. I suggested that we had an average of 2.9 to 3 kilometers. It's actually—it's still in that general range, and one side is going to be 2.74 kilometers or the other one will be 3.24 kilometers; correct?

A. That would be what those add to, yes.

Q. Okay. Now, on that basis of your map, you have concluded that logging Unwin Lake would not actually be economic because helicopter logging is not economic at a distance over 2.5 kilometers.

A. I don't believe I said it's uneconomic over a distance of 2.5 kilometers. It would be dependent upon the species, grades, the product markets, the prices at the time and a whole host of things.

Q. What, sir, do you believe would be the economic distance?

A. Without studying it, I don't think I could offer you an opinion right now, but my examination or investigation into this appeared that at the prices that we were looking at for the species,
15:45:47 1 and given the cost of helicoptering at the time, it would not be economic at the present or foreseeable future.

Q. But your Report, sir, was critical of Mr. Ruffle, and Mr. Ruffle estimated the distance to only be 2.3 to 2.4 kilometers.

A. Even at that, it would be--I would be--I would be doubtful that it would be economic at that distance.

Q. I see.

Now, first of all, let's look at Figure 6.4-1 again. You will see the square property outlined in the upper edge of the Theodosia property around where you have written 1.10 kilometers above the dotted line?

A. Yes.

Q. You see that property?

A. Yes.

Q. I'm going to call that property Lot 2314.

A. I believe that's correct.

Q. Yes. If Lot 2314 was owned by Merrill & --I'm not finished--if it was owned by Merrill &
15:46:42 1

1195

A. I would still have concerns. I did not

Q. Mr. Jendro, just answer my question.

A. I would still have concerns, sir.

Q. I see.

A. And the basis of your concerns would be

Q. And have you been to Unwin Lake, sir?

A. I have not.

Q. And are you aware of any of the

A. Sitting here right now, I cannot recite
1196

15:47:35 1  them to you, but I have looked at the inventory data
2  that was produced by Mr. Ruffle.
3      Q.   Yes, and you heard Mr. Ruffle give
4  testimony about the very high quality of the timber
5  on Merrill & Ring lands.
6      A.   I did hear that.
7      Q.   Yes, but you didn't go there to investigate
8  that, sir?
9      A.   I did not go there to investigate it, no,
10  sir.
11      Q.   But you can make a comment based on whether
12  it would be economical or not to be able to helilog
13  that property?
14      A.   My concern is several-fold in addition to
15  what I have already told you.
16      Q.   Just answer my question.
17           ARBITRATOR ROWLEY:  Let him finish his
18  answer.
19           MR. APPLETON:  I'm sorry, I thought he was
20  giving me a nonresponsive question.
21           ARBITRATOR ROWLEY:  He was answering your
22  question.
THE WITNESS: Could I have the question again, sir.

BY MR. APPLETON:

Q. Sure. I will read it back off the transcript. But you did not go there to investigate that, sir?

A. No, I did not.

Q. Okay. Now, may I refer you now to Tab 2 of the binder before you. This contains Mr. Ruffle's Report. I'm going to ask you to look at Tab 9 of his Report, which I reproduced on a slide. I have also set it out here on the monitor. This shows the Theodosia property. It shows a network of logging roads through the Theodosia property that continue until Lot 2314. As you will see noted on the Lot 2314, the forest cover label, which is a numbering format Merrill & Ring uses for the Theodosia property.

A. I can't read it on my screen.

Q. Okay. Do you not have the Report in front?
15:49:23 I'm sorry, I asked you to please turn to Tab 2 and look specifically at Tab 9, sir.

I said it's on the screen to assist you, but as a witness, sir, if I ask you to do something, it would be helpful if you would actually look at the book.

A. I will be glad to do so.

Q. Good. Please look at it. Are you having a problem seeing it now, sir?

A. No.

Q. Okay, good. Now, let me repeat my question: You will see that this shows the Theodosia property, and we have a series of network logging roads through the Theodosia property that continue into Lot 2314. Do you see that before you?

A. I do.

Q. Yes. And you will see noted on Lot 2314 the forest cover label, which is numbering format that Merrill & Ring uses for the Theodosia property?

A. I see that, yes.
Now, would you please turn to Tab 18 of Mr. Ruffle's Report. I'm going to ask you to turn to the third page of this tab. We are going to look at an aerial photograph. This is numbered 011096. You will recognize this as an aerial photograph of the same area of the Theodosia property, and you will see that Lot 2314 is adjacent to it. It's also reproduced on the slide here, sir, but if you could look in the book--

A. What tab is it?

Q. This is Tab 18, sir, of Mr. Ruffle's Report. It's right in front of you.

A. There are several different photos in that, sir.

Q. That's why I gave you the number, Mr. Jendro. I'm sorry, please follow. It's number 011096.

A. Yes.

Q. You have that page. Can you just repeat the number of the page in front of me.

A. 011096.
15:51:08 1

Q. Excellent. We are on the same page.

Is that the same picture before you as on the monitor, sir?

A. It appears to be, yes.

PRESIDENT ORREGO VICUÑA: Mr. Appleton, I suggest that you might discuss things with a bit more patience. You seem to lose it.

MR. APPLETON: Yes, I'm sorry. I would like to get the right document, that's all.

