

This document is out of date and no longer relevant. It is provided for reference purposes only.  
Ce document est périmé et n'est fourni qu'à titre de référence.

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 3

HEARING ON JURISDICTION AND THE MERITS

Wednesday, May 20, 2009

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

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

Also Present:

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

Court Reporter:

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

## C O N T E N T S

WITNESSES:	PAGE
JUDY KORECKI	
Continued direct examination by Ms. Tabet	624
Cross-examination by Mr. Nash	657
Redirect examination by Ms. Tabet	769
by Ms. Di Pierdomenico	772
Questions from the Tribunal	774
Recross-examination by Mr. Nash	789
BRIAN BUSTARD	
Direct examination by Mr. Dumberry	792
Cross-examination by Mr. Nash	812
Questions from the Tribunal	872
ROBERT LOW	
Direct examination by Mr. Appleton	877
Cross-examination by Mr. Little	933

1 P R O C E E D I N G S

2 PRESIDENT ORREGO VICUÑA: Good morning.

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

5 Would you like to continue, Ms. Tabet.

6 MS. TABET: Yes, I would.

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

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

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

20 MR. NASH: Yes, I think it would. And if  
21 it's okay to have it in black and white, we will do  
22 it that way.

09:02:29 1           The second matter is that you will recall  
2 that Mr. Schaaf gave evidence with respect to a map  
3 which at the time of his giving evidence could not  
4 be located in your materials, but we proceeded  
5 ahead. We do have a copy of the map for members of  
6 the panel. I believe the Secretary has been given  
7 those copies.

8           SECRETARY OBADIA: We had found the  
9 document afterwards.

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

14           And you will recall it was over the  
15 question of the helilogging from Unwin Lake to a  
16 piece of property besides Theodosia, and it was a  
17 question of the distance and a question of whether  
18 there was road access to that piece of property, and  
19 there was a square that Mr. Schaaf identified and  
20 indicated it was owned by a company called R. D.  
21 Merrill & Company, which is a member of the Merrill  
22 & Ring Group of companies.

09:03:39 1           The third housekeeping matter is that I  
2 have advised my friend Ms. Tabet that Mr. Stutesman  
3 has to leave today, and if there is to be--she had  
4 raised the issue of perhaps some  
5 recross-examination, and if that is to occur, it  
6 will have to be today. He has to leave the building  
7 at about 3:00 this afternoon, and I think my friend  
8 is aware of that and appreciates our situation.

9           Thank you.

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

12           Ms. Tabet.

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

18           PRESIDENT ORREGO VICUÑA: For yesterday?

19           MS. TABET: For yesterday.

20           PRESIDENT ORREGO VICUÑA: Okay.

21           MR. APPLETON: Mr. President, just as a  
22 housekeeping matter, is it be possible that Canada



09:04:35 1 will be able to file these documents electronically  
2 as well so to make it easier and make sure that they  
3 don't get misplaced for each day, especially since  
4 we now have two days, and perhaps there might be a  
5 third day, so that we can all make sure that we are  
6 not mistaken about exactly those paragraphs that you  
7 have noted? And since we just have one binder, and  
8 I don't want it to get misplaced with all the  
9 volumes that will have to be sent back here, I just  
10 think it's a safer archival method if we can do  
11 that. Is that possible?

12 MS. TABET: I will check and let you know.

13 PRESIDENT ORREGO VICUÑA: Okay. Thank you  
14 very much.

15 Please proceed, then, with the examination.

16 JUDY KORECKY, RESPONDENT'S WITNESS, CALLED

17 CONTINUED DIRECT EXAMINATION

18 BY MS. TABET:

19 Q. Good morning, Ms. Korecky.

20 A. Good morning.

21 Q. So, yesterday we talked about the Advisory  
22 Committee, and the Minister, and I'm trying to

09:05:37 1 understand the relationship between the two, so I  
2 have a few questions in that respect.

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

6       A.   Effectively, the Minister has to be  
7 satisfied--closer?--the Minister has to be satisfied  
8 the logs are surplus to domestic need.

9       Q.   And where does that come from?

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

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

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

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

20      A.   The Minister will take into account the  
21 recommendation from the FTEAC Committee with respect  
22 to whether or not the offer is a fair market value.

09:06:51 1           As well, the FTEAC Committee may present a  
2 view with respect to the validity of the offer.

3           In addition, the Minister will consider  
4 other factors such as whether or not there is a  
5 question of unfair targeting. The Minister will  
6 consider this offer within the scope of other offers  
7 that have been placed on that Federal  
8 biweekly--offers that have been placed with respect  
9 to the offering company, particularly with regards  
10 to that particular advertiser, among other things.

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

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

19       Q.    This is your first Affidavit?

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

22       Q.    This is a document that says Memorandum of

09:08:10 1 Understanding Between--

2 A. It's the second document in this tab, which  
3 is entitled Terms of Reference.

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

6 A. The fourth page.

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

14 And if you go down to subitem four which  
15 speaks to the functions and responsibilities, it  
16 lists those different responsibilities of the FTEAC,  
17 the first of which is to review all referred  
18 applications to advertised logs, and what this means  
19 is that those applications which have offers to  
20 assess the validity of any offers to purchase  
21 regarding applications, and determine whether or not  
22 those offers are a fair representation of the

09:09:13 1 domestic market value. To determine--the third  
2 point--"to determine whether or not the logs under  
3 application are surplus to domestic needs and make  
4 recommendations to their disposition."

5           And the last point is, "to submit  
6 recommendations to the Director General of the  
7 bureau for consideration."

8           And if you look to sub five on the next  
9 page up at the top, it sets out the  
10 disposal/consideration of applications by FTEAC.  
11 And the FTEAC will formulate recommendations  
12 concerning applications by consensus, and may  
13 dispose any application of by A, recommending the  
14 export be approved; B, recommending that the export  
15 be refused; or, C, requesting further information.

16       Q.   That's very useful. Thank you.

17           Now, you said that the department doesn't  
18 have that in-house expertise, so perhaps you can  
19 explain why the Committee, what kind of expertise  
20 the Committee provides.

21       A.   The Committee is composed of industry  
22 members, both those members who buy logs and who

09:10:25 1 sell logs, so we see both sides of the spectrum.

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

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

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

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

21       Q.   Is what you do with the FTEAC Committee  
22 similar, in your view?

09:11:30 1       A.   Certainly.  Ultimately, it is for us to  
2   make a recommendation and a determination, and we  
3   take on board the views of those we have canvassed  
4   in the consultation process.

5       Q.   Now--

6       A.   Perhaps I should clarify that in making the  
7   decision with regard to the export of logs we also  
8   take into account any submissions that have been  
9   received by the advertising company.

10      Q.   What I'm wondering, Ms. Korecky, is in the  
11   absence of this Committee, how would the Minister  
12   make this decision?

13      A.   In the absence of this Committee?  With a  
14   formalized Surplus Test in place?

15      Q.   Yes.

16      A.   I guess, and I hate to speculate, but  
17   without this committee in place, it would be up to  
18   me to make that determination.

19      Q.   I will have a few questions for you,  
20   Ms. Korecky, on some of the allegations that the  
21   Investor's witnesses has referred to as blackmail,  
22   and I will ask that the session to be closed because

09:12:45 1 I will be taking you to some of your exhibits that  
2 are restricted.

3           So, if we can ask witnesses that  
4 are--sorry, people who are not allowed to hear  
5 restricted access to leave the room, please.

6           MR. APPLETON: Could Ms. Tabet just clarify  
7 exactly who she believes would constitute that  
8 group. For example, I see Mr. Cook in place, and I  
9 assume he would have to leave as well.

10           MS. TABET: No--well, this is information  
11 that relates to action that Ms. Korecky has taken in  
12 response to complaints and that deals with third  
13 party information. That's why we've designated as  
14 restricted. It relates to conduct of other parties  
15 and the actions that Ms. Korecky has taken in  
16 response, so we would believe that for that part  
17 your clients Mr. Schaaf and Mr. Stutesman then  
18 should not have access to that information.

19           It's going to be fairly brief, and I don't  
20 want to belabor the point, but I should be done in  
21 about 10 minutes or so or 15 minutes.

22           MR. APPLETON: It seems reasonable to me.



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

2 THE WITNESS: And Mr. Kurucz as well?

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

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

6 (End of open session. Confidential  
7 business information redacted.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

09:14:11 1

## CONFIDENTIAL SESSION

2 BY MS. TABET:

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

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

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

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

14 A. That is correct.

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

18 A. Specifically with regards to offers that  
19 are being placed on the Federal Bi-Weekly List, we  
20 receive complaints that range from comments with  
21 respect to the pricing, which we do appreciate very  
22 much to get a broader perspective on what the actual

09:15:57 1 market value price of a log should be.

2           We receive complaints with regards to the  
3 validity of the offering company to make an offer.

4           We receive complaints with regards to the  
5 fact that a company may believe it is being unfairly  
6 targeted by the offering company, as well as on a  
7 range of smaller procedural matters.

8       Q.    And what do you do with these complaints?

9       A.    I look into those complaints.  Depending on  
10 the nature of the complaint different things are  
11 done, but essentially I do look into those  
12 complaints.  If further information is required, I  
13 seek that further information.  I will go back to  
14 the advertising company for clarification and in  
15 certain instances contact the offering company for  
16 clarification as well.

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

19       Q.    Now, I'm trying to get a sense of these  
20 types of complaint.  It seems to me that some of  
21 them are just run of the mills and providing more  
22 information.  Some of them seem to relate to graver

09:17:02 1 conduct. Can you explain what you think is, you  
2 know, an abuse of the process or some problematic  
3 conduct versus something that's--just to help us.

4 A. Certainly.

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

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

17 Q. Is that what has been referred to yesterday  
18 as the issue relating to the penalty box?

19 A. Yes, that's what euphemistically referred  
20 to by the industry.

21 Q. Okay, can you explain that to us, please.

22 A. Certainly. From our perspective, when an

09:18:09 1 offer is placed--and let me take everybody to  
2 Section 4 of Notice 102, which is on the fourth page  
3 up at the top on the left, and I will draw  
4 everyone's attention to Section 4.3. When  
5 considering offers, FTEAC proceeds as follows: "The  
6 FTEAC will not consider offers to purchase logs by  
7 any person who has exported logs directly or  
8 indirectly from Canada within the previous 90 days.  
9 The 90-day period covers the period between the day  
10 on which the export took place and the day on which  
11 the offer to purchase is made."

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

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

21       A.    The purpose of this is to ensure that a  
22 company does not within the same 90-day period

09:19:24 1 export a boom of logs and then make an offer on  
2 somebody else's logs or the reverse.

3 Q. Why is that?

4 A. Essentially it's to ensure that they are  
5 not taking advantage of both sides of the system.

6 Q. I see. So, it's to have some fairness in  
7 the process.

8 A. Exactly.

9 Q. Okay. So, you're explaining this is the  
10 90-day rule, and these kinds of abuses have been  
11 brought to your attention, then?

12 A. Since I've come on board, there have only  
13 been a handful of instances where we have looked  
14 into the 90-day rule. And I make reference to this  
15 in my Affidavit.

16 Q. Would you take us to that, please.

17 A. Certainly. Let me just look for  
18 the--paragraph 138, which is located on Page 35 of  
19 my Affidavit, it's on the right side about halfway  
20 down. We refer to an example where it came to our  
21 attention that Interfor was--had placed some offers,  
22 and in the proceeding 90 days, another company named

09:20:39 1 Timberwolf had exported a boom of logs. This was a  
2 particularly complex issue for us, and I would go  
3 back to the words of Section 4.3 of Notice 102,  
4 where it refers to export directly or indirectly.  
5 Certainly, it is much easier if there is a direct  
6 relationship between the two companies in question.  
7 In this particular instance, Interfor and Timberwolf  
8 are not the same company. There is no corporate  
9 relationship. However, they do have some common  
10 business dealings.

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

20       Q.    Yes, I believe we've heard about this  
21 instance from Mr. Ringma and Mr. Stutesman  
22 yesterday.

09:21:51 1           Can you explain how this came to your  
2 attention.

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

5       Q.    You didn't investigate this yourself?

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

17           It was discussed at the FTEAC meeting, and  
18 further information was sought from Interfor.  With  
19 that information, a determination was made, and a  
20 memorandum was--I can't recall if this was one of  
21 those instances where we went to the Minister with a  
22 memorandum, I believe it was, but a decision was



09:22:57 1 made to inform Interfor that they would for this  
2 90-day period not be able to make offers on the  
3 Federal Bi-Weekly List.

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

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

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

20       Q.    Exhibit 45 of your first Affidavit.

21       A.    Of my first Affidavit.

22       Q.    All right.

09:24:17 1       A.    This letter is actually a wonderful example  
2    of how Merrill & Ring understands what is the nature  
3    of the information that we are seeking with regards  
4    to other factors, so you will notice at the bottom  
5    of paragraph--of Page 1, Mr. Stutesman writes me  
6    with regards to shortage of supply.

7       Q.    He writes Mr. Jones--

8       A.    Sorry, he wrote to Mr. Jones--this is  
9    1998--and he indicates that this particular mill had  
10   shut down, and they did have an inventory of logs.

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

13       Q.    So, what did you do with this?

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

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

20       A.    With regards to 4.3 of Notice 102, there  
21   was no relationship. However, Mr. Jones, with the  
22   evidence before him, believed that there really was

09:25:26 1 no supply need on the part of Doman and so wrote a  
2 memo to the Minister, asking that the FTEAC  
3 recommendation with respect to the fact that the  
4 logs would be--should be declared nonsurplus based  
5 on the narrow element of the fair market value, that  
6 that recommendation, when you look at that with  
7 other factors, specifically with respect to the  
8 supply needs of this mill, that the recommendation  
9 really ought to be that these booms of logs are  
10 surplus to domestic need.

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

15 A. Can you reframe that, please.

16 Q. Yes, I'm sorry.

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

21 A. And that goes to the level of information  
22 that we have before us when the decision is made.

09:26:38 1 There are many letters that come to us that are  
2 letters that contain vague allegations. There are  
3 other letters that do not speak to the points that  
4 come within the scope of the other factors that we  
5 consider.

6 And each particular issue is assessed on a  
7 case-by-case basis. The fact that a company writes  
8 us a letter does not necessarily guarantee that that  
9 boom will be declared surplus to domestic needs. We  
10 have to make an assessment on the factors placed  
11 before us.

12 Q. So, again, and the factor here, was it--

13 A. In this particular issue?

14 Q. Yes.

15 A. It was a question of the mill not really  
16 having a supply need for this particular boom of  
17 logs at this particular point in time.

18 Q. And you had evidence to that?

19 A. And there was evidence to that effect.

20 Q. All right. The other example that

21 Mr. Stutesman raised was about the fact that

22 CIPA--we heard about CIPA--can make an offer while a

09:27:47 1 related company, Itochu, I'm not exactly sure  
2 exactly what the relationship is--exports, and that  
3 was at Page 321 and 322 of the transcripts  
4 yesterday.