PRESIDENT ORREGO VICUÑA: Okay. You've got the right document.

BY MR. APPLETON:

Q. Now, we have the right document and have everything here. Now, let's see if we could get the question again.

You see on this aerial photograph the same network of roads that are on the road map that we saw before on Tab 9 and that Lot 2314 has been completely clear-cut.

A. The road network, to the best of my recollection, just looking at the earlier exhibit, appears similar, I would agree, and it has been
Q. Would you like us to put the other map--
A. No, I will accept your word.
Q. Okay. And you just confirmed to me that you did not do a site visit to Unwin Lake. Did you do a site visit, sir, to Theodosia?
A. No, sir.
Q. Did you do a helicopter tour of the properties before you prepared your Report?
A. No.
Q. Did you do a title search of the properties or any of the properties in the area before you prepared your Report?
A. No, sir.
Q. Did you look at the logging map at Tab 9 or this aerial photograph of Tab 18 of Mr. Ruffle's Report before completing your Supplemental Report?
A. I believe I did.
Q. Well--but yet you assumed that Lot 2314 was not Merrill & Ring property?
A. No, I didn't necessarily assume that. I will agree with you that I did not know that it was
another property owned by the family of companies of Merrill & Ring, but I didn't know that, no.

Q. But now as a result of your assumption that Lot 2314 was not a Merrill & Ring family property, you concluded in Appendix P of your Supplemental Report that Unwin Lake's volume of 76,590 cubic meters should be removed from Merrill & Ring's Harvest Plan and that Mr. Ruffle made an error by including it.

A. I did.

MR. APPLETON: I have nothing further.

PRESIDENT ORREGO VICUÑA: Thank you, Mr. Appleton.

Questions?

MR. LITTLE: We have no further questions. Thank you, Mr. President.

PRESIDENT ORREGO VICUÑA: Fine. Thank you so much, Mr. Jendro. You are free to go.

(Witness steps down.)

PRESIDENT ORREGO VICUÑA: So, we shall perhaps take a break for 10 minutes. Okay. We are doing very well. Just one to go.
15:54:09 1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22
I'm a partner with the firm, and also the partner in charge of our advisory practice in--I'm a partner with the firm, and I'm also the--in charge of our transaction advisory services practice in Western Canada.

Q. Okay. And can you briefly state your qualifications for the Tribunal, please.

A. Yes. I have a business degree from the University of Western Ontario. I'm a Chartered Accountant and a Chartered Business Valuator.

Q. Okay. Now, can you please describe the core areas of your practice for us.

A. Those would be business valuations, transaction advisory services and litigation support, so I'm retained in connection with mergers and acquisitions with regulatory matters, with corporate and debt restructurings.

I'm also retained in connection with commercial disputes where the issue is business values or business losses, and I served as an expert witness on a number of occasions in that regard.
And I have acted as an arbitrator in a number of situations where the situation is business losses.

Q. Okay.

MR. WATCHMAKER: I would just like to confirm, Mr. President, are we in closed session?

SECRETARY OBADIA: Yes, until you don’t say anything, we keep it the way it is, so it’s just a question of saying the word.

MR. WATCHMAKER: So, we are closed?

SECRETARY OBADIA: Yes, we are closed.

MR. WATCHMAKER: All right.

BY MR. WATCHMAKER:

Q. Mr. Bowie, can you please explain to the Tribunal what you were asked to do in this matter.

A. Yes. I was asked to review Mr. Low’s Report and conclusions with respect to Merrill & Ring’s financial losses, and I was also before that asked to review Mr. Sandy’s Report and conclusions.

Q. Now, do you agree with Mr. Low’s conclusions?
A. No, I do not. I found Mr. Low's estimates of financial losses to be generally unsupported and overstated.

Q. Okay. Now, your Report provides your detailed conclusions, but in terms of the key areas of the claim, how did your conclusions differ from those of Mr. Low's, sir?

A. Well, in my Report, I have some tables that summarize what the differences are in terms of our conclusions. So, I believe they're in my Core Bundle under Tab 1. There are two tables from my Report. The first table summarizes the comparative estimated losses for the Past Loss Period and the second table for the Future Loss Period. And you will note at the bottom of the second table it sets out the past and future loss totals.

Now, in addition, what the tables set out are the estimated losses under each of the Articles allegedly violated and as well summaries the losses in a two-part component, one being the alleged Loss Export Premiums and the second being the incremental costs.
Okay. Let's take the claims one by one, sir. Let's start with the claims under Articles 1102 and 1105. I understand that they are identical. Could you state your conclusions with respect to the alleged Export Premium aspect of these claims.

Our conclusion with respect to the Lost Export Premiums were that they were indeterminable based on the information we had provided to us. Mr. Low's estimate of approximately $12.1 million was based on the raft analysis prepared by Merrill & Ring. And as we heard from Mr. Jendro and Mr. Reishus, there were a number of problems identified with that particular analysis.

Now, we were not able to provide an alternative estimate of what the financial losses might be under that category as there was not sufficient information provided by the Investor to be able to assess what amount of shortfall there would have been on the logs that were sold arising from the Procedures.

And what about the alleged incremental
1208

16:18:44 1  costs claimed under Articles 1102 and 1105?