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

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

13           I think that one has to understand with  
14 respect to the 90-day rule that it really falls into  
15 place when there is both an offer and an export  
16 within the same 90-day period. If you don't have  
17 those two elements and then the linkage between the  
18 two companies, then the 90-day rule does not apply.  
19 And at the time that I was contacted by Merrill &  
20 Ring, I did the research, I went into our records  
21 and found that Itochu Canada Limited had not  
22 exported in that time frame, and I believe in

09:29:03 1 Paragraph 142 I indicate that--and let me go back to  
2 the dates on this--so Mr. Stutesman wrote me in  
3 March of 2006 and May 2006 on the same issue, and I  
4 looked into the matter and determined that no  
5 Federal surplus permits had been issued to Itochu  
6 since March 2005.

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

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

15       Q.   And this again is who?

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

21       Q.   And then later what happened? Did this  
22 issue get resolved?

09:30:17 1 A. That's not in my--

2 Q. Oh, okay.

3 A. I write nothing more about CIPA in my  
4 Affidavit, so I wouldn't feel comfortable speaking  
5 about that matter.

6 Q. Ms. Korecky--

7 A. But let me frame that from the perspective  
8 of Merrill & Ring, that is the extent of our  
9 discussions with regards to CIPA and Itochu.

10 Q. Ms. Korecky, could I take you to Tab 48 of  
11 your first Affidavit, please. I believe this is a  
12 case dealing with targeting of Merrill & Ring's  
13 logs, so can you explain this to us, please, what  
14 happened there.

15 A. Certainly.

16 I will draw everyone's attention to Page 3  
17 of this memorandum, Paragraph 6. It really is the  
18 operative paragraph, 6 and 7.

19 Essentially what had happened was, and I  
20 made reference earlier to the fact that one of the  
21 factors we look at is the pattern of offers that  
22 have been made to determine whether or not there has

09:31:39 1 been unfair targeting of a company. And in this  
2 particular instance, you will note halfway down  
3 through the paragraph, and this would be Line 1, 2,  
4 3, about Line 7, I would say, starts on the right  
5 side, at the time Merrill & Ring applied to export  
6 the logs, a total of 16 packages of cedar logs were  
7 seeking export approval. However, it was noticed  
8 that DCP placed offers on only the M&R packages and  
9 placed no offers on 10 other proposals." TimberWest  
10 and Weyerhaeuser, which had four and six booms that  
11 were advertised at that time--"As a result those  
12 latter 10 packages were deemed to be surplus to  
13 domestic need and approved for export. The six  
14 packages proposed for export by Merrill & Ring were  
15 deemed to be not surplus by FTEAC. There was no  
16 justification to consider the six Merrill & Ring  
17 packages as not surplus while at the same time  
18 consider the other 10 packages as surplus. On the  
19 basis of our assessment, therefore, it was agreed to  
20 approve the export of the Merrill & Ring logs  
21 because the recommendations by FTEAC"--and again,  
22 the recommendation by FTEAC is solely with respect



09:32:54 1 to the fair market value nature of the offer, "and  
2 the objections raised by DCP were not sustainable."

3 In this particular instance it was another  
4 case where we believed there was unfair targeting,  
5 and the Department of Foreign Affairs acted and  
6 declared those booms of logs to be surplus to  
7 domestic need.

8 Q. Can you read the first line of Paragraph 7,  
9 please.

10 A. Certainly.

11 Q. "As has been our practice, we have  
12 determined that logs are surplus when offers appear  
13 to be targeted at one company (in this case, clearly  
14 Merrill & Ring) by another company (consistently  
15 DCP)."

16 Does, this, in your view, represent your  
17 practice?

18 A. Yes, it does.

19 Q. Okay, Mr. Korecky. Now, I understand that  
20 for these cases that we've discussed you have taken  
21 action.

22 A. Um-hmm.

09:33:52 1 Q. Have other cases been brought to your  
2 attention?

3 A. Other cases of unfair targeting?

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

8 A. Certainly.

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

15 Q. And circumvention of the 90-day rule?

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

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

21 A. To my knowledge, there were very few  
22 instances where an abuse was looked into, a

09:34:52 1 potential abuse was looked into, or an abuse of the  
2 system was found.

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

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

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

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

21 And I think one thing that the Tribunal  
22 certainly needs to understand is that the Vancouver

09:36:03 1 Log Market is an immense market, and in Tab 4 of the  
2 exhibits to my Affidavit on Page 99, which is the  
3 second last page--

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

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

9 Q. It's on the screen?

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

11 Q. So, what are we looking at here?

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

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

22 A. That is correct.

09:37:22 1           I would also draw everyone's attention to  
2 the first section in this chart which refers  
3 specifically to the Coastal region. And if again  
4 you look to the far right column, the percentage of  
5 booms of logs that are--a volume of logs that are  
6 exported from the Coast is 21.2 percent. What that  
7 essentially means is that 80 percent of the harvest  
8 remains in the pure domestic market.

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

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

16       Q. I see.

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

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

21       A. A very small percentage, somewhere  
22 around--I believe it's around 2 or 3 percent.

09:38:27 1 Q. I see.

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

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

8 A. Complaints--

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

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

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

18 A. So, going back and the reason I wanted to  
19 show this chart to everyone is because really the  
20 Vancouver Log Market is an immense market, and  
21 Mr. Ringma yesterday drew us a picture of an  
22 iceberg, and the reality is is that is how I view it

09:39:21 1 as well. We see what is at the tip of the iceberg.  
2 We are only aware of those offers that are placed  
3 before us, the offers that are adjudicated by FTEAC,  
4 and that is the scope of what we are aware of.  
5 There is a whole host of negotiations, of  
6 relationships that exist.

7 Q. But you're aware of these negotiation, are  
8 you?

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

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

17 A. I have no reason to be concerned about  
18 those negotiations. I can't speculate as to the  
19 history between the two companies. I can't  
20 speculate with regards to what those companies have  
21 said to each other, what they've promised to each  
22 other. I have none of that knowledge.

09:40:28 1 Q. I'm trying to get a sense of what's  
2 happening because we heard a lot of allegations  
3 that, you know, the Investor's witnesses were saying  
4 that they felt they were held hostage by the system.  
5 What would happen if Merrill & Ring decided  
6 to advertise all their logs and not do any  
7 negotiations?

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

18 In the instance that we believe and make a  
19 determination that the offer is a valid, fair market  
20 offer and declare the boom of logs to be not surplus  
21 to domestic need, Merrill & Ring is in a position  
22 with a couple of options. One option is to accept



09:41:38 1 the offer. That offer is binding on the offeror but  
2 not on Merrill & Ring. The other option they have  
3 is to go into the domestic marketplace and find  
4 another buyer.

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

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

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

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

17           PRESIDENT ORREGO VICUÑA: Yes.

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

21           (End of confidential session.)

22

09:42:23 1

## OPEN SESSION

2 PRESIDENT ORREGO VICUÑA: Yes, thank you,  
3 Ms. Tabet.

4 We will have now the cross by Mr. Nash.

5 MR. NASH: Thank you, Mr. President.

## 6 CROSS-EXAMINATION

7 BY MR. NASH:

8 Q. Good morning, Ms. Korecky.

9 A. Good morning, Mr. Nash.

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

12 A. Thank you.

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

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

18 BY MR. NASH:

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

22 A. That is correct.

09:43:27 1 Q. As I understand it, in the fall of 2005?

2 A. That is correct.

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

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

8 Seamless.

9 BY MR. NASH:

10 Q. And you were appointed in an acting  
11 position in September of 2005?

12 A. No, I was appointed Deputy Director in  
13 September 2005.

14 Q. In September 2005.

15 Mr. Cook was already appointed at that  
16 stage to the Provincial side of this equation?

17 A. Yes. He was appointed.

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

20 Q. Yes.

21 A. And that I acted as his delegate in the  
22 interim time from when he retired to the point where

09:44:23 1 I was appointed Deputy Director.

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

4 A. That's correct.

5 Q. And you were appointed in September of  
6 2005?

7 A. That is correct.

8 Q. And Mr. Jones was gone; right?

9 A. Yes.

10 Q. And you were new to the position?

11 A. That is correct.

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

15 A. Mr. Jones and I had had some discussions  
16 about the Log Export Control Regime. I had done  
17 some work on log export controls prior to that time.  
18 I did go out to British Columbia in I believe it was  
19 2002 or 2003, with Mr. Jones, where we met with  
20 several industry members as well as attended an  
21 FTEAC meeting.

22 Q. A few years before?

09:45:12 1 A. That was a few years before.

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

5 Q. Mr. Ruhl?

6 A. R-U-H-L.

7 Q. Okay.

8 A. That is correct.

9 And we had a fulsome discussion on Log  
10 Expert Controls.

11 Q. He gave you an orientation?

12 A. He and I spoke, and he provided me with his  
13 perspective as well.

14 Q. Just to go a little bit back to your  
15 background, you've got a few university degrees, I  
16 believe?

17 A. Yes, I do.

18 Q. You have a degree?

19 A. Is that in my Affidavit.

20 Q. You have a degree in law?

21 A. Yes, I do.

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

09:45:54 1 it?

2 A. No, I don't.

3 Q. A BA majoring in history?

4 A. In history?

5 Q. Yes.

6 A. No.

7 Q. Geography?

8 A. No.

9 Q. Economics?

10 A. No.

11 Q. Ecology?

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

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

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

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

21 A. No.

22 Q. Or in marketing and sales?

09:46:28 1 A. No.

2 Q. And you completed your law degree in 1998?

3 A. 1997.

4 Q. '97?

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

6 Q. And you article ed as a lawyer?

7 A. Articles, yes. I articulated with Stikeman

8 Elliott, which is a law firm in Ottawa. I

9 specifically chose to article with Stikeman because

10 they did have a regulatory practice, and I really at

11 that point in time had a sense that I did want to go

12 work with Government and work in the regulatory

13 sphere.

14 Q. So, you went straight from articles to the

15 Department of Foreign Affairs?

16 A. That is--I did a contract for the Center

17 for Trade Policy and Law, and then I went to Foreign

18 Affairs.

19 Q. You went to Foreign Affairs in 2000, I

20 think?

21 A. That is correct.

22 Q. And you went there as a Policy Analyst?

09:47:13 1 A. That is correct.

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

6 A. That's correct.

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

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

13 Q. And did you study constitutional law?

14 A. That was my worst course in law school.

15 Q. And did you only take one of them?

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

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

22 A. It was not my favorite topic.



09:48:11 1 Q. And I take it in your career you have not  
2 had any actual hands-on experience in the forestry  
3 industry?

4 A. That is correct.

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

7 A. That is correct.

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

14 A. That is correct.

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

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

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

22 A. It contains--it is the regulation that sets

09:49:10 1 out the types of goods that are controlled. There  
2 is an incorporation by reference to what we term our  
3 guide to export controls, and that sets out by line  
4 item all the items that are controlled under the  
5 Export Control List.

6 Q. And how many items are there that are  
7 involved in your responsibilities?

8 A. We have--our list is some 200 pages.

9 Q. 200 pages. And how many items would be on  
10 each page?

11 A. Oh, I would have no idea.

12 Q. Thousands?

13 A. Certainly.

14 Q. And logs is one of those items; is that  
15 right?

16 A. Yeah, certainly logs is one item.

17 I would point out that we issue the  
18 equivalent number of permits for logs that we do for  
19 all other items under the Export Control List that  
20 are the purview of our division.

21 Q. But you deal as the Deputy Director of the  
22 division, you deal with--you're responsible for

09:50:01 1 dealing along with the Director, for all of the  
2 items; is that right?

3 A. That is correct.

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

6 A. On paper, logs is a portion of the dossier.  
7 With respect to the amount of time that I spend with  
8 regards to logs, it can vary between 50 to 75  
9 percent of the time I spend on substantive issues.

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

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

15 A. That is correct.

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

18 A. That is correct.

19 Q. Or the ecosystems in British Columbia?

20 A. Not an expert, certainly, no.

21 Q. No? Or the geography or topography of  
22 British Columbia?

09:50:52 1 A. An expert, no.

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

4 A. That is correct.

5 Q. Or in transportation issues involving  
6 British Columbia?

7 A. An expert? No.

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

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

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

22 Q. So, I think you used--I can't recall the

09:51:39 1 expression you used yesterday--you're a nonsubject  
2 expert? Is that the phraseology you used?

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

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

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

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

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

15 Q. Okay, you're a manager?

16 A. And I do I believe over the last 10 years  
17 since I have been with the Export Controls Division,  
18 the numerous international meetings I have attended,  
19 the numerous FTEAC meetings I have attended, the  
20 amount of time and energy that I spent on these  
21 files developed a certain expertise with respect to  
22 the role that I have to play.

09:52:25 1 Q. My question is really about the category  
2 that you fall in. Are there subject matter experts  
3 within the department?

4 A. Subject matter experts?

5 Q. Yes.

6 A. At the Department of Foreign Affairs?

7 Q. Yes.

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

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

20 A. Yes.

21 Q. Have you got it in front of you?

22 A. It's right in front of me.

09:53:19 1 Q. Go to the first page.

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

5 A. Yes, I do.

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

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

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

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

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

20 BY MR. NASH:

21 Q. So, when you swore your Affidavit, you  
22 weren't speaking or thinking like a lawyer. You

09:54:10 1 were speaking and thinking like a policy person?

2 A. A policy person, right.

3 Q. Fair enough.

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

10 A. That is correct.

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

13 ARBITRATOR ROWLEY: Where are you reading  
14 from, please?

15 MR. NASH: Paragraph 5.

16 BY MR. NASH:

17 Q. "The Federal Government of Canada has sole  
18 authority related to the regulation of trade and  
19 commerce. The Exports Controls Division is  
20 responsible for the administration of most of the  
21 export controls authorized pursuant to the Export  
22 and Import Permits Act."



09:55:00 1 A. That is correct.

2 The Constitution Act of 1867 is one of the  
3 things I did take away from my course in  
4 constitutional law.

5 Q. You remember that much?

6 A. I remember that, yes.

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

15 A. I'm sorry, which paragraph?

16 Q. Paragraph 9.

17 Are you with me?

18 A. Yes, yes.

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

22 And then if you go to Paragraph 10,

09:56:02 1 under--actually go to the next headline, "Categories  
2 of Lands in British Columbia for Forestry Purposes,"  
3 you set out there are four categories of land for  
4 forestry purposes in British Columbia. Private land  
5 acquired through the Crown, Crown grant prior to  
6 March 12, 1906. Logs from these lands are subject  
7 only to Federal regulation, including Notice 102.  
8 They're not subject to British Columbia's local use  
9 or manufacture requirements.

10 A. That is correct.

11 Q. You define them as Federal Land.

12 How do you know that?

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

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

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

21 Q. And the system that sets out that these are  
22 Federal Lands, what is that system?

09:57:08 1       A.    I know that I'm sitting in the state of  
2 Washington, D.C., right now or the District of  
3 Columbia.  It's not a state, but I can't tell you  
4 how or when this became a state, but I do know for a  
5 fact that I'm sitting in this state or this  
6 district.