2      A.   We estimated those to be approximately
3  $1.1 million compared with Mr. Low's estimate of
4  approximately $4.7 million.
5      Q.   Okay.  And were you able to conclude as to
6  how much of that $1.1 million is attributable to the
7  Procedures?
8      A.   Well, not completely.  The $1.1 million is
9  comprised or represents eight different cost
10  categories, and we were not able to in many cases
11  apportion what portion actually would relate to
12  incremental costs directly attributable to the
13  Regime as compared to other factors that may have
14  caused the costs to be different.
15      Q.   Okay.  Now, what about the allegations
16  under Article 1106?
17      A.   The allegations under--Mr. Low's
18  calculations under Article 1106 are essentially the
19  same as those calculated for Articles 1105 and 1102,
20  with the exception that the fees-in-lieu are not
21  included.
22      Q.   And what were your conclusions with respect
to this particular allegation?

A. Our conclusion here as well was that the losses under this particular Article were not determinable based on the information provided to us. The allegations under Article 1106 are fundamentally different than those under Articles 1102 and 1105, and we would assume that there would be different losses arising from that, as well.

Now, Mr. Low acknowledges that there are differences, but the number that he puts forward is the same as it is for Article 1102 and 1105 except for the fees-in-lieu.

Q. And what about the Investor's allegation of under Article 1110, sir?

A. Mr. Low's calculations under Article 1110 are again basically the same as under Articles 1102 and 1105. The only difference is a December 2006 valuation date is used, and then added to that is compounded interest from that date forward to the end of May 2009.

So, the underlying assumptions and components that give rise to those calculations are
the same as those used for 1102 and 1105, so any of the issues and problems associated with those calculations would apply to those under Article 1110, as well.

Q. Okay. Now, did you form an opinion on the general methodology of causation employed by Mr. Low to quantify the Investor's alleged losses?

A. Yes, I did. Mr. Low's calculations do not address what the financial losses are associated with individual allegations. The assumption appears to be that all of the allegations apply, and then the manner in which the losses were quantified or calculated does not allow itself to then separately identify specific allegations and quantify what those might be.

Q. Could you provide us with an example of this, sir.

A. Yes. Mr. Low's inability to come up with a specific figure for Article 1106 would be about that. Mr. Low acknowledges or indicates that some of the loss components in the conclusion, the numbered conclusion, do not relate to Article 1106.
Q. What would be advisable for the Tribunal to take into consideration with respect to this problem of causation, sir?

A. Well, I guess the issue is, which I think has been raised, is if the Tribunal was to conclude that a particular allegation had merit, then one would have to be very careful to ensure that the extent and quantum whether or not there was—whether there were losses that really flow from that particular allegation.

Q. Okay. Now, Member Rowley asked Mr. Low if specific loss could be calculated for a specific violation. Do you have any further comment?

A. It would depend on the violation, but unfortunately the way the information has been presented and the lack of certain information, I don't believe there is sufficient information to actually go down and hone into specific allegations. For some you may be able to do it, but for others the information has not been provided by the Investor.

Q. Okay. Why do you believe Mr. Low ended up
16:23:39 1

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

16:23:39 1

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Mr. Bowie?

A. Well, Mr. Low's estimates are based largely on information and assumptions provided to him by Merrill & Ring that in some cases have proven to be not supported, and some of them are inconsistent with the information that's on the record.

Q. Could you give us an example of how this impacted his estimate for the Lost Export Premiums.

A. Well, again, Mr. Low relies on Merrill & Ring's raft analysis for his Lost Export Premium calculations; and again, based on information from Mr. Jendro and Mr. Reishus, there are problems with that analysis--that would feed into Mr. Low's conclusions.

Q. Okay.

A. --that would feed into Mr. Low's conclusions.

Q. Sorry.

A. And what about incremental costs?

A. Well, again, Mr. Low appears to rely quite extensively on the assumptions and information they
1213

16:24:45 1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22
timberlands that I understand Merrill & Ring did not have the cutting rights for after December 2006.

The second is that the retrospective past harvest calculations assume that all of the harvests would have been sold in the first half of the year, when, according to Merrill & Ring's calculations, the premiums are higher.

And the third factor is that by moving the losses or the calculations from the Future Loss Period to the Past Loss Period, the time value of money or the present-value factor is not--is not factored.

Q. Okay. Mr. Bowie, you have been fairly critical of Mr. Low's approach. How would you have conducted this quantification differently?

A. I would have sought from my client all of the information and documentation that I felt was needed to determine or assess what level of price shortfalls were rising on logs sold in the Past Loss Period, and I would have done the same thing to identify and quantify what incremental costs were incurred to be able to come up with those two...
And to the extent that I did not have the expertise to deal with some of that information, I would have indicated that we needed an independent expert to assist in that quantification. In addition, I would have attempted to undertake the analysis in such a way that we would be able to, as best possible, identify what the losses were associated with the various allegations that are being made, so if you could—if you—should you find that there was one or two or whatever number might be that you could put some sort of reasonable number to that.

Q. Okay. Mr. Bowie, where can someone easily see for themselves what you’ve estimated the incremental costs are versus those determined by Mr. Low?

A. Those are set out in my Report at Schedule C-4. I believe a copy has been included in my Core Bundle.

Now, what this sets out or summarizes are the eight different incremental cost categories and
the amounts estimated or calculated by KPMG, by even
Mr. Low for the past and future period, and as well
as a total.

Q. Okay. Now, generally speaking, what caused
the differences in your incremental loss estimates
for contrast with that of Mr. Low?
A. The differences would relate to some of
the information on the record not being supportive of
the incremental costs being calculated or claimed,
some the inclusion of costs related to the domestic
inventory or sales that would not have been affected
by the Regime, and the third other additional
information that was not supportive but was
inconsistent with the incremental cost claimed.

Q. Okay. I would like to ask you about a few
of these incremental cost claims. However, is it
correct to say that you have concerns with almost
all of these eight claims made by Mr. Low?
A. Yes, with the exception of the
fees-in-lieu.

Q. Okay. Could you just state your
conclusions with respect to sales commissions.
A. The sales commissions, Mr. Low's, if you look on the schedule, the sales commissions referred to as sales commissions annual dollar impacts the third cost from the bottom-up, and Mr. Low's estimate was approximately $1,030,000.

Q. Okay. And what were your conclusion, sir?

A. There was really very little in the way of support or documentation around this particular cost. There were amounts indicated with there is no information on the record as to support, that I was aware of, that these costs were, in fact, incremental. We requested additional information. My conclusion was that for a claim of approximately a million dollars, it was not supported or substantiated.

Q. Okay.

A. We had no basis to attribute any number to it.

Q. Now, what are your conclusions on timber management costs, Mr. Bowie?

A. Well, I think Mr. Low's conclusions were based on $1 per cubic meter charge, I believe, for
The exported timber. We—and I think there had been various discussions around the inconsistencies in what was described in Mr. Low's Report what actually shows up in the Timber Management Agreement, and then what Mr. Schaaf indicated was to be included in that charge. Our estimate was approximately $77,000, and we referenced the indicated premium differences or fee differences between the export logs and domestic logs, and that was how we estimated those incremental costs.

Now, that assumes that the increment was all, in fact, related to the Regime as opposed to other factors that may explain some portion of a differential, but our number assumes a hundred percent of it.

Q. Okay. What is your understanding of Mr. Low's but-for assumption?

A. My understanding of Mr. Low's but-for assumption is that Merrill & Ring would not be subject to the Regime or to export controls, but everybody else who is would be.
16:32:08 1 week in examination that because of the Tribunal doesn't have the authority to strike down the Regime, the but-for should be assumed by Mr. Low. Do you agree with that?

A. No, I do not. That, I believe, would be a legal determination of what the but-for should be. It could be a number of things. It could be, as Mr. Low is assuming, that Merrill & Ring would be not subject to the Regime or--but everybody else who currently is would be, or it could be that Merrill & Ring would not be subject to the Regime, but neither would its competitors. And then you could have--it would also vary depending on what one's conclusions were in terms of what was violated. So, it was very much a moving target in terms of what the but-for should be.

But generally, we would take instructions as to what the but-for would be. You would test the reasonableness of that, but that is usually a legal determination.

Q. Okay. Mr. Rowley, I believe, asked Mr. Low about the value of booms denied surplus status. Do
you have any comment on this topic?

A. Well, in our Report, we do have, based on Mr. Low's and Merrill & Ring's analysis with their Export Premiums, but we do have what the losses would be using those assumptions as relates to the logs that were deemed not surplus.

Q. Okay.

A. Now, that is, I believe, also included in my Core Bundle, and it's included in my Report. It's referred to as Schedule C-1.

ARBITRATOR ROWLEY: Just refer to where it is in the Core Bundle, for the transcript.

THE WITNESS: Sorry. It's under Tab 9. This is just a summary that sort of groups the various information from Mr. Low's Exhibit 2, and you will see we have a column, third column over, and it says "denied surplus question?", and wherever there is a yes would indicate where the--where the logs were deemed not surplus, and there were approximately 1,800 cubic meters in the category that--where the actual market was domestic and the ideal market was domestic. Those ones were...
1 actually sold in the domestic market, so there are no losses attributed to those.

And then if we go down to the I guess it's the third category down, it says "domestic export," and what that indicates is there was 16,448 cubic meters of the booms that were deemed not surplus, and the calculated losses in Mr. Low's analysis attributable to those was approximately $460,000.

Q. And that was based on their numbers; correct?

A. Yes. That's based on, again, on the assumptions, the Export Premium assumptions, in Mr. Low's analysis.

Q. Okay. Thank you very much, Mr. Bowie.

MR. WATCHMAKER: That concludes my examination, Mr. President.

PRESIDENT ORREGO VICUÑA: Thank you, Mr. Watchmaker.

Mr. Appleton, please.

CROSS-EXAMINATION

BY MR. APPLETON:

Q. Good afternoon, Mr. Bowie.
16:35:59 1

Good afternoon.

May I refer you, please, to Page 5 of your Supplemental Affidavit. You should find it in the binder in front of you, sir. There you have a chart of Past Losses. I believe it's up on the board.

Yes.

MR. APPLETON: Could we just go off the record for a moment?

(Discussion off the record.)

MR. APPLETON: We are back on.