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

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

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

20       A.    They are located in the Province of British  
21 Columbia, but some of them are regulated by the  
22 Federal Government, certainly.  Those would be the

09:58:04 1 Federal/Private Lands as well as those Aboriginal  
2 Lands that are located in the province of British  
3 Columbia.

4 Q. But as a constitutional matter, aren't  
5 private lands in British Columbia under Provincial  
6 jurisdiction, or do you know that?

7 A. They're located in the Province of B.C.,  
8 but as relates to Federal export log controls, they  
9 fall under Federal jurisdiction.

10 Q. I'm just asking whether--

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

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

21 MS. TABET: I have the right to object.

22 PRESIDENT ORREGO VICUÑA: Yes, but the

09:58:54 1 issue is that the cross-examination you are  
2 conducting should be related strictly to the  
3 Affidavit.

4 MR. NASH: Absolutely.

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

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

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

17 BY MR. NASH:

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

21 A. With respect to the issue of log export  
22 controls, they are under Federal jurisdiction, and

09:59:49 1 that is why Notice 102 applies to them, and that is  
2 why before that Notice 23 applied to them, and that  
3 is why before that there were other LERs in place  
4 with regards to those items, and that has been in  
5 place for quite some time.

6 Q. And where does that jurisdiction derive  
7 from?

8 A. Again, you're asking me a question that you  
9 have asked, and I have been unable to answer.

10 Q. So, you don't know yourself where the  
11 Federal jurisdiction over private forest lands comes  
12 from; is that correct?

13 A. That is correct. And in the five years I  
14 have been dealing with this, it's never been an  
15 issue up until today.

16 Q. Isn't, in fact, the jurisdiction that the  
17 Federal Government has over the regulation of  
18 private lands with regards to forests, isn't that a  
19 delegated jurisdiction from the Provincial  
20 Government under the Forest Act to the Federal  
21 Government or do you know that?

22 A. I do not know that.

10:00:44 1 Q. So, you're not able really to express an  
2 opinion on constitutional law matters?

3 A. I stated that several minutes ago, yes.

4 Q. Yeah.

5 You say then--

6 A. You asked me if I was a constitutional  
7 expert, at which point in time I said no.

8 Q. If you go to Paragraph 12, please, on  
9 Page 4. You refer then to the first category which  
10 we just reviewed. The first category, "'although in  
11 private hands' is referred to in the industry as  
12 Federal Land because Canada has exclusive  
13 jurisdiction over that land." And you know that  
14 from your personal knowledge?

15 A. Those are Federal Lands.

16 Q. Because Canada has exclusive jurisdiction  
17 over that land?

18 A. Um-hmm.

19 Q. Yes?

20 A. What I know relates to the Surplus Test.  
21 That is what is my regulatory mandate, and I'm aware  
22 that the Federal Government has exclusive

10:01:45 1 jurisdiction with regards to the Federal Surplus  
2 Test or the Surplus Testing of the logs that come  
3 from that land. That is the scope of my regulatory  
4 function.

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

8 A. Over the land?

9 Q. Over the land, as you say there.

10 A. In what respect?

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

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

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

22 A. And I apologize if I misled anyone with



10:02:43 1 that. It's an inartful way to say that we have  
2 control over the export of those logs.

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

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

9 Q. And that's it?

10 A. With regards to those lands?

11 Q. Yes. Or do you know?

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

17 Q. Did you write this Affidavit?

18 A. Yes, I did.

19 Q. The entire thing from beginning to end?

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

22 Q. So, if you go to Paragraph 18, "Similarly

10:03:51 1 the Province of the British Columbia does not have  
2 the constitutional authority to control export of  
3 logs grown on Federal or Provincial Land, which is  
4 the exclusive jurisdiction of the Federal Government  
5 under Section 91 of the Constitution Act. As well,  
6 the Province of British Columbia cannot regulate the  
7 local manufacture or use of logs grown from private  
8 lands under Federal jurisdiction."

9 A. That is correct. There is no local use or  
10 manufacture rule with regards to logs that come from  
11 Federal Lands.

12 Q. But isn't it true that British Columbia  
13 could retake its jurisdiction over those lands with  
14 a stroke of the legislative pen?

15 A. Again--

16 Q. Right?

17 A. Mr. Nash, I have no idea because--

18 Q. You don't know?

19 A. No, I have no idea. I don't know at what  
20 point in time the authority over those lands was  
21 ceded and what was the instrument. I do know for a  
22 fact that it did take place, and that is what is

10:04:47 1 relevant to these proceedings.

2 Q. Do you know when it took place?

3 A. Well, it took place in March of 1906.

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

18 A. Yes, that is correct. I have actually  
19 visited in the Interior, driven through the Cascade  
20 Mountains. I have met with industry members both in  
21 the Interior and the Coast, and I believe this to be  
22 true.

10:05:52 1 Q. Well, you believe it to be true because you  
2 had been told it by somebody?

3 A. I believe it to be true.

4 Q. Or you read it somewhere?

5 A. I went on the trip, I looked with my eyes,  
6 I spoke with people. I have certainly over the  
7 years gathered a fair amount of knowledge, and this  
8 is to my understanding to be the truth, and I have  
9 had no evidence to the contrary in the last five  
10 years.

11 Q. In Paragraph 26 the Province of British  
12 Columbia relied heavily on the forest industry for  
13 its industrial development.

14 A. Um-hmm.

15 Q. Now, really, Ms. Korecky, do you have any  
16 expertise in the history of British Columbia and its  
17 industrial development?

18 A. I do know that the industrial development  
19 of British Columbia is heavily dependent on the  
20 forestry industry.

21 Q. But in its history it's relied heavily on  
22 the forest industry for its industrial development?

10:06:40 1 A. Yes, I'm aware of that.

2 Q. You're not an expert in--

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

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

9 A. That is correct.

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

11 A. Um-hmm.

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

13 A. Yes, um-hmm.

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

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

22 A. I certainly wasn't there at that time.

10:07:33 1 Q. Nor was I.

2 A. Nor were you and most of the people in this  
3 room.

4 Q. Well, it depends on when the period ends.

5 A. That being said we have a certain  
6 understanding of the history generally having been  
7 brought up in Canada, and I certainly over the last  
8 several years have learned of this matter to further  
9 extent. This is a general knowledge section,  
10 Mr. Nash.

11 Q. If you go to Page 8, Paragraph 31, under  
12 the title four, "Harmonization of log controls  
13 between the Federal Government and British  
14 Columbia," and therein you give a history of the way  
15 the two systems came together--

16 A. That is correct. Um-hmm.

17 Q. --to be what it is today; is that correct?

18 A. Yes.

19 Q. And the goal of the system is that both  
20 regimes be harmonized?

21 A. That is correct.

22 Q. And that they both reflect one another and

10:08:18 1 that they both work together in harmony?

2 A. Yes, that is correct.

3 Q. And that the definitions for phrases and  
4 concepts under one Regime is the same as the  
5 definition, the phrases and concept in another  
6 Regime. They are supposed to meld together;  
7 correct?

8 A. I wouldn't quite characterize it that way,  
9 Mr. Nash.

10 The reality is, as I mentioned yesterday,  
11 and as you just pointed out again, that there  
12 are--there is a constitutional distinction between  
13 the authorities that the Government of British  
14 Columbia has and the Federal Government has. We  
15 have two distinct legislative bases. We have two  
16 distinct focuses; and so, therefore, we harmonize to  
17 the extent that it is possible and that it is  
18 practicable.

19 So, yes, there is some interlinkage of  
20 terminology, but certainly there are some  
21 distinctions.

22 Q. You're aware that Interfor--I'm actually

10:09:15 1 going to be speaking about companies now, and  
2 turning to some TEAC minutes, so I ask that the  
3 session be closed to the public.

4 (End of open session. Confidential  
5 business information redacted.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22



10:09:26 1

## CONFIDENTIAL SESSION

2 BY MR. NASH:

3 Q. I would like to take you first to  
4 Exhibit 58, please.

5 A. Certainly.

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

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

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

20 Q. So, you describe that as a tension. You  
21 have been here for the evidence for the last few  
22 days?

10:10:55 1 A. Um-hmm.

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

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

6 Q. You've heard of this before.

7 And some of the complaints have been around  
8 Interfor; right?

9 A. Some of the complaints, yes.

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

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

18 A. That is correct.

19 Q. Sorry, 2005.

20 If you go to the third page, you will see  
21 that there is a series of offers on the Coast on the  
22 October 1st and 15th a Bi-Weekly List?

10:11:53 1 A. If you'll give me a second, please.

2 Q. Yes.

3 A. I was not at this meeting, so I would like  
4 to review this quickly.

5 Q. Sure. Take a look at it, and we can go  
6 through it quickly.

7 (Witness reviews document.)

8 Q. You see that there is a series of offers  
9 made by Interfor on applications put forth by  
10 Weyerhaeuser on various booms?

11 A. Um-hmm.

12 Q. And you will see that all of the offers are  
13 found to be fair, and you will see that most of the  
14 applications are withdrawn.

15 A. That is correct.

16 Q. You see that?

17 Now, was there a change in the way the  
18 minutes were done? Because in the early days it  
19 seems that the application withdrawn is actually  
20 formulated and put on the minutes recorded, whereas,  
21 in the later minutes of TEAC it seems that that  
22 notation doesn't come up. Was there a change, to

10:12:57 1 your knowledge?

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

4 Q. The application to advertise was withdrawn?

5 A. That is correct.

6 Q. Okay. All right. You don't know that, but  
7 you just read it that way?

8 A. Well, it does not indicate the offer was  
9 withdrawn but the application was withdrawn.

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

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

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

21 A. That is correct. That was I went--you will  
22 notice in the last paragraph of this letter he

10:13:58 1 understands that I will be in Vancouver. I called  
2 him with regards to this letter indicating that I  
3 would be meeting with Merrill & Ring, Island  
4 Timberland, and TimberWest, and he indicated that  
5 they were well aware of his concerns and that he  
6 felt there was no need to discuss this further.

7 ARBITRATOR ROWLEY: Could I just interrupt  
8 for a moment.

9 MR. NASH: Yes.

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

15 MR. NASH: Thank you.

16 THE WITNESS: It's Exhibit 54.

17 BY MR. NASH:

18 Q. Thank you very much.

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

22 A. That's in the second paragraph?

10:14:58 1 Q. Second paragraph--"of 3,234,000 cubic  
2 meters, and of this allowable volume in 2004, they  
3 supposedly cut 2,964,000 cubic meters, 270,000 cubic  
4 meters less than they could have. 2005 data is not  
5 available."

6 Did you look into that ever?

7 A. Did I look into this issue.

8 Q. Yes.

9 A. Of Interfor's annual allowable cut?

10 Q. Yes.

11 A. Their allowable annual cut is a Provincial  
12 issue.

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

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

18 Q. It's an irrelevancy do you?

19 A. Well, just like I do not look at and I have  
20 no knowledge of the Harvest Plan of Merrill & Ring  
21 or their business plan. I do not know what their  
22 projections are, and I do not know what they

10:15:55 1 harvest, no.

2 Q. Do you look at allowable annual cut at all  
3 as an issue in your determination, your  
4 consideration, your opinion as to whether there is a  
5 surplus of logs in British Columbia?

6 A. The annual allowable cut--and let me just  
7 clarify--

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

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

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

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

18 BY MR. NASH:

19 Q. And your explanation.

20 A. Certainly. The annual allowable cut is  
21 something that is determined by the Provincial  
22 Government, and I'm certainly no subject matter

10:16:39 1 expert as to how this annual allowable cut is  
2 arrived at. I understand that a certain allowable  
3 cut is permitted, and then the company that has been  
4 granted that annual allowable cut is free to choose  
5 how much it chooses--how much it decides to harvest  
6 or not, just like Merrill & Ring is free to choose  
7 how much it will harvest within a year.

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

13 A. That is correct.

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

18 Q. And you don't--leaving aside the individual  
19 companies involved, you don't even look at the  
20 allowable annual cut as a totality for all logging  
21 companies and how much they've either overcut or  
22 undercut? That's not a factor?



10:17:47 1       A.   That is correct.  That is not at all a  
2   factor.  What we are aware of certainly and we do  
3   take into consideration, you will see it at the  
4   beginning of all of the FTEAC minutes is there is a  
5   general market review, and there are several  
6   paragraphs that do speak to what are the general  
7   conditions at that point in time.

8       Q.   Got that.

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

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

12       Q.   Oh, yes.

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

17       Q.   If you go over to Page 3 of Mr. Kurucz's  
18   letter, with all that we know of Interfor--I'm in  
19   the middle of the page, the paragraph straight in  
20   the middle, "Interfor, a company that exported logs  
21   in the past, they have mills in Washington that cut  
22   logs from B.C.  They have ties to brokers that are

10:18:39 1 exporting logs, et cetera. I think I see a very big  
2 resemblance to Northwood Hardwoods, which is an  
3 example he refers to previously, and I would like to  
4 ask your administration to take a serious look as  
5 Interfor as a company that should also not be  
6 allowed to offer on the Federal advertised list. I  
7 must add that the Provincial TEAC did not rule as  
8 Thomas Jones did."

9 A. This is the Northwood Hardwoods--

10 Q. Right.

11 A. --instance. Do we have a copy of the  
12 particular minutes where this was dealt with by  
13 FTEAC?

14 Q. The Northwood Hardwoods is an example that  
15 he cited. I'm not interested in that example. But  
16 what I'm interested in is knowing whether you knew  
17 at that time that Interfor had at least flagged as a  
18 problem to you very shortly after you came on.

19 A. Certainly. And if we could go to my  
20 Affidavit, where I do mention that when we looked at  
21 issue of Interfor with respect to the 90-day rule  
22 that one of the persons or one of the pieces of

10:19:38 1 evidence that I did follow came from Tony Kurucz.

2 Q. Right.

3 FTEAC did look into Interfor, didn't it?

4 A. Yes.

5 Q. Not long after this?

6 A. That is correct.

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

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

16 Q. You've heard of that expression?

17 A. I've heard of that expression.

18 Q. And you've heard of blockmail?

19 A. I've also heard that industry term.

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

22 A. Um-hmm.

10:20:34 1 Q. If you'll turn to Paragraph 65 of your  
2 Affidavit.

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

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

9 A. That is correct.

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

15 A. With regards to a specific issue such as  
16 the 90-day rule, we do not know of, as I mentioned  
17 before, all of the business dealings that take place  
18 in the industry. There are many times where we see  
19 an Export Permit from Merrill & Ring for an Island  
20 Timberland boom. We do not know the conditions of  
21 the sale. We just are aware that there is some  
22 level of a relationship. Was I aware about this

10:21:58 1 relationship between Interfor and Timberwolf? No,  
2 but people in the industry bring this to our  
3 attention, and when it becomes known to us, then we  
4 act on it.