BY MR. APPLETON:

Sorry, Mr. Bowie, I think we have taken care of these technical problems. I would like to look at the chart of Past Losses. I believe that was up recently before when you were taken through your direct evidence.

Yeah. The one I have on the screen is the same as that because I can't read that one.

We will work on the monitor in front of you. It's the same as in your materials there.

Okay.

Now, if we can look at this chart, the
16:37:12 1

first column shows your calculation of Merrill & Ring Past Losses. At the bottom of this first column you show Merrill & Ring's total losses of $681,664, and then you compare that to Merrill & Ring's total losses as assessed by Deloitte's of $13,984,228. Is that correct?

A. Yes, that's for Article 1110.

Q. And that large discrepancy because, in your column, you show most of the categories as ones for which you were not able to calculate the loss.

A. Yes.

Q. Now, I have set out the next slide, Page 6 of your Report--you might want to turn to that--and there you have the other chart which we recently saw, that was the chart of estimates of Future Losses.

A. Yes.

Q. And at the bottom of your first column showing your calculation of Merrill & Ring's Future Losses, there you show a total of $1,122,054 as compared to Deloitte's assessment of Merrill & Ring's total losses of $18,682,368.
A. This is for Article 1110, as well?

Q. Yes. I'm just going to pick one to try to keep apples to apples and oranges to oranges.

A. Okay.

Q. So, again, the large discrepancy is because in your first column you show that you were unable to make the calculations for most of the categories of loss; is that correct?

A. Yes.

Q. So, with all the information needed to fill in the blanks on these charts, you actually can't come to any conclusion at all, can you?

A. That we are indicating that it is—based on the information provided, it was not determinable what the Lost Export Premiums are, and the same for Article 1106. It's not determinable based on the information we had to be able to attribute a dollar value to those particular alleged violations.

Q. So, that's the same answer for each of the headings; correct?

A. Yes.

Q. Okay. Before you completed your
Supplemental Affidavit, you have a copy of the Deloitte Report?

A. Yes, we did.

Q. And you had a copy of all the exhibits of the Deloitte Report?

A. Yes, we did.


A. Yes.

Q. And Exhibit 8 to the Deloitte Report is an Annual Report for TimberWest for the year 2007.

A. Okay.

Q. You might--well, you might want to turn to Exhibit 8, actually.

You know TimberWest is a large integrated forest products company in British Columbia?

A. Yes.

Q. You know that KPMG are the auditors for TimberWest?

A. Yes.

Q. You're a partner of KPMG?
16:40:15 1
2      A. Yes, I am.
3      Q. So, then, let's look at Exhibit 8. I
4  believe the Secretary is getting that available for
5           the Members of the Tribunal.
6      A. Yes.
7      Q. Now, let's make sure everyone is there.
8           Very good.
9           Now, you know that TimberWest recognizes an
10  Export Premium for exporting logs out of British
11  Columbia as a material source of revenue in their
12  Financial Statements which were prepared by KPMG?
13      A. Would you like to show me that?
14      Q. Sure.
15           Well, actually, let's turn to Page 48, sir.
16  And I have set it out on the screen as well and may
17  assist you where I'm going--we could look.
18           If you look at Page 48 and you look on the
19  right-hand column Page 48 and the management
20  discussion, I will just read out to you and also put
21  the text up on the slide. There is the paragraph
In 2007, TimberWest sold 1.2 million cubic meters of logs into markets in Asia and the U.S. West Coast at an average sales realization premium of $18 per cubic meter over what would be realized in the domestic markets. The premium earned by selling private land logs into the export market represents 25 percent of the 2007 distributable cash and has represented more than half the distributable cash generated by the company in the past. The ability to export private land logs has also played a key role in keeping employees working. Selling logs at higher international prices allows owners of private land to harvest stands that would otherwise be uneconomic. Forcing private forest landowners to sell logs to domestic sawmills at prices lower than international prices transfers the value from the tree grower to the processors, impairs the value of private
16:43:05 1

2           timberlands in Coastal British Columbia,
3           and reduces pricing of Crown logs sold on
4           the Coast of British Columbia.
5           Does that refresh area memory?
6      A.   Yes.
7           KPMG--these are management notes.  This
8  wouldn't be an KPMG audit comment.
9      Q.   Yes, but KPMG does prepare their Financial
10  Statements, and KPMG has prepared their Financial
11  Statements, and KPMG does attribute a large amount
12  of their distributable cash with respect to the
13  Export Premium that's involved there; is that not
14      A.   KPMG doesn't make that attribution.  That
15  would be TimberWest management.  What KPMG would be
16  reviewing are revenues and expenses, and what would
17  be left would be distributable cash, and it would be
18  management commenting on how they are characterizing
19  how their net cash is.
20      Q.   And my question, sir, is whether you were
21  aware of what was in the TimberWest Annual Report.
22      A.   Yes.
Q. So--and you can confirm that KPMG is the auditor on page 53.
A. Yes.
Q. Okay, fine. So--excuse me for one moment. Let's just turn over. Let's go back to your Report for a moment. Actually, you know what--well, let's turn to your Report. Let's go to Page 13, and I would say it must be your Supplemental Report Paragraph 38. It's on Page 12.
A. Yes.
Q. You see the paragraph says, "We spoke with Mr. Gazeley of Dakota Creek Resources Limited"?
A. Yes.
Q. You don't need to look at some of these other paragraphs but at Paragraph 124 you again refer to discussions with Mr. Gazeley with respect to the export cost of sorting. And again in Paragraph 155 you refer to "our interview with Mr. Gazeley" in reference to export log preparation. And then again in Paragraph 170 you refer
1230

16:45:24 1 to "our interview with Mr. Gazeley" in reference to log storage.

And then in Paragraph 192 you refer to Mr. Gazeley in reference to scribner scaling.

And then in Paragraph 196 you refer to Mr. Gazeley in reference to scaling technology and cost.

And then yet again in Paragraph 249 you refer to Mr. Gazeley in reference to the storage holding of logs.

Do you recall these references to Mr. Gazeley?

A. Yes, I believe he is referenced a number of times.

Q. Could you just repeat that. I couldn't hear you.

A. Yes, I believe he is referenced a number of times.

Q. Oh, yes.

Nowhere in your Supplemental Affidavit, Mr. Bowie, do you identify what Mr. Gazeley does, nor do you reference any verifying documentation.
that you may have received from him. Would you please tell the Tribunal who Mr. Gazeley is.

A. He is a consultant. He used to work for Canfor, I believe it is, and we met with Mr. Gazeley just to get an understanding of sort of how the movement of logs worked and the storage, the towing, just to get a flavor for what sort of went on in the industry.

Q. Now, in respect of all these areas that you spoke to Mr. Gazeley about, I take it that you don't have personal expertise in these areas and that's why you spoke to Mr. Gazeley?

A. Yes, it was to get an understanding of what these issues were.

Q. And are there specific facts either discussed with Mr. Gazeley—well, are the specific facts you discussed with him, are they set out anywhere in your Report?

A. There are a number of references to Mr. Gazeley, and I believe a lot of times the references are to be Mr. Gazeley, so the references would be there, yes.
Q. But there's nothing else?
A. Nothing else like what?
Q. Well, like interview notes?
A. No.
Q. How about there is no Witness Statement from Mr. Gazeley?
A. No, there is not.
Q. But the specific facts you discussed with Mr. Gazeley were important enough in coming to your conclusions that you had to specify them as you reached your conclusions and considerations in this case; yes?
A. Sorry, could you repeat that?
Q. I will try that again.
A. The specific facts you discussed with Mr. Gazeley were important to coming to the conclusions you reached.
A. To a certain extent. We were largely talking to Mr. Gazeley to get an understanding of what was going on, and when we talk about various things in our Report, to the extent that would be referenced to information we discussed with...
16:48:02 1

2      Q.   Well, then, these were important
3  considerations for you, weren't they?
4      A.   It was important for me to understand how
5  these things worked, yes.
6      Q.   Okay.  That's why you specified them;
7  right?
8      A.   I specified them showing my source of
9  information, yes.
10      Q.   Thank you, Mr. Bowie.
11           PRESIDENT ORREGO VICUÑA:  Thank you,
12  Mr. Appleton.
13           Mr. Watchmaker.
14           MR. WATCHMAKER:  Just one question on
15  redirect.
16                  REDIRECT EXAMINATION
17           BY MR. WATCHMAKER:
18      Q.   Mr. Bowie, why did you contact Mr. Gazeley
19  instead of relying on Mr. Cook or Ms. Korecky, sir?
20      A.   We just wanted an independent outside
21  person to talk to about what some of the issues are
22  in terms of towing, storage, just to get a flavor
for what was going on in the industry on the Coast, and that's where Mr. Gazeley works and has worked for a number of years.

MR. WATCHMAKER: Thank you. Those are my questions.

ARBITRATOR DAM: Yes, I had just one question.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR DAM: I wanted to understand your statement about the Timberlake-- (Pause.)

ARBITRATOR DAM: My question had to do with your comments on the Timberlake.

THE WITNESS: TimberWest, sir.

ARBITRATOR DAM: TimberWest, sorry. Are you saying that KPMG never comments on the management comments, other than to verify the numbers that might be used there?

THE WITNESS: Those would be management comments.

ARBITRATOR DAM: They are management comments; I understand that. That's what I'm asking...
THE WITNESS: We would read them. I'm not sure exactly what all the audit procedures are. I'm not an audit partner, but usually we are involved in reading the notes of the Financial Statements, and I'm not sure to what extent we were involved in reading the management discussion.

ARBITRATOR DAM: So, you're not actually knowledgeable about whether or not KPMG reviewed those--the management comments or verified the theories that were expressed in them or not; right?

THE WITNESS: No.

ARBITRATOR DAM: Okay. Thank you.

ARBITRATOR ROWLEY: Please turn to Tab 9 of your Core Bundle. You described this earlier in your testimony. But do I understand that the 459,613 figure found under about the seventh column which is Deloitte’s damages claimed--it’s described as Deloitte’s damages claimed, under that column--that that 460-odd thousand-dollar figure reflects the loss calculation called “Lost Premiums” on those rafts for which Merrill & Ring applied for
but was denied surplus status--

THE WITNESS: Yes.

ARBITRATOR ROWLEY: --by Mr. Low.

THE WITNESS: Yes. If you were to go through and look at each of the individual rafts that were deemed not surplus, then these would be the amounts that in aggregate would add up to what the Export Premium was.