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

12 A. That is correct.

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

15 A. 30, 31?

16 Q. Yes, please.

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

22 A. There are no written conflict-of-interest

10:23:15 1 guidelines for FTEAC. However, there are guidelines  
2 that are followed, and they are evidenced in the  
3 FTEAC minutes.

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

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

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

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

19 Q. The two of you sit down with the new member  
20 and you explain the conflict-of-interest guidelines?

21 A. We actually begin the first meeting; we  
22 begin that meeting with an explanation so that they

10:24:10 1 are aware before any business of the Committee is  
2 discussed exactly what the expectations are for them  
3 with regards to conflict of interest and with  
4 regards to confidentiality of the information  
5 related to the FTEAC meeting.

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

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

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

20 A. That is, yes.

21 Q. A real or perceived conflict? Okay.

22 We will go to the minutes of March 10,

10:25:05 1 which is Exhibit 30.

2 A. Um-hmm.

3 Q. Of 2006. And you're in attendance by  
4 conference call?

5 A. That is correct.

6 Q. And would you attend most of the minutes of  
7 FTEAC by conference call?

8 A. I make certain, since I took this role on  
9 in February 2005, that the Federal Government is  
10 always represented. The reality is that we are  
11 located in Ottawa, and to transport ourselves on a  
12 monthly basis to Vancouver for a three-hour meeting  
13 would not be practicable. Therefore, we do tend to  
14 assist--to attend the meetings via teleconference,  
15 and that works very well for us.

16 Q. How many actual meetings have you attended  
17 in person since you started in September of 2005?

18 A. I personally have attended one meeting. My  
19 colleagues have attended, I believe, another three  
20 meetings.

21 Q. Over the course of the last  
22 three-and-a-half years? About one a year on



10:26:04 1 average.

2 A. I can't speak to what took place when I  
3 spent that year on maternity leave, but what we do  
4 try to do is we do try to get out to British  
5 Columbia for the field trip so that we have an  
6 opportunity to get ourselves into the industry and  
7 to learn something new.

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

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

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

10:27:07 1 from your standpoint--

2 A. That is correct, yes.

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

8 A. Yes.

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

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

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

20 Q. Right. And I think Mr. McCutcheon, or do  
21 you know, had left Interfor by this time, or do you  
22 know that?

10:28:07 1 A. He would have left Interfor by this time.

2 Q. He left at the end of 2006? Sorry, 2005?

3 A. He would have retired--I'm just trying to  
4 think exactly when he retired. He certainly was  
5 with Interfor. I believe he injured himself later  
6 in 2005 and would have left early in 2006. The  
7 specific dates I do not recall.

8 Q. So, he's left Interfor within a few month s  
9 of the date of this meeting; correct?

10 A. Yes.

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

16 A. Um-hmm.

17 Q. So this meeting is being held on March 10,  
18 2006.

19 A. That is correct.

20 Q. And involves consideration of two lists,  
21 one of which is dated January 27, 2006; correct?

22 A. That is correct.

10:29:05 1 Q. And the earliest that the Applicant could  
2 get on that list would have been 10 days before  
3 that?

4 A. That is correct.

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

9 A. Just give me one second.

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

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

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

17 Q. Yes.

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

20 Q. No later than January 17?

21 A. No later than January 17.

22 Q. And it might have been earlier other in

10:30:14 1 fact?

2 A. Potentially.

3 Q. In order to capture the Tuesday deadline,  
4 given in our example?

5 A. That is correct.

6 Q. And then going down to the issue under  
7 consideration here, what follows are the 15  
8 applications; correct?

9 A. Yes.

10 Q. All made by Island Timberland. And you go  
11 over to the next page, and every one appears to me  
12 to be the same.

13 A. Um-hmm.

14 Q. All of the offers are made by Interfor. It  
15 is therefore recommended that the Minister refuse to  
16 review the proposed export.

17 A. Um-hmm.

18 Q. And so at this stage, all of the  
19 applications are going to be recommended to be  
20 rejected; correct?

21 A. I think it's a little more complex than  
22 that. What essentially happened was that we became

10:31:06 1 aware of the Interfor issue, and there were these  
2 offers to consider. And because we had not come to  
3 a final determination with regards to the 90-day  
4 rule, I made the request that we consider these  
5 offers, regardless, and therefore there would be a  
6 determination at least with respect to the fair  
7 market value assessment during the appropriate time  
8 period, and then either that the validity--the  
9 offers themselves if they were of fair market value  
10 would be determined to be valid or invalid.

11           And if you note on Page 2, in Paragraph  
12 4(a), this is noted, and this is under 4(a) under  
13 the Coastal section right after the underline. It  
14 says, "The fairness of the offers has been reviewed  
15 at this time so that no delays are caused due to the  
16 decision not to accept the offers or not." It was  
17 to ensure that we had all the information as quickly  
18 as possible.

19       Q.    Right.

20       A.    So, what these particular notations relate  
21 to is the FTEAC recommendation with respect to the  
22 fair market value assessment only.

10:32:10 1 Q. So at that stage, Island Timberland would  
2 be notified of the disposition by the Committee of  
3 those offers; is that correct?

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

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

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

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

15 A. Um-hmm.

16 Q. Yes?

17 A. Yes, they are.

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

21 A. Um-hmm, yes, so that's less than two months  
22 later.

10:32:56 1 Q. And so, at that point, if Island Timberland  
2 did not give notice of the disposition, preliminary  
3 disposition of these offers, then they don't know  
4 the status. If they did get notice, they either  
5 wait for the Committee's investigation to conclude  
6 or they sell the logs domestically; is that their  
7 alternative? Is that fair?

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

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



10:34:02 1 sought to issue a Surplus Letter at that point in  
2 time.

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

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

10 Q. Right.

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

13 A. That is correct.

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

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

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

20 A. Um-hmm.

21 Q. And that's found at Tab Exhibit 31;  
22 correct?

10:34:47 1       A.    That is correct, under Item Number 2 where  
2    it indicates that due to a conflict of interest,  
3    John McCutcheon did not take part in the discussion  
4    related to the actions of Interfor.

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

9       A.    Um-hmm.

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

12       THE WITNESS:  Oh, I do apologize.  It's an  
13    awful habit.  Yes.

14       BY MR. NASH:

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

19       A.    Could I say that--

20       Q.    --at number four, under harvested surplus,  
21    there is no reference to John McCutcheon leaving the  
22    room; correct?



10:36:37 1 Minutes, "Due to a conflict of interest, John  
2 McCutcheon did not take part in the discussions  
3 related to the actions of Interfor. A) Island  
4 Timberlands letter. Background from the previous  
5 meeting: Island Timberlands GP Limited submitted a  
6 letter (email) to J. Cook that suggested  
7 International Forest Products LTD (Interfor) had  
8 exported logs in 2006. Investigation of the  
9 allegation found that Interfor had paid the stumpage  
10 on the volume harvested under timber mark AR3002  
11 held by the Ucluelet Economic Development Corp.  
12 TEAC/FTEAC discussed the situation and confirmed  
13 that there was reason to suspect an indirect  
14 relationship between the export of timber by  
15 Timberwolf and Interfor." And I will just stop  
16 there.

17           This information obviously came from  
18 private industry. Mr. Ringma, no doubt, from Island  
19 Timberland; right?

20       A.    He's very forthcoming, yes.

21       Q.    Yes.

22           And he brought it to the attention of the

10:37:36 1 Committee. The Committee spent a month  
2 investigating.

3 A. Um-hmm.

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

10 "The Chair of TEAC/FTEAC sent a letter to  
11 Doug Konkin, Deputy Minister of Forests and Range,  
12 and Robert Fonberg, Deputy Minister, International  
13 Trade Canada, recommending that Interfor be advised  
14 that they were in contravention of export policy.  
15 Due to their indirect involvement in export on or  
16 about February 12, 2006,"--we are now at April 7,  
17 2006?

18 A. That is correct.

19 Q. "Any offers by Interfor on timber  
20 advertised for export should not be considered until  
21 after April 25, 2006, which is less than three weeks  
22 down into the future Provincial timber or May 12,

10:38:32 1 2006, Federal timber. The Committee restated their  
2 support for the recommendation."

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

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

7           Q. Yes.

8           A. Yes.

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

11          A. That is correct.

12          Q. Retroactive to almost two months before;  
13 correct?

14          A. Yes.

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

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

20                PRESIDENT ORREGO VICUÑA: How long?

21                MR. NASH: 20 or 30 minutes.

22                PRESIDENT ORREGO VICUÑA: Okay. So, we

10:39:15 1 will break.

2 THE WITNESS: I'm correct to press ahead if  
3 you don't think you have many more questions for me.

4 PRESIDENT ORREGO VICUÑA: You have 30  
5 minutes, so we will break for 10 minutes.

6 (Brief recess.)

7 PRESIDENT ORREGO VICUÑA: Fine. We may  
8 proceed, Mr. Nash, please.

9 BY MR. NASH:

10 Q. We were at Exhibit 31 on Page 2, and we  
11 were at the bottom of Paragraph 2 referring to the  
12 length of time that Interfor was going to be in the  
13 penalty box.

14 So, as I understand it, then, they were in  
15 the penalty box for about three weeks on the  
16 Provincial side and about four weeks or maybe five  
17 weeks on the Federal side; that's correct?

18 A. No, I don't think that's correct. The  
19 reality is that they had placed offers on the  
20 proceeding Bi-Weekly List, and those offers had not  
21 been finalized. The adjudication of them had not  
22 been finalized.

10:59:34 1           So, in effect, those offers were in limbo  
2 until a determination was made, so therefore de  
3 facto they were in the penalty box because they were  
4 not allowed to make offers. I mean, they had  
5 physically placed offers, but the offers that they  
6 made were not released, even though a fair market  
7 value assessment had been assigned to those logs.

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

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

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

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

21       Q.   They had offers placed in that period of  
22 January 27th in the 14-day period following;



11:00:41 1 correct?

2 A. Yes.

3 Q. And so--but the time of their suspension  
4 was retroactive to February 12; that's correct?

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

7 Q. The date of the which?

8 A. The date of the export.

9 If you go to the--

10 Q. I don't need a source if you could tell us  
11 the date of the export.

12 A. Certainly. Okay.

13 Let me go back to Notice 102, Section 4  
14 which indicates that the FTEAC will not consider  
15 offers to purchase logs by any person who has  
16 exported directly or indirectly from Canada within  
17 the previous 90 days, and the previous 90-day period  
18 covers the period between the day on which the  
19 export took place and the day on which the offer to  
20 purchase is made. And the date on which  
21 consideration would take place of those offers would  
22 have been March 10.

11:01:52 1 Q. And the date of the export here is

2 February 12, 2006.

3 A. That's correct.

4 Q. That's what the minutes says.

5 A. Um-hmm.

6 Q. And so, if you read on to the next, the  
7 second next paragraph, "The members advise that the  
8 clear notice needs to be provided to Interfor as  
9 soon as possible. They recommended that J. Cook do  
10 what is possible to get a quick response from the  
11 Ministry." The committee had concerns about the  
12 length of time it takes to advise a company if they  
13 have been put in the 90-day penalty box.

14 Did the Committee have concern about  
15 advising the company's competitors that the company  
16 was in the penalty box?

17 A. The company's competitors?

18 Q. Yes.

19 A. You refer to who?

20 Q. Any competitors. Did the Committee have a  
21 concern that the industry know that a company was in  
22 the penalty box?

11:02:44 1 A. You're talking about the industry as a  
2 whole?

3 Q. Yes.

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

7 Q. Any other competitors in the industry.

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

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

18 Q. What is the ongoing issue?

19 A. The ongoing issue is that the Federal  
20 Government, like the Provincial Government, has  
21 certain obligations related to the privacy of  
22 information related to the people that it deals

11:03:39 1 with, and so the information regarding the 90-day  
2 rule is something that if a company is found to have  
3 violated the 90-day rule, the ruling would go to  
4 that company, but no one else would have knowledge  
5 of that.

6 Q. And you would be concerned about that?

7 A. To inform that company so that they're  
8 certainly aware that any offers that they place  
9 would not be considered valid, so that they make  
10 alternate arrangements, yes.

11 Q. Has consideration been given to having an  
12 open process in this Committee consideration of  
13 offers?

14 A. Which Committee consideration? The 90-day  
15 rule.

16 Q. FTEAC. Any consideration of offers. Has  
17 there ever been any discussion about the possibility  
18 of having an open forum, an open way of dealing with  
19 these matters in a transparent way?

20 A. The reality is is that a company which has  
21 offers placed on it is well within its right to  
22 write letters to us, and we have provided many

11:04:33 1 examples where companies have written to us. They  
2 certainly have an input. I think that what we need  
3 to reiterate is that the FTEAC Advisory Committee is  
4 a consultative committee that provides advice to us.  
5 It is not an open forum. It's not an advocacy for  
6 any forum for any one company, but individual  
7 companies certainly do have the ability to contact  
8 us and, as I've mentioned previously, they call us,  
9 they e-mail us, they write us on an ongoing basis  
10 with any questions they may have, with any concerns  
11 they may have.

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

20           ARBITRATOR ROWLEY: Ms. Korecky, may I just  
21 interrupt for a moment. The question you were asked  
22 was whether the Committee gave any consideration to

11:05:43 1 holding its meetings in public or in a transparent  
2 way. You didn't answer that question.

3 THE WITNESS: I do apologize.

4 ARBITRATOR ROWLEY: And it is important  
5 that you respond to the questions you're asked  
6 rather than to argue the case.

7 THE WITNESS: I understand.

8 The question of whether or not the FTEAC  
9 meetings are public or not is really not a question  
10 for FTEAC. It is a question for the Federal  
11 Government. We have convened this Committee to  
12 provide us with advice.

13 And as I read to you earlier, the Terms of  
14 Reference of the Committee indicate that the  
15 deliberations of the Committee are confidential.  
16 Certainly, if a company would like to write a  
17 letter, they can write a letter, and they do have an  
18 input or they can come and provide us with--

19 ARBITRATOR ROWLEY: I don't believe you're  
20 answering the question. Was consideration given by  
21 anybody to holding these proceedings in public?

22 THE WITNESS: The FTEAC meetings generally?

11:06:39 1 Or with regards to the specific issue?

2 BY MR. NASH:

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

5 A. The meetings generally.

6 Q. Yes.

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

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

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

18 Q. You never--

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

21 Q. Have you ever made a recommendation to the  
22 Minister to have the FTEAC determinations and

11:07:33 1 deliberations and adjudications dealt with in an  
2 open and transparent and public way?

3 A. Can you define open and transparent for me.

4 Q. Is there something confusing about that  
5 concept?

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

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

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

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

22 A. Again, and I apologize, but our view is



11:08:48 1 that this is a Consultative Committee that provides  
2 advice to the Minister and is not meant to be an  
3 open forum. That industry does have the opportunity  
4 to provide us with their input, and ultimately the  
5 Committee provides me with advice. I make decisions  
6 based on the recommendations of the Committee and  
7 the advice provided to me by the recommendations of  
8 the committee and the advise. Any other information  
9 is provided to me by industry.