ARBITRATOR ROWLEY: And the 460,000-dollar Export Premium would be subject--I'm not saying that the criticism is right, but it would be subject to the criticism that you and the other expert witnesses from Canada have made of the Low Report?

THE WITNESS: Yes. That calculation is based on the Export Premiums that were calculated by Merrill & Ring, yes.

ARBITRATOR ROWLEY: And reverting to the first tab of your Core Bundle Page 6, under Articles 1102 and 1105--I think I've got the wrong place. It's the previous page, sorry, Page 5. Under 1102 and 1105, the third item down, "Subtotal-Alleged Lost Export Premiums Incremental Costs," that's your
16:54:21 1

1237

2  calculation of incremental costs of 340,000-odd
3  dollars.
4           THE WITNESS:  I'm sorry, where are you?
5           ARBITRATOR ROWLEY:  I started by taking you
6  to the wrong page.  I'm at Page 5.
7           THE WITNESS:  Okay.
8           ARBITRATOR ROWLEY:  Under the heading
9  Articles 1102 and 1105.
10           THE WITNESS:  Okay.
11           ARBITRATOR ROWLEY:  I'm going down three
12  lines to "Subtotal-Alleged Lost Export Premiums
13  Incremental Costs."
14           THE WITNESS:  Yes.
15           ARBITRATOR ROWLEY:  As I understand your
16  testimony, based on the information you had, you
17  couldn't come up with a lost premiums figure, but
18  you were able to do an assessment of incremental
19  costs.
20           THE WITNESS:  We were able to make a better
21  estimate of the incremental costs by making some
22  adjustments to those presented by Mr. Low, and that
23  was--I think in our Report we caution that it's
16:55:37 1

2  still based on a number of assumptions and that it

3  still in many cases assumes that 100 percent of the

4  costs we identified are, in fact, incremental when

5  they perhaps could relate to other factors. So,

6  it's a very rough estimate adjusting Mr. Low's

7  calculations, but we were not able to do that at all

8  with respect to the Export Premiums.

9           ARBITRATOR ROWLEY: Thank you.

10           PRESIDENT ORREGO VICUÑA: Thank you.

11           I'm always a bit hesitant to ask questions

12           to very distinguished experts and loss adjustors

13           because it will certainly reflect my ignorance, but

14           still I will put it in any event.

15           The question is this: You mentioned that

16           it's indeterminable for various reasons. Let us

17           assume that it's not possible to determine on the

18           specifics how much for such-and-such boom or export

19           or operation or whatever it is. Fine. Let's start

20           from that assumption.

21           Now, is it in any way feasible to say in

22           the absence of the specific information about item

23           by item or some other feature, is it feasible to
16:57:17 1

2  say, "Look, what I sold in the domestic market not
3  intended for the domestic market," because if you
4  were intending it there is no problem--not intended,
5  but you were asked to sell it through the mechanisms
6  we have considered in terms of offers and blockings
7  and whatever one calls it. Well, one would have
8  that information on precise terms, say so many booms
9  in so many years were subject to sales at these
10  prices because of the offer, et cetera.
11  Now, can you actually establish, say, an
12  average to say, in accordance to these sales, the
13  average price in the domestic market, domestic fair
14  market price is X; right? Is that understandable
15  what I'm saying?
16  THE WITNESS: I think I understand what
17  you're saying, yes.
18  PRESIDENT ORREGO VICUÑA: Okay. Now, you
19  go the other side and say, how much would I have
20  realized obtained for these same booms or amounts or
21  cubic meters or whatever measurement you are using
22  in the international market, understanding by
23  "international market" probably a basket of things.
It could be U.S., Korea, Japan or other or one or two, I don't know, and say this same volume of exports that I sold domestically would have meant or resulted in an average sale price of Y. Do you follow that side of the equation?

THE WITNESS: Yes, I believe I do.

PRESIDENT ORREGO VICUÑA: Okay. And then--this is absolutely genial, I suppose--you deduct X from Y and say this average, which was X if you draw the difference with Y, you would have, which is on average, the difference between the domestic market and the foreign. Would that be feasible? You might say that technically it's madness, and maybe it is.

THE WITNESS: Would it be feasible?

PRESIDENT ORREGO VICUÑA: But in the absence of the specifics that you say here it's indeterminable.

THE WITNESS: Are you saying would it be feasible with the information we have right now?

PRESIDENT ORREGO VICUÑA: Well, you would have to add the information, I suppose. Well, it is
17:00:38 1

right now available from the point of view of how much it was sold in the domestic market and probably figure out what was the average price and how much would those same booms have produced in the international market on an average price. But that information is generally available except for the averages, of course.

THE WITNESS: I don't believe you could do that with the information we have. You could perhaps seek to get all sorts of information of prices received in the export market for the different species, same time frame. It would be a significant analysis to actually go through that. I don't think it's—I don't think there is anything I'm aware of that would lend itself to just saying, "Oh, that would be approximately 10 percent" or "that will be approximately"—because there will be so many variables. It really comes down to what you're comparing it to and whether it's a fair comparison.

And even just assembling that information I do not believe it would be that easy, but you could
try to do something like that, but that would be a significant analysis to do that.