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

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

19 Q. You never made that recommendation?

20 A. I never made that recommendation.

21 Q. In any way?

22 A. No.

11:09:48 1 Q. How many of your recommendations to your  
2 Minister are reversed by the Minister?

3 A. My recommendations to the Minister?

4 Q. Yes.

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

7 Q. Yes.

8 A. With regards to surplus status?

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

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

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

19 A. Um-hmm.

20 Q. And in normal circumstances, in almost all  
21 circumstances is it fair that you pass on those  
22 recommendations to the Minister?

11:10:45 1           A.    As I mentioned previously, there are many  
2 decisions that are made--

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

5                    THE WITNESS:  I apologize.

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

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

20                   BY MR. NASH:

21                   Q.    Of the more routine matters, the offers  
22 that are considered to be within fair domestic value

11:11:35 1 and circumstances where it's recommended that the  
2 Export Permit not be granted, of those routine  
3 matter do any go to the Minister?

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

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

18 A. That is correct.

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

21 A. That is correct.

22 Q. And at what level are those decisions taken

11:12:42 1 at?

2 A. Those decisions of signing the permits, the  
3 Surplus Letters and the not Surplus Letters, that is  
4 managed by me, and the official permits bear the  
5 signature of the Director General.

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

11 A. That is correct.

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

14 A. That's decided at the administrative level.

15 Q. You decide that?

16 A. That's correct.

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

21 A. That is correct.

22 Q. And so then you decide whether or not there

11:13:32 1 are circumstances under which those recommendations  
2 should be reconsidered?

3 A. Whether other factors should be considered.

4 Q. Whether other factors should be considered.

5 You make that decision?

6 A. Yes.

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

9 A. That is correct.

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

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

17 Q. But you make the decision?

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

21 Q. But you make the decision?

22 A. Well, ultimately I follow up, but I

11:14:22 1 certainly don't make decisions over my Director or  
2 Director General's head.

3 Q. So, you make the decision to investigate or  
4 not investigate. You're the Minister's delegate for  
5 that purpose?

6 A. I am the person who has the information  
7 before me, and therefore I will go. And if I  
8 believe there is a need to look further into this, I  
9 will discuss with my Director, my Director General,  
10 depending on the particular issue, and they will  
11 give me the go-ahead to follow on this issue.

12 Q. So, if you decide there is a need to look  
13 into an issue, you will discuss it with your  
14 colleagues, but ultimately you will make a decision  
15 as to whether it should be investigated further;  
16 isn't that fair?

17 A. With my superiors.

18 Q. Right.

19 A. And colleagues.

20 Q. Right.

21 A. Yes.

22 Q. Now, is it anywhere laid out for industry

11:15:06 1 representatives to know that you are the decision  
2 maker in almost all cases except those exceptional  
3 cases that you referred to?

4 A. Is it set out?

5 Q. Is it set out anywhere.

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

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

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

20 A. That is correct, yes.

21 Q. And in that sense, you're the judge of  
22 whether a particular application has merit or not;



11:16:12 1 isn't that fair?

2 A. I think that's a fair assessment.

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

5 A. On those nonroutine issues.

6 Q. Right.

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

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

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

18 A. That is correct, yes.

19 Q. And in this process of deciding whether a  
20 matter should be investigated or not, do you issue  
21 reasons for not proceeding with an investigation  
22 that you decided that you won't proceed with?

11:17:13 1           Do you send a reasoned letter to the  
2 Applicant, saying we have decided not to proceed  
3 further with this matter? We accept--I accept the  
4 recommendation of FTEAC for the following reasons,  
5 so that they can look and see what factors have been  
6 taken into account? Do you do that?

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

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

16       A. That is correct.

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

21       A. That is correct.

22       Q. And on those issues that you do

11:18:13 1 investigate, I think you said that you go to the  
2 offeror and interview the offeror?

3 A. There are occasions, yes.

4 Q. So, you conduct your own investigation?

5 A. That is correct.

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

10 A. Um-hmm.

11 Q. Right?

12 A. Yes, I do. Yes.

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

17 A. No, they are not.

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

22 Q. Well, you referred to other factors that

11:19:01 1 you take into account.

2 A. Yes.

3 Q. Is there a list of all of those other  
4 factors laid out somewhere in a policy statement or  
5 a bulletin or a notice to industry? In your  
6 applications for reconsideration of an FTEAC  
7 recommendation, these are the factors that I, Judy  
8 Korecky, will take into account or the  
9 representative of the Minister in determining  
10 whether an investigation will go ahead or not? And  
11 if it goes ahead, how it will be determined and what  
12 factors will be taken into consideration? Is there  
13 any bulletin along those lines?

14 A. There is no bulletin along those lines.  
15 When I came into this position in 2005, it became  
16 very clear to me very quickly that industry was  
17 well-informed regarding the different factors and  
18 consideration. We have looked at many letters.

19 I cannot speak to the discussions that  
20 Thomas Jones had with industry. However, industry  
21 certainly--and it has been presented as  
22 evidence--have provided many letters about the

11:20:02 1 different kinds of issues that we consider in making  
2 our assessment.

3 Q. What are those issues?

4 A. Certainly there is the fair market value  
5 assessment.

6 Q. Do you advise how you determine that?

7 A. Do I advise how I determine that?

8 Q. In your process of investigation, do you go  
9 back to the Applicant and advise the Applicant how  
10 you're going about determining fair market value?

11 A. They are aware that under the notice, terms  
12 of Notice 102 that FTEAC provides a recommendation  
13 to me, and there are instances, some of which are on  
14 the record, where a company will come forward and  
15 say I don't believe that the offer I've received is  
16 fair market value, unless they do before FTEAC makes  
17 its determination, they provide information into the  
18 process, and they will indicate perhaps just simply  
19 that I don't think that's the right value, this is  
20 what I believe to be the right value. There are  
21 times where they will give me information regarding  
22 transactions that they are aware of. So, that's one

11:21:07 1 aspect.

2 Q. That's one aspect.

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

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

10 Q. Right.

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

16 A. What I tend to do is I tend to take the  
17 information that is provided to me in the offer. I  
18 listen to FTEAC recommendation. I read the  
19 information provided to me by the advertiser. And  
20 in certain occasions the advertiser provides  
21 information, and it is exactly in line with what the  
22 Committee does, with what the Committee provides to

11:22:04 1 me that they indicate this is a low offer, and  
2 therefore the issue stops there.

3           In those instances where the company  
4 indicates to me that they believe the offer to be  
5 low and they provide me with another piece of  
6 information that happens to differ in terms of the  
7 recommendation provided to me by FTEAC, I look to  
8 the evidence before me. And if I feel there is  
9 merit to further investigating, I further  
10 investigate.

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

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

22       Q.   Right.

11:22:58 1           And do you tell the Applicant what  
2 information you've taken into consideration in your  
3 adjudicative process in coming to your determination  
4 as to fair market value?

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

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

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

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

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

21      Q.   All the other steps you don't advise them  
22 of?



11:23:47 1       A.   They are certainly aware that FTEAC  
2 provides a recommendation, but any other information  
3 I do not advise them on.

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

13       A.   Those additional steps?

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

17       A.   From their perspective?

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

21       A.   The determination is made, and no reasons  
22 are given beyond the fact that we have determined

11:24:38 1 that the offer, because in this case I'm assuming  
2 that it would be a determination that the offer is a  
3 fair market value offer and that the offer is a  
4 valid fair market value offer, and therefore the  
5 boom was declared not surplus.

6 Q. So, you tell the Applicant the result, not  
7 the process?

8 A. That is exactly correct.

9 Q. Or the evidence you have looked at?

10 A. That is correct, um-hmm.

11 Q. Could you turn to your Affidavit at  
12 Paragraph 85, please.

13 A. Um-hmm.

14 Q. Paragraph 85 states that Notice 102  
15 requires that applications to advertise logs located  
16 in remote areas be advertised in volumes of not less  
17 than 2,800 cubic meters per application. "'Remote  
18 area' is defined in the industry as areas from which  
19 logs must be barged rather than towed."

20 My first question is: Where is that phrase  
21 defined?

22 A. Actually before I answer your question,

11:26:05 1 would you mind terribly if I made a correction? And

2 I do apologize.

3 Q. Make the correction to me.

4 A. I do apologize, I really did not want to  
5 mislead anyone, but I would remark that there is an  
6 error here in the first sentence. It should read  
7 and it's really striking the last two words, so the  
8 sentence should read: Notice 102 requires that  
9 applications to advertise logs located in remote  
10 areas be advertised in volumes of not less than  
11 2,800 meters cubed, period.

12 Q. So, to answer my question.

13 A. To answer your question, remote area--

14 Q. Where is that phrase defined?

15 A. That phrase is not defined. It's referred  
16 to in Notice 102.

17 Q. It's simply referred to in Notice 102?

18 A. That's correct.

19 Q. It's not defined anywhere?

20 A. No, it is not defined. It is not publicly  
21 defined.

22 Q. Is it privately defined?

11:26:59 1       A.    Within the scope of the Committee, it is  
2 defined and attached to minutes that you referred to  
3 yourself yesterday.

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

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

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

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

17       Q.    As you understand.

18       A.    That is correct.

19       Q.    Have you ever received a confirmation from  
20 an industry association or group to say we  
21 understand that remote area is defined as barging  
22 rather than towing?

11:27:51 1       A.    Let me explain.  When I first came on board  
2    and I had that discussion with Don Ruhl, one of the  
3    questions I did ask him, and I went through Notice  
4    102, and we had this discussion, was can you please  
5    define remote areas for me.  Do we have a map?  And  
6    he told me at that time that there was no such map  
7    and that generally it is known as barge rather than  
8    tow.  However, that there were more specific details  
9    in terms of the length and distance, length of time  
10   it takes and the distance traveled.  That answer was  
11   satisfactory at that point in time because I knew  
12   where to go to get the information if I was ever  
13   asked a question on this matter.  However, since I  
14   came on board in 2005, I do not recall having been  
15   approached by any company with a question regarding  
16   remote status.

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

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

22       Q.    Perhaps you will let me finish my question

11:28:49 1 and I will let you finish your answer.

2 A. Um-hmm.

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

7 A. That is correct.

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

12 A. Yes, I was.

13 Q. And you heard his definition of remote?

14 A. That is correct.

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

17 A. This is not my definition.

18 Q. What is your definition?

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

21 Q. Right.

22 A. As I mentioned to you, this is something

11:29:39 1 that we have never had to apply, so this is a  
2 notional element of the system because we have never  
3 been asked. There have never been any complaints  
4 with regard to remote area status.

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

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

20 A. That's correct.

21 Q. And Mr. Walders seems to be the go-to guy  
22 on remote both from his standpoint--

11:30:39 1 A. Mr. Walders is an employee of BCMoF.

2 Q. Exactly.

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

7 Q. Even though the two systems are harmonized?

8 A. That is quite correct. We have  
9 jurisdiction.

10 Q. Right.

11 A. As you painfully pointed out to me.

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

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

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

21 A. And certainly I will get to the 5 percent  
22 issue.



11:31:28 1           Essentially when the Committee looks at the  
2 offer, they take into account all the information  
3 provided. They compare this boom, two booms they  
4 have seen on the domestic market, and they make a  
5 recommendation. So they look at the species, they  
6 look at the sort, they look at the length, they look  
7 at the width, they look at the volume. They look at  
8 the diameter.

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

12       A.   My determination.

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

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

20       A.   The range, let's say as an example, would  
21 be 100 to \$110. And so, when we look at offers that  
22 are received, we see offers that are 100, 101, 105,

11:32:26 1 110, sometimes 115, and on the rare occasion--and  
2 this happens a handful e times a year--we might see  
3 an offer that's at \$99.

4           And you have to understand that it is very  
5 difficult, and I think others will speak to this, to  
6 assign an exact value to a boom of logs.

7       Q.    Right.  I've got that one.

8       A.    Yes.

9           So, when it comes to looking what is on the  
10 margins of the range, the 5 percent rule is not an  
11 absolute rule.  Sometimes we're looking at \$99 for  
12 an offer, sometimes \$98.  The boom is looked at a  
13 little more carefully.  Sometime at 97, people will  
14 say, well, you know, that's low.

15       Q.    That's a little low.

16       A.    That's low.

17           And you will see in the FTEAC minutes that  
18 when we got to that margin that it is referred to as  
19 a low but fair.  And again--

20       Q.    Low but fair?

21       A.    Low but fair.

22       Q.    So in that example the 97-dollar on the

11:33:20 1 range of 100 to 110 would be low but fair?

2 A. That is correct.

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

5 A. That is correct.

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

9 A. It's not a 13 percent.

10 Q. From 97 to 110?

11 A. From 100 to 97.

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

14 A. This is the range, is a hundred to, let's  
15 say, 110, and there are times when an offer that is  
16 \$99, it's very close, will be accepted.

17 Q. Is it always a range that you come to, or  
18 is it one, usually one--

19 Typically it's a range?

20 A. That is correct.

21 Q. Not a fixed figure. Just over to Notice  
22 102, just to confirm with you, Notice 102 is not--

11:34:19 1       A.    Could I respond to one other element with  
2 regards to the 5 percent rule, if you please?

3       Q.    Is it a guideline or a rule?

4       A.    A guideline.  I apologize.  It's 5 percent  
5 element.

6       Q.    It's a guideline.  Go ahead.

7       A.    I cannot find the exhibit.  Perhaps I can  
8 get a little assistance.  The exhibit that sets out  
9 all of the offers that have been made and considered  
10 by FTEAC.

11       Q.    Actually it's not something that's  
12 necessary for an answer to my question.

13       A.    But maybe we won't refer to the document,  
14 but in reality the 5 percent aspect of this has not  
15 had a direct impact on Merrill & Ring, and in my  
16 Affidavit there is an exhibit which sets out all of  
17 the offers that Merrill & Ring has received.

18       Q.    This is entirely unresponsive?

19       A.    And whether the adjudication is fair market  
20 value, low, or below fair market value.  And if you  
21 look to that exhibit, you will see that in the  
22 period of interest here from December 2003 to the

11:35:13 1 present, there has not been one assessment of low  
2 but fair.

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

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

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

17 BY MR. NASH:

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

20 A. Yes.

21 And the document is Exhibit 85.

22 Q. Thank you.

11:36:06 1            Notice 102 is not legislation; that's  
2 correct?  
3        A.    That is correct.  
4        Q.    It's a policy?  
5        A.    That is correct.  
6        Q.    And it's a policy that applies only to logs  
7 from British Columbia?  
8        A.    That is correct.  
9        Q.    It's a statement respecting the policy and  
10 administrative practices concerning British Columbia  
11 logs; that's correct?  
12        A.    That is correct.  
13        Q.    Not Alberta logs, Ontario or Quebec or New  
14 Brunswick logs?  
15        A.    That is correct.  
16        Q.    Has there been any change to Notice 102  
17 since its inception in April of 1998?  
18        A.    The actual text of Notice 102?  
19        Q.    The text?  
20        A.    No, there have been no changes since then.  
21        Q.    But the practice has changed from time to  
22 time?

11:36:46 1 A. Yes, certainly.

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

4 A. That's correct.

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

8 Do you conclude from their testimony, from  
9 your perspective, that the blocking they described  
10 is actually going on, and the blackmail that they  
11 describe is actually being paid?

12 A. Is being, beg your pardon?

13 Q. Is being paid.

14 A. I don't understand that last.

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

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

19 Q. Okay.

20 A. From our perspective, offers are placed on  
21 the Federal Bi-Weekly List, and this is certainly  
22 allowed, and it is set out and is expected part of

11:37:40 1 the process set out in Notice 102.

2           Are there instances where there is perhaps  
3 unfair targeting? Yes. And when we've become aware  
4 of that, we act.

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

9       Q. Have you heard the stories before today or  
10 yesterday or the day before?

11       A. I've heard those stories, and I've  
12 certainly heard other stories from the mills as  
13 well.

14       Q. Right. And having heard those stories, do  
15 you have any sympathy for Merrill & Ring in this  
16 process?

17       A. I'm sympathetic to everyone's concerns and  
18 everyone's needs. I have certain things that  
19 I--certain elements that I can address and certain  
20 elements that I cannot address.

21       Q. Now, the test that is applied in  
22 determining fair domestic value is the Surplus



11:38:42 1 Requirement Test; is that correct?

2 A. That is correct.

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

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

8 Q. Which is--

9 A. As per--

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

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

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

18 A. We are talking about supply and  
19 distribution, and so while there may be within the  
20 Province of B.C. logs of a certain type, and they  
21 may find themselves in the Interior, that is not a  
22 very helpful to a mill that is located on the Coast

11:39:33 1 and vice versa.

2 Q. With respect, that's an argument. You're  
3 looking at surplus, and surplus you're testing  
4 whether there is a surplus by determining a fair  
5 domestic value; isn't that what you're doing?

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

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

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

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

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

16 Q. Well, what do you look at in terms of when  
17 you're doing your own independent investigation?  
18 What do you look at in terms of how the relationship  
19 between surplus and fair domestic value?

20 A. What I look at is whether there is an  
21 expression of need, and that is concretized by an  
22 offer, so that's the first thing: Is there an offer

11:40:36 1 on the table?

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

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

8 A. There is a need.

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

12 A. Okay.

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

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

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

22 A. And I look at what the market review

11:41:26 1 states. That's one consideration.

2 Q. But how do you make the connection between  
3 surplus and price in applying that test?

4 A. Those are two different considerations.

5 Q. Okay. Explain that for me.

6 A. Okay. As you're well aware by now, we look  
7 to whether there is a valid fair market value offer.  
8 The validity relates to the 90-day rule. The  
9 validity relates to the completeness of the offer.  
10 We look at the fair market value assessment.

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

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

21 Q. So, you accept at face value that an offer  
22 that comes in is a legitimate offer?

11:42:32 1 A. That is correct.

2 Q. Okay.

3 A. The process, Notice 102 intends for  
4 companies to be able to make offers.

5 Q. Right.

6 And you've actually sort of assumed that  
7 the company has gone to the trouble of going and  
8 seeing the logs?

9 A. For the most part, companies will go and  
10 see the logs.

11 Q. Right. FTEAC doesn't go and see the logs  
12 in determining price?

13 A. No, they do not.

14 Q. There is a Memorandum of Understanding  
15 which you referred to in your direct evidence  
16 between the Minister of Forests and the department;  
17 that's correct?

18 A. Um-hmm, that is correct.

19 Q. And that provides for cooperation?

20 A. Yes.

21 Q. And an exchange of information?

22 A. Yes.

11:43:05 1 Q. And part of the cooperation includes the  
2 sharing of information about surpluses and shortages  
3 in logs, of logs in B.C.; that's correct?

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

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

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

12 A. That could be one element.

13 Q. Just let me finish, please.

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

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

22 Q. Right.

11:44:09 1           And those would be--include discussions  
2 around whether there is a surplus or shortages?

3       A.    Some instances.

4       Q.    In British Columbia; that's correct?

5       A.    Yes.

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

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

11:46:00 1 search for them.

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

4 Q. No documents in response to this?

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

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

13 A. Yes.

14 Q. Correct?

15 A. I did swear this.

16 Q. That's true?

17 A. That is true.

18 Q. And what you swore is true?

19 A. What I swore is true. My understanding of  
20 the document is that we were to provide any  
21 information that had not been provided with the  
22 first Affidavit.



11:46:47 1 Q. Even though this certificate does not say  
2 that; is that fair?

3 A. (Witness nods head).

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

7 BY MR. NASH:

8 Q. If you turn to document request number 11  
9 on Page 3, the request was made by the Investor for  
10 documents evidencing any shortage of logs anywhere  
11 in Canada related to, A, the needs of national  
12 defense; or, B, log supplies for domestic sawmills.  
13 And you swore a certificate on the 27th of August  
14 '08, a copy of which I will show you, certifying  
15 that there were no documents.

16 A. Yes, I recall signing that.

17 Q. And that were true?

18 A. That was true.

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

21 PRESIDENT ORREGO VICUÑA: Thank you,  
22 Mr. Nash.

11:47:47 1 Any questions on redirect?

2 MS. TABET: Yes, I do.

3 REDIRECT EXAMINATION

4 BY MS. TABET:

5 Q. Ms. Korecky, Mr. Nash took you through a  
6 few, I think three or four of the minutes of the  
7 meetings of FTEAC at various dates between 1998 and  
8 2006.

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

11 A. Typically, there are 12 meetings a year.

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

15 A. That is correct.

16 Q. Okay.

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

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

22 Q. Now, can you remind me of the date of

11:48:58 1 Mr. McCutcheon's termination from Interfor?

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

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

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

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

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

20 Q. And you have been on those field trips?

21 A. I have been on one field trip in the  
22 Interior, yes, but my delegates have been on various

11:50:03 1 other trips.

2 Q. Ms. Korecky, are you aware of the term  
3 "ministerial discretion"?

4 A. Yes, I am.

5 Q. And is that what's granted under the Export  
6 and Import Permit Act?

7 A. That's correct.

8 Q. Do you know if the ministerial discretion  
9 under the Export Permit Act on Notice 102, whether  
10 it's been challenged before Canadian courts?

11 A. Ministerial discretion with regards to  
12 Notice 102 broadly?

13 Q. Yes.

14 A. Notice 102 more broadly was challenged in  
15 the Federal Court of Canada under a constitutional  
16 challenge of Notice 102. Well, there are two  
17 elements to it. One element was a constitutional  
18 challenge as to whether the Federal Government had  
19 the constitutional authority to create policy Notice  
20 102, and whether or not the legislation provided for  
21 policy Notice 102. And both the Federal Court and  
22 the Federal Court of Appeal found that, yes, the

11:51:10 1 Federal Government did have that authority.

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

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

8 Q. Thank you, Ms. Korecky.

9 Just give me a moment.

10 (Pause.)

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

17 BY MS. DI PIERDOMENICO:

18 Q. Hi. Okay.

19 So, the question that was asked Ms. Korecky  
20 by Mr. Nash was whether or not you had found  
21 documents relating to document requests 58 and 59, I  
22 believe.

11:52:39 1 A. That is correct.

2 Q. Now, when you did your document request,  
3 was there a specific date or time line that you were  
4 given in terms of how far back you should look for  
5 documents?

6 A. Certainly. There was a time line. I  
7 cannot remember the specific time line, but we  
8 certainly did adhere to it. I would assume that it  
9 really related to the coming into force around the  
10 date of the coming into force of Notice 102.

11 Q. If I could just refer you to Page 2, the  
12 actual request that you were given.

13 A. Um-hmm.

14 Q. I'm sorry, she doesn't have the request.

15 A. Yes, I have it. It's Tab 80.

16 Q. So, at the top of Page 2, it reads:  
17 "Unless otherwise stated, documents should be  
18 produced for the period from December 1st, 2003, to  
19 June 4th, 2008.

20 A. That is correct.

21 Q. And therefore the documents that are  
22 requested before that date were not produced?

11:54:02 1 A. That is correct.

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

5 Q. Thank you.

6 PRESIDENT ORREGO VICUÑA: Thank you.

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

10 QUESTIONS FROM THE TRIBUNAL

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

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

19 With regards to Notice 102 and minutes  
20 under Notice 102, those are confidential to the  
21 Minister unless the Minister decides to release them  
22 as allowed by Federal law, and that would be the

11:55:16 1 restrictions of the Privacy Act.

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

4 THE WITNESS: Yes.

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

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

11 ARBITRATOR DAM: Of what?

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

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

19 THE WITNESS: Aspect, yes.

20 ARBITRATOR DAM: In other words, it's kind  
21 of a violation of a rule; it's not necessarily a  
22 violation--



11:56:06 1 THE WITNESS: That's correct.

2 ARBITRATOR DAM: The same would then be  
3 true of you if you were to discuss with outside  
4 parties what happens, it would be not a  
5 statutory--would not be a violation of the Privacy  
6 Act. It would just be a violation of the  
7 confidentiality aspect of the way business is done  
8 in the department; is that right?

9 THE WITNESS: As my legal counsel has  
10 informed me, we are not allowed either verbally or  
11 in writing to provide business confidential  
12 information.

13 ARBITRATOR DAM: Who is "we"?

14 THE WITNESS: We being Government.

15 ARBITRATOR DAM: But the members can?

16 THE WITNESS: The members, however, are  
17 bound by the Terms of Reference of the FTEAC  
18 Committee.

19 ARBITRATOR DAM: And by being bound by the  
20 Terms of Reference, what would be the consequence if  
21 they were to do so?

22 THE WITNESS: They would be censured and

11:57:06 1 they would potentially be taken off the Committee.

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

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

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

17           THE WITNESS: We can share how we operate.  
18 We cannot share the information that is business  
19 confidential or that which is deemed to be the  
20 information that becomes advice to a Minister that  
21 becomes part of the deliberation process as relates  
22 to specifics--

11:58:04 1           ARBITRATOR DAM: But you really make that  
2 determination not on the basis of any rules or  
3 regulations, but just how you decide to handle it.

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

6           ARBITRATOR DAM: Right.

7           What if a member of the press calls?

8           THE WITNESS: A member of the press calls?

9           ARBITRATOR DAM: Yes.

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

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

17          THE WITNESS: That's exactly it, yes.

18          ARBITRATOR DAM: All right. Thank you.

19          ARBITRATOR ROWLEY: Ms. Korecky, how many  
20 times has Merrill & Ring complained to you or to the  
21 Federal Government, to your knowledge, about being  
22 denied export license applications?

11:59:09 1           THE WITNESS: Your question relates  
2 specifically to applications themselves or the  
3 process in general, just to clarify?

4           ARBITRATOR ROWLEY: I thought I was clear.  
5 Applications, they have applied for an Export  
6 Permit. They have not been granted one. How many  
7 times have they complained to the Federal  
8 Government?

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

14           No?

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

18           THE WITNESS: Certainly, but the way that  
19 the process works, Mr. Rowley, is that they cannot  
20 apply for a permit unless they have surplus status,  
21 so they are not denied a permit, they're denied  
22 surplus status.

12:00:06 1           ARBITRATOR ROWLEY: Okay. Thank you.

2           Then so I'm clear, how many times has  
3 Merrill & Ring complained, to your knowledge, to the  
4 Federal Government about being denied surplus  
5 status?

6           THE WITNESS: Since the beginning of Notice  
7 102, I can't speak to all of those examples. There  
8 are examples--

9           ARBITRATOR ROWLEY: I'm asking about your  
10 knowledge.

11          THE WITNESS: My knowledge.

12          Since 2005, they have written a number of  
13 letters to us about the process, and they have  
14 provided input into the process and complaints about  
15 the process. With regards to a specific  
16 determination that has been made, so an ex post  
17 facto complaint; I'm not aware of many.

18          ARBITRATOR ROWLEY: Well, I am interested  
19 in specific denials, so leave aside complaints about  
20 the process that are generic, and so is it right--is  
21 it your evidence that as regards being denied  
22 surplus status with respect to a particular

12:01:22 1 application, there are only a few complaints that  
2 you're aware of?

3 THE WITNESS: That is correct.

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

7 THE WITNESS: I would probably say less  
8 than five.

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

12 THE WITNESS: I would say less than five.

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

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

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

22 THE WITNESS: I'm trying to think--I know

12:02:15 1 that Mr. Stutesman has contacted me about certain  
2 issues. In some instances they have been telephone  
3 calls. I do not recall that there is anything in  
4 writing, and I apologize if I lead you in error on  
5 this, that there is any evidence on the record of  
6 something in writing that they have provided to us  
7 ex post facto a decision having been made.

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

14 THE WITNESS: After a decision is made?

15 ARBITRATOR ROWLEY: Correct.

16 THE WITNESS: That is correct.

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

20 THE WITNESS: Certainly. Merrill & Ring  
21 provides input into the process with regards to  
22 specific offers, and you will have seen the letters

12:03:33 1 they have provided. As well, they provide general  
2 comments, critiques about the system, request for  
3 changes.

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

6 THE WITNESS: My apologies.

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

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

20 ARBITRATOR ROWLEY: So, if there is no  
21 complaint after a surplus or a nonsurplus decision  
22 has been made, then is the--I don't quite understand



12:04:57 1 where the input fits in. Is it into the TEAC and  
2 FTEAC process itself?

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

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

8 THE WITNESS: That is correct.

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

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

12:06:27 1 exhibit to my Affidavit.

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

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

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

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

20           ARBITRATOR ROWLEY: Now, I think you  
21 probably will have answered this question when you  
22 told me that Merrill & Ring has not complained, to

12:08:06 1 your knowledge, about ministerial decisions, but let  
2 me put it in any event. You talked about being  
3 subject to a good deal of litigation concerning  
4 Notice 102.

5 THE WITNESS: Yes.

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

10 THE WITNESS: No, they have not.

11 ARBITRATOR ROWLEY: Thank you.

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

14 Just one follow-up question. It has come  
15 up several times how do you actually determine  
16 whether an offer is fair and that it reflects the  
17 fair market price. Well, yesterday, I was left with  
18 the impression that that same determination then at  
19 the level of Mr. Cook, which is the, say, the first  
20 round of information is a rather difficult thing to  
21 do. It's based a bit on industry information, a bit  
22 on the market, which is not quite transparent or not

12:09:45 1 quite evident in any event.

2           So, information is gathered from different  
3 sources, and finally it comes to a conclusion on  
4 whether that is fair or not and can be compared to  
5 something else fairly.