But isn't it true that most of these financial estimates are done on assumptions? For example, when you do a discounted cash flow analysis which all your firms do regularly, is it not based on assumptions, say, well, according to the record of profits or so, what I will have expected for the future is so much. And if inflation were this or that, then that would have meant something else and so on, and you simply assume. You don't have the certainty because it's the future. And then once you apply that, well, it's an estimate, fair as much as it is feasible to forecast, but then in reality it might be totally different. It doesn't work at all in the same terms.

I agree. That's sort of future-looking. This is actually looking back at what actually happened on the discount. People do make assumptions all the time, but what you want to be here would be looking at
what was actually suffered in the past, and you might use that as a benchmark as to what the loss might be in the future. But again to have it be much more than just a guess, you would have to go through quite a bit of effort to make sure you're gathering appropriate information so you are--that you are making a meaningful comparison as opposed to just--you could guess at numbers, but I think that was pretty much what it would end up being, but you could with more--you could use that as another reference point, but again I think that would require quite a bit of analysis to have a meaningful comparison.

PRESIDENT ORREGO VICUÑA: Yes, I agree from the point of view of the scientific estimate, but cannot you make an educated guess as to one you would do for the future? There is no scientific certainty, but still there is an educated guess this is the most reasonable and likely thing we can think about. Cannot that be done also in this example I mentioned to you?

THE WITNESS: It could be done. Again,
that probably would be an educated guess. There would be a lot of variables to look into the future, but you could always make assumptions or estimates of anything. It's just a question of how strong or how solid they might be.

PRESIDENT ORREGO VICUÑA: Right.

Mr. Bowie, thank you so much.

THE WITNESS: Thank you.

PRESIDENT ORREGO VICUÑA: Sorry, Mr. Watchmaker.

MR. WATCHMAKER: Yes, just one matter arising that came to me that's more of a clarification for the record than anything else. You just tweaked my memory when you mentioned the word "income."

FURTHER REDIRECT EXAMINATION BY MR. WATCHMAKER:

Q. Mr. Bowie, we heard testimony earlier today I think from Mr. Low in response to a question from Member Rowley about profits of Merrill & Ring's and some numbers were quoted. Do you have any comment on that?
A. Yes. I believe, if my memory was correct, that what you asked for was Mr. Low to read you the net income profit numbers just for the record, and what the numbers that were read out were the gross profit numbers, which is the profit before operating expenses. So, if that was the number you were looking for, then that's what Mr. Low read you. If you're looking for what the net profit number was, that's not what Mr. Low read you.

ARBITRATOR ROWLEY: Do you have both of them here?

THE WITNESS: Yes.

ARBITRATOR ROWLEY: Why don't you read them to us.

THE WITNESS: Okay. I will start with 2004 and then go through to 2007.

So, the gross profit for 2004 was approximately 4,100,000. The net income for 2004 was approximately 3,100,000.

For 2005, the gross profit was approximately $6.3 million. The net profit was approximately $5.6 million.
For 2006, the gross profit is approximately $5.1 million; and the net profit was approximately $4.2 million.

And for 2007, the gross profit was approximately $4.4 million; and the net profits was approximately $2.7 million.

The total for the four-year period gross profit for those four years is $19,873,000; net income is $15,633,000.

BY MR. WATCHMAKER:

Q. One additional matter arising out of Professor Vicuña's questions to you with regards to being able to do comparison. What are the reasons that would make it difficult? I think we heard them, but...

A. I'm sorry? Could you repeat that?

Q. Sure.

What would be the reasons that would make that type of comparison difficult to do? You mentioned that they would be difficult.

A. This is trying to go to get averages? Is that what you're referring to?
Q. In the actual comparisons.
A. Accessing the information would be an issue, but in particular down to the--so that you are actually of the same grades, the species, the timing. There would be a number just as we heard there was a number of issues in terms of the comparability of logs. Again, you're going to be sort of in the broad categories. And I'm not sure how readily available that sort of information would be on that sort of level of detail.

PRESIDENT ORREGO VICUÑA: Just one thing in respect to that thought.

Is there no, say, world market information available? I asked you because in some other case, for example, in which it was also very difficult to estimate the price of important gas in a certain European country because the sources were different, there were all sorts of difficulty. Well, finally, the statistics of the International Energy Agency were used. Of course, they might reflect reality or not for that specific case, but they're an educated guess. If the price is 10 for a given year, well,
17:09:31 1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

1248

THE WITNESS: There may be not that I'm aware of. I'm not saying there isn't, but not that I'm aware of.

PRESIDENT ORREGO VICUÑA: Okay. Great. Thank you very much.

Well, Mr. Bowie, thank you. You are excused now.

THE WITNESS: Thank you.

(Witness steps down.)

PRESIDENT ORREGO VICUÑA: You have done extremely well. I'm surprised.

So, tomorrow we meet at 9:00 to hear from Professor Howse. Just to remind you, we have, of course, the opinions of Professor Reisman, so we will have them all in mind, and surely they will show up as we discuss with him, with Professor Howse, as we discuss with him ideas of the sort. So, just for all of you to keep that in mind and be able to make the most of tomorrow's meeting.
17:10:42 1

(Whereupon, at 5:12 p.m., the hearing was 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