6           Now, my question to you, Ms. Korecky,  
7 relates to the fact that, as you're sitting away,  
8 are you entirely satisfied that what has been done  
9 before you have to have your say reflects actually  
10 that, or you have to convince yourself as the  
11 Federal representative that that is, in fact, so,  
12 and that the information is a good one and so on and  
13 so forth? Now, of course, later you can have  
14 submissions by the industry saying this is fair or  
15 not fair, but at the first level of decision when  
16 you have to determine let's approve the offer  
17 because it's fair enough, do you or are you able to  
18 conduct an independent assessment of that market  
19 value at a distance? How do you work it out?

20           THE WITNESS: I look to the information  
21 that we have with regards to previous offers, other  
22 offers that are on the list. Certainly one can

12:11:24 1 ballpark certain types of booms of logs, but this is  
2 a very precise science, and that is why we have our  
3 industry Advisory Committee. There is one general  
4 publication which is called the Forest Industry  
5 Trader, and not that one could be a hundred percent  
6 guided by that, but if you look to that document,  
7 they also provide ranges. Each boom is unique, and  
8 each boom is individual. It is something like  
9 appraising a diamond, with a different cut,  
10 different quality, what have you, and that becomes  
11 something that really the experts have the most  
12 intimate knowledge on.

13           And a boom, there will be a range for that  
14 boom. That is again not to say that's the best  
15 value that can be received for that boom, but I feel  
16 confident that the ranges that we receive accurately  
17 reflect the ranges that are in industry. The  
18 reality is that as I mentioned before, most of the  
19 trading that takes place in Vancouver is on the pure  
20 domestic market, and that is the information that  
21 comes to us. It is those transactions that lead,  
22 that essentially are the ones that are considered by

12:12:37 1 the Committee.

2           And I have to say one more thing, if I can,  
3 that I actually had a discussion with Paul Stutesman  
4 about the issue of what other sources could we be  
5 guided by, and I said to him I would welcome an  
6 independent, objective kind of reporting on this  
7 issue. Can you point me to one? And Mr. Stutesman  
8 told me that he could not.

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

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

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

21           PRESIDENT ORREGO VICUÑA: Mr. Nash, please.

22                                   RE-CROSS-EXAMINATION

12:13:57 1 BY MR. NASH:

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

4 You mentioned that booms are like diamonds?

5 A. That is one analogy. There are many.

6 Q. And do people buy them by description?

7 A. Yes.

8 Q. Okay. Thank you.

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

12 (Witness steps down.)

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

15 Now, let me give you the time. We have  
16 spent until now. The Investor has used seven hours  
17 and 45 minutes. The Respondent has used two hours  
18 42 minutes. So, that's where we stand, and I do  
19 mention this so that everyone will be able make its  
20 own estimates.

21 Well, then we have now the statement by  
22 Mr. Bustard. Is Mr. Bustard here?

12:15:20 1 MS. TABEL: We will go get Mr. Bustard.  
2 PRESIDENT ORREGO VICUÑA: Okay.  
3 SECRETARY OBADIA: Is it going to be open  
4 or closed?  
5 MS. TABEL: Open.  
6 SECRETARY OBADIA: Open, okay.  
7 (Pause.)  
8 BRIAN BUSTARD, RESPONDENT'S WITNESS, CALLED  
9 PRESIDENT ORREGO VICUÑA: Good morning,  
10 Mr. Bustard.  
11 THE WITNESS: Good morning.  
12 PRESIDENT ORREGO VICUÑA: Would you please  
13 care to read the Witness Statement that you have  
14 before you. It should be on the table.  
15 THE WITNESS: I solemnly declare upon my  
16 honor and conscience that I shall speak the truth,  
17 the whole truth, and nothing but the truth.  
18 PRESIDENT ORREGO VICUÑA: Thank you,  
19 Mr. Bustard.  
20 Professor Dumberry, will you make the  
21 direct, please.  
22 MR. DUMBERRY: Thank you, Professor.



12:18:05 1

## DIRECT EXAMINATION

2 BY MR. DUMBERRY:

3 Q. Good morning, Mr. Bustard.

4 A. Good morning.

5 Q. What is your current occupation?

6 A. I'm a forest consultant.

7 Q. You work for which company?

8 A. Vanlog Forestry Services Limited.

9 Q. Okay. And can you tell us what this  
10 company does exactly.11 A. Yes. Vanlog is been in existence for about  
12 a year-and-a-half, and during that period I have  
13 been involved in advising clients on such matters as  
14 log prices on a bank of a log market, quality  
15 control issues on the bank of a log market, and  
16 regulations, some of the clients I have worked with  
17 are interested in export regulations. I have been  
18 advising them on that. Two projects I had were  
19 concerning marine accidents. One was a large barge  
20 which I did some work on that on behalf of the  
21 underwriters. Another one was on a booming booming  
22 ground.

12:19:03 1 Q. Thank you.

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

4 A. That's correct.

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

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

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

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

12:20:08 1 market?

2 A. That's correct.

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

5 A. Yes, I am.

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

9 A. Yes, I do.

10 Q. In which capacity and how?

11 A. In Notice 102 was--1998 was first enacted,  
12 and during that period I was a log seller for  
13 TimberWest, which is a large owner of private lands  
14 and some public tenure in Coast of British Columbia.  
15 And in 1999 I went to a company Primex Forest  
16 Products, which bought exclusively on the bank over  
17 log market. It had no logging of its own.  
18 Subsequently that company was taken over by a  
19 company, International Forest Products, commonly  
20 known as Interfor. In that capacity I was the  
21 General Manager of log supply and buying for up to  
22 five mills.

12:21:14 1 Q. Could you slow down?

2 A. Certainly.

3 Q. Thank you so much.

4 So, is it fair to say that since 1998, you  
5 have advertised logs on the Bi-Weekly List, and you  
6 have also made offers on logs on this list?

7 A. That's correct. From 1998 for the first  
8 next two years.

9 Q. Okay.

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

12 So, when a buyer is interested in buying  
13 logs on the market, on the B.C. market, where would  
14 that buyer first have a look at? Would it be the  
15 Bi-Weekly List?

16 A. No. That's the--the log buyer--many of the  
17 mills in coastal British Columbia are large  
18 consumers of logs. The amount of logs that are  
19 available on the Bi-Weekly Export List is relatively  
20 small compared to the amount that they buy. So, a  
21 buyer would be looking--he may have 20, 25 different  
22 suppliers that he's buying from, and he will be

12:22:22 1 dealing with those people--in addition, he will also  
2 look on the Surplus Test.

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

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

11 Q. Thank you.

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

15 A. Certainly.

16 When a log seller, for instance a logger,  
17 decides that he would like to put the logs up for  
18 export and test the surplus to see if there is a  
19 surplus on a domestic market, he takes that boom of  
20 logs with its different characteristics that, for  
21 instance, length and diameter, et cetera, and he  
22 sends that list to the Federal Government. The

12:23:20 1 Federal Government then takes--advertises that list,  
2 that boom of logs, sorry, on the Bi-Weekly List, and  
3 from that the buyer of the sawmill, for instance,  
4 the log buyer, will have access to those logs. The  
5 list indicates where the logs are located, and so he  
6 will make the decision whether he was--is interested  
7 in buying those logs.

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

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

17       A.   That's correct.

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

21       A.   The second option is where the buyer will  
22 contact the advertiser of those logs and indicate to

12:24:45 1 him that he is interested in buying the logs that he  
2 has advertised on that list.

3 Q. So, I would like to understand. So,  
4 basically, that would be a phone call, a letter, or  
5 how does that work?

6 A. It's usually a phone call. Most  
7 transactions and most discussions on the Vancouver  
8 Log Market are done over the telephone.

9 Q. And then what happened next? What happened  
10 during that phone call usually?

11 A. By the buyer indicating that he's  
12 interested in that, purchasing those logs, it's an  
13 indication to the seller that these logs may not be  
14 surplus, and that it gives the seller the  
15 opportunity to say I would very much like to export  
16 these logs, can I work with you, would you be  
17 interested in, if I offered you a similar boom of  
18 similar volume and quality to make up for this boom  
19 that I would like to export? It's a simple  
20 negotiations. That's the type of business that's  
21 done regularly in the purchasing of logs on the  
22 Surplus Test. It's just normal business.

12:25:57 1 Q. So, let it be clear on that. For you these  
2 negotiations which are before an offer is made on  
3 the list are simple business negotiation between  
4 companies?

5 A. That's right.

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

9 Q. Allegations are made by the Investor in  
10 these arbitral proceedings that there are threats  
11 that are made by some companies, potential buyers,  
12 and there is also allegation of intimidation.

13 Do you have any personal knowledge as a  
14 buyer, because you have acted as a buyer in the  
15 past, of any such threats or intimidations?

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

19 Q. Okay. I would like to go back to the first  
20 option you mentioned. Now we just covered the  
21 second option. I would like to go back to the first  
22 option you mentioned earlier.



12:26:59 1            Could you describe for us again this first  
2 option.

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

15            So by doing this, the buyer is indicating  
16 he's very serious interested in buying these booms  
17 because he's making an investment in time and money  
18 to go and look at those logs. So, he will go and  
19 look at those logs. And if he looks at them and he  
20 says, yes, those are the types of logs that I'm  
21 interested, my mill is interested in buying that  
22 type of log, I'm going to make an offer on those

12:28:01 1 booms. That's exactly what I want.

2           So, he will go back, and then he--the next  
3 step is that he will submit an offer to the Federal  
4 Government indicating on a written offer which he  
5 signs and he's put a lot of thought into this.  
6 These are very experienced people that do this, and  
7 he puts a price on it, and he will indicate that  
8 this is what he is willing to pay for that boom.

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

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

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

20           Now, let's move to the second phase which  
21 is basically when an offer is actually made by a  
22 company on these logs. I would like to know what

12:29:06 1 happened then.

2       A.   Once you submit the indication with the  
3 formal offer, then there is a window of opportunity  
4 at that point because you also have to send the  
5 letter to the seller of the logs, so you've got the  
6 buyer is sending out a letter to the Federal  
7 Government, and he's also sending the same letter  
8 out to the seller of the logs, so this is a trigger  
9 to the seller, and the seller will say--he may  
10 choose at this point to say, look, give you a phone  
11 call is say I realize you're serious on this, you  
12 have taken a look at those logs. At this point I  
13 would like to offer you another boom, a substitution  
14 boom. This is another way of normally transacting  
15 business under that option.

16       Q.   And this transaction would start with a  
17 phone call, or would it be a letter, an E-mail?

18       A.   Usually, it's a phone call. Like I  
19 mentioned, most discussions are done on the phone.

20       Q.   And you would describe these as  
21 negotiations between companies?

22       A.   That's the part of the negotiating process,

12:30:13 1 that's correct.

2 Q. Okay. I'm sure you were aware in these  
3 arbitration proceedings allegations have also been  
4 made that at this later stage there were threats and  
5 intimidation made. Do you have any personal  
6 knowledge in your 20 years of experience, do you  
7 have any personal knowledge of such threats and  
8 intimidation?

9 A. I have personally not been threatened or  
10 intimidated.

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

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

15 Q. Okay. Thank you.

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

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

21 A. Once the FTEAC has ruled on those logs and  
22 they have determined that the offer that was

12:31:18 1 submitted by a buyer is fair and reasonable, then  
2 those booms are deemed to not be surplus to the  
3 domestic forest sawmilling business of the Coast of  
4 British Columbia.

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

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

18           So, the seller can sell those to whoever he  
19 wants, but if he decides that he wants to sell them  
20 to the person, the buyer that put the original offer  
21 in, the buyer has to buy them. He's obligated to  
22 buy them. But the seller can sell them to whomever

12:32:44 1 he wishes, and that's a very important part of the  
2 Surplus Test.

3 Q. Why is that?

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

16 And that's--the Surplus Test is very  
17 simple, and it is very effective in my experience,  
18 in my 20 years of experience. The Surplus Test  
19 works.

20 Q. Can I come back to something you said  
21 earlier. You mentioned the fact that one of the  
22 options for a buyer is to actually go to the list,

12:34:02 1 and then you mentioned several other options which  
2 are available to buyers.

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

6 A. That's correct.

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

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

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

21 A. When you were purchasing logs, you looked  
22 at all of the options. It's very important to have

12:35:18 1 many suppliers. When you have a large sawmill, you  
2 have millions of dollars invested. You don't want  
3 to invest it--you don't want to be relying on the  
4 Surplus Test. The Surplus Test comes and goes. One  
5 week there may be several booms offered, and another  
6 there may be months before other booms of the  
7 quality that you're looking for. So, you have to  
8 have many, many different suppliers, so you are--you  
9 don't want to put all your eggs in one basket.  
10 You're constantly looking for other--for new  
11 suppliers.

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

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

18 When the market was strong and there was a  
19 shortage of logs, and the mills were requiring  
20 inventory, then you were frequently looking at--you  
21 were looking at the export Surplus Test every time  
22 it came out. So, it's a factor of supply and



12:36:25 1 demand, do you need the logs, and if you need the  
2 logs, the Surplus Test is one of only--only one of  
3 many options that you do to purchase the wood.

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

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

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

11 Q. Yes.

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

16 Then that triggers, like I mentioned  
17 initially, the seller of the logs says, hold on. I  
18 think I want to make a deal here. This is important  
19 to me to get this boom of logs out on the export.  
20 So, he has gone to the buyer on the telephone or  
21 whatever, and he said, I think we better make a deal  
22 here. If you want that logs, I know you're

12:37:33 1 interested in that logs, I want to get my boom out  
2 on export, maybe we can make a deal. That's  
3 negotiations. That's what it's all about.

4 Q. So the reason why they want to make a deal  
5 is because both parties have an interest in making a  
6 deal, or is it a result of intimidation and threats?

7 A. No, both parties--when--a boom is rejected  
8 on the Surplus Test. I've always said both parties  
9 have lost, and that may seem a little confusing but  
10 you ask why is that? Because the reason is is the  
11 buyer--the seller hasn't been successful in getting  
12 his logs out, so he's not very happy. The buyer,  
13 because the seller does not have to sell to the  
14 person who put the offer in, he's under no  
15 obligation that he probably is going to--I'm not  
16 very happy with this situation. I'm going to sell  
17 to this other guy. So neither the buyer nor the  
18 seller has been able to capitalize and make a deal,  
19 so neither party has won. They both have lost.

20 So, there is an incentive for both parties  
21 to come to an agreement, and that's what happens in  
22 the majority of the cases.

12:38:39 1 Q. When you say that a seller that would  
2 advertise logs on the list would be unhappy because  
3 he cannot export, why would that be?

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

12 Q. Is it fair to say that this unhappiness is  
13 rather rare? I mean, let me rephrase that.

14 Under your many years of experience,  
15 logs--is it true that logs that are advertised on  
16 the list are very often getting the surplus permit?

17 A. Most logs that are offered under the  
18 Surplus Test either go to stage--to Option 1 or  
19 Option 2, the two options where you have the  
20 negotiations start, and the negotiations are just  
21 about in most cases are successful. So, the number  
22 of booms that do not get out are in a minority.

12:40:06 1 Q. Let's talk about the minority now.

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

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

11 Q. Thank you.

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

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

20 Q. Thank you. I have no further questions.

21 PRESIDENT ORREGO VICUÑA: Right, thank you,  
22 Professor Dumberry.

12:41:16 1 Will we have cross-examination? We don't  
2 have much time before the break.

3 MR. NASH: We will have cross-examination.  
4 Perhaps I could cross-examine for 10 minutes and  
5 then we have lunch?

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

8 CROSS-EXAMINATION

9 BY MR. NASH:

10 Q. So, Mr. Bustard, good afternoon.

11 A. Good afternoon.

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

15 A. That's correct. From March of 2001 until  
16 December of 2007.

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

19 A. Coastal log supply.

20 Q. Coastal log supply.

21 And can you give a bit more elaboration  
22 about what your responsibilities were.

12:42:26 1           A.    I was responsible for the maintaining the  
2    inventory, a sufficient inventory for the mills to  
3    match the market, the lumber cutting market that  
4    they had, and there was also Interfor is a large  
5    logger, and so the--some of the logs were not  
6    consumed internally, so they were sold on the open  
7    market, so that fell under my responsibility.

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

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

14           A.    It varied.  The company during that period  
15   was withdrawing, getting smaller, selling off some  
16   assets.  They sold off quite a few assets, and  
17   initially the allowable cut was approximately  
18   3 million meters I believe if my memory is correct,  
19   and it was probably down by 2007, probably down  
20   maybe somewhere around the low 2 to 2.1, 2 million.

21           Q.    And when you're talking about the allowable  
22   cut, can you explain that for the Tribunal.

12:43:42 1       A.    Yeah.  The allowable cut is--in British  
2 Columbia--on Coastal British Columbia, you have two  
3 types of tenure or two types of land.  You have  
4 Federal Land of which Notice 102 is involved with,  
5 and you have the Provincial Land.  So, the Interfor  
6 had no Federal Land.  Interfor had Provincial Lands,  
7 and it was made up of different tenures, timber  
8 licenses, and timber Tree Farm Licenses.

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

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

16       Q.    And so, for the early part of the 2000s,  
17 Interfor's allowable annual caught was approximately  
18 3 million?

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

22       Q.    And when did it start to decline?

12:44:48 1       A.   As the markets deteriorated, the company  
2 made the decision to reduce its allowable cut.

3           Now, I would like to be very clear: I do  
4 not work for Interfor. These are my--anything I say  
5 is my personal basis. It's not--I'm not in any way  
6 reflecting what the opinion of Interfor, and so this  
7 is not--Interfor has given me no direction. I  
8 haven't talked to them in a year, over a year.

9       Q.   I understand.

10      A.   So please keep that in mind.

11      Q.   Will do. And I'm just going by your  
12 recollection.

13      A.   Right. Okay.

14      Q.   So I think you were going to tell me when  
15 the allowable annual cut began to decline from the  
16 3 million level to the 2 million level.

17      A.   I think it was just Progressive throughout  
18 that seven years. It just continued to decline  
19 and--yeah.

20      Q.   So, around 2004, 2005, it would be in, say,  
21 2.5 million cubic meters in that range?

22      A.   You know, I would just be guessing, so I



12:45:49 1 don't want to guess.

2 Q. We don't want to you do that.

3 A. So, it declined during that period.

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

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

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

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

22 Q. And were you one of the executives as a

12:47:05 1 General Manager?

2 A. Yes, I was.

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

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

9 Q. In Bernabi, okay.

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

12 A. Yes, I did, I do.

13 Q. And how long have you known John  
14 McCutcheon?

15 A. Probably, I've known John the whole 20  
16 years in the log business, but I didn't know him  
17 well until I went to work for Primex, which was in  
18 1999, and I got to know John quite well in 1991.

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

22 A. That's correct.

12:47:59 1 Q. What was Mr.--

2 A. I was with Primex at the time also when it  
3 became part of it, so I was with John at Primex.

4 Q. Right. And the two of you went over to  
5 Interfor?

6 A. That's correct. That group of us did.

7 Q. Right.

8 And what was Mr. McCutcheon's position at  
9 Primex and Interfor through the change?

10 A. John was--there were two log supply  
11 managers for the Fields Sawmill, which is located in  
12 the Campbell River area, and John was one of those  
13 log supply managers for Fields Sawmill.

14 Q. So, was he under you in a way?

15 A. At that point he was not. When the  
16 operations consolidated in 2001 under Interfor, I  
17 took on the responsibility of all of the mills' log  
18 supply, and John reported to me.

19 Q. And John McCutcheon is a person involved  
20 for many years in the forestry industry?

21 A. That's correct.

22 Q. Did a gentleman named Phil Warnery work

12:49:03 1 with you at Interfor?

2 A. Phil Warnery, that's correct.

3 Q. How long did he work for you and what was  
4 his position?

5 A. Phil was one of the junior log traders. He  
6 came on to--he was hired in the log supply probably  
7 in about 2002.

8 Q. And was he with Interfor working as part of  
9 your team until you left in 2007?

10 A. Yes.

11 Q. And did you have other members of a log  
12 supply team, traders and so on, to--

13 A. Yes, there was a group.

14 Q. To fill your mandate.

15 How many were in your group?

16 A. Of actual log traders?

17 Q. Yes.

18 A. There were some that had crossover  
19 functions. There was probably five to six  
20 individuals.

21 Q. And did you all work in the same physical  
22 area? I'm speaking in the Interfor years.

12:50:13 1       A.    In the Interfor years--for part of the time  
2 we did, and there was--part of the operation was at  
3 one mill and the other was at another operation.  
4 So, we weren't all in the same office for most of  
5 the time.

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

9       A.    At the time at Interfor or at Primex?

10      Q.    At Interfor.

11      A.    At Interfor, yes.

12      Q.    He was the only one?

13      A.    No, there were others.

14      Q.    There were others?

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

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

19      A.    No.

20            MS. TABET: I don't mean to interrupt  
21 again, I'm sorry, but we are keeping it within  
22 fairly related to the Affidavit, the Witness

12:50:58 1 Statement that he has filed in this arbitration?

2 MR. NASH: I hear my friend, but this is  
3 cross-examination, and I think we are entitled to  
4 ask questions about the background to this matter.  
5 Arising out of the Affidavit.

6 BY MR. NASH:

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

9 A. For part of the time I did.

10 Q. And which part was that?

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

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

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

19 Q. I think you said that the allowable annual  
20 cut was being reduced through the 2000s, to when you  
21 left in 2007, it was around 2 million. Is that your  
22 recollection, it was in the 2 million cubic meter

12:52:27 1 range?

2 MS. TABET: Again, you're cross-examining  
3 him on the allowable cut for Interfor. That has  
4 nothing to do with the content of the Affidavit, not  
5 even related to the content of the Affidavit.

6 MR. NASH: Mr. President and Members of the  
7 Tribunal, in any ordinary proceeding if evidence has  
8 come up in--during the proceeding and a witness  
9 comes after that evidence is heard, then questions  
10 can be asked of that witness about the evidence in  
11 the hearing. It relates to issues arising in this  
12 matter. It relates to evidence that we've heard  
13 from other witnesses. It is in some ways responsive  
14 to issues that are raised in the Investor's  
15 materials and their statements, and it's all  
16 relevant in my submission.

17 PRESIDENT ORREGO VICUÑA: It might be very  
18 relevant but the issue is that he's not supposed to  
19 know or state or be asked about things that are not  
20 related to his own statement. Say someone already  
21 spoke about legal issues. Would you think that  
22 because he came in later he should answer that? No.

12:53:40 1           So, please stick to the subject matter of  
2 the statement and to the extent related, of course,  
3 you may ask questions, but if it is something which  
4 flies a bit beyond, then it's beyond.

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

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

21           PRESIDENT ORREGO VICUÑA: Well, we will  
22 have to break now, in any event, but let me mention



12:55:18 1 to you which is the general guideline. If you are  
2 asking him about the way buyers and sellers  
3 negotiate and which the implications of the  
4 negotiation, that's all right. But to the extent  
5 that you are asking him to speak about what did he  
6 do or someone else did for some other company, I  
7 think it is a bit beyond.

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

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

12 MR. NASH: That's fine.

13 PRESIDENT ORREGO VICUÑA: Thank you.

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

16

17

18

19

20

21

22

1                                   AFTERNOON SESSION

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

4                   Mr. Nash.

5                                   CONTINUED CROSS-EXAMINATION

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

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

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

17                   He also referred to buyers and sellers'  
18 intentions and their motivations, and he also has  
19 referred in his statement to his own experience.

20                   And he was also asked by me friend  
21 Mr. Dumberry about the role of Government in this  
22 engagement and in the negotiations between the

14:00:48 1 buyers and sellers, and, of course, we know that  
2 Mr. McCutcheon had a role to play in this process.  
3 He was the Chair of an Advisory Committee to  
4 Government, and he was a close colleague working  
5 with Mr. Bustard at the time.

6           So, I don't intend at all to depart from  
7 anything that is in his statement or in the evidence  
8 that he's given this morning. All of my questions  
9 will relate to those issues, but they will include  
10 discussions of his experiences in his most recent  
11 job in industry as a log buyer at Interfor.

12           PRESIDENT ORREGO VICUÑA: Right, but let me  
13 clarify one further point. To the extent that he  
14 will have referred to the subject, you, of course,  
15 are very welcome to discuss it with him. But to the  
16 extent that it might involve questions that he does  
17 not mention, for example, I'm not sure--I don't  
18 remember, I think, the case of Interfor is not  
19 discussed--then the relationship becomes a bit  
20 distant.

21           So, let us be practical about it. You ask  
22 your question. If you feel that it's something that

14:02:09 1 is beyond your knowledge or your information or what  
2 you should be doing, you just say so, and that's it.

3 THE WITNESS: Thank you.

4 MR. NASH: Thank you, Mr. President.

5 BY MR. NASH:

6 Q. Mr. Bustard, in your experience during the  
7 2000s, it was common for you to use the export  
8 control system to accommodate your company's needs?

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

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

21 A. The company that I was employed by had some  
22 of--had a logging program, that's correct.

14:03:32 1 Q. And they were, during that period, allowed  
2 to cut anywhere between 2 to 3 million, depending on  
3 the time period, 2 and 3 million cubic meters?

4 A. To my recollection, that's right.

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

7 A. We--even though you cut 3 million meters, a  
8 lot of the wood--the forest grows--the nature of the  
9 stand is a lot of the trees you aren't able to use  
10 in you manufacture of your plants because these  
11 mills are all specific using different types of  
12 trees, so we didn't generate enough logs from our  
13 own operations to run those mills. These were  
14 world-class mills. They were using--they could use  
15 750,000 meters annually per year, and we would not  
16 be able to supply that out of the allowable cut  
17 because there wasn't enough of that suitable wood  
18 from that, so we had to buy aggressively on--we were  
19 an aggressive buyer on the open market.

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

22 A. We required many purchases.

14:04:30 1 Q. Did you monitor the 14-day advertising  
2 period that the list appears, the Bi-Weekly List,  
3 for logs that you might be interested in purchasing?

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

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

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

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

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

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

18 A. If we were short of logs, that was one of  
19 the areas that we would monitor, that we would look  
20 at. That was one of the options. If we did not  
21 require the logs, and if the mills had enough wood  
22 or we were shutting the mill down for market

14:05:30 1 reasons, then we would not be searching for wood off  
2 the--from our different suppliers, including the  
3 Surplus Test.

4 Q. And were you involved in negotiating deals  
5 in advance with exporters who you either knew were  
6 going to be exporting or you expected might be  
7 trying to export in order to get some of your log  
8 supply?

9 A. There was a period that that was--when  
10 there was a lot of stability in the market and mills  
11 knew they were going to run and that they knew they  
12 needed logs or were short of logs, then that was one  
13 of the options that a buyer may choose is to look at  
14 prebuying a volume of logs.

15 Q. I'm really thinking more of you and your  
16 experience and what your experience was. Did you  
17 have--

18 A. I have--personally I have done that. I  
19 haven't done that for a long time, but there was too  
20 much risk to the sawmill.

21 Q. How does that work?

22 A. Well, if the market falls, then you are

14:06:31 1 obligated to buy those logs, so it works to the  
2 advantage of the seller and the buyer if there is a  
3 good stable market, and they both wanted to look at  
4 the opportunity to give them some stability. If the  
5 market is not a strong market and they expect there  
6 will be some downturns, then they will not enter  
7 into an agreement like that.

8 Q. Well, it works to the benefit of the buyer  
9 because the buyer gets those logs at cheaper than  
10 the international price; right? That's how it works  
11 for the buyer.

12 A. The buyer pays what he will negotiate with  
13 the seller at the time, and that price is based on  
14 many, many things. Supply and demand, like I  
15 mentioned, is a big factor. The quality of the logs  
16 is a big factor. International currency is a big  
17 factor. All of those factors are considerations  
18 when you're buying logs and selling logs on the  
19 international market.

20 Q. But the benefit to--one of the benefits to  
21 the buyer is that if an exporter wants to export  
22 logs where the price might be higher and you can buy



14:07:40 1 them domestically where the price might be lower,  
2 you get them at a better price than the exporter  
3 realized?

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

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

19               The buyer--the seller, he's not forced into  
20 doing that.  In many cases the seller may be the one  
21 that approaches the buyer and asks him, are you  
22 interested in turning an agreement like this where I

14:08:39 1 offer you a fairly big package of substitution logs  
2 rather than a boom by boom, and then the buyer at  
3 that time will look at it and decide whether he's  
4 interested or not.

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

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

14 Q. Substitution of what?

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

18 Q. I see.

19 So, it comes at a time when the logs that  
20 he has for international sale, the ones he would  
21 like to sell internationally come up for sale or  
22 been advertised for sale on the 14-day list in the

14:09:50 1 scenario; is that right?

2       A.   Well, you're mixing, you're putting  
3 everything together.  You're asking me what is the  
4 substitution in the context of this, and I told you  
5 what that is, and now you're asking me about the  
6 substitution.  I don't follow what you're asking.  
7 Could you please break it into portions.

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

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

18       A.   I would like to rephrase that.

19       Q.   Okay.

20       A.   I believe what you're referring to is the  
21 opportunity for the seller to buy logs of equal  
22 quality and equal volume in recognition for allowing

14:10:57 1 the logs to be--not putting--allowing the logs to be  
2 declared surplus. They're not putting an offer on  
3 the surplus.

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

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

18 Q. Oh.

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

21 Q. Right.

22 A. Then what he's doing is he's saying he's

14:11:57 1 testing the surplus. He's testing the domestic  
2 market. Does anybody out there want to buy these  
3 logs? Are they surplus?

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

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

18       Q.    Right.

19       A.    It starts with the seller.

20       Q.    Starts with the seller.

21       A.    The seller because he's putting the logs up  
22 on the export. He's the one that's testing Notice

14:12:52 1 102 to see if there is a surplus. The buyer isn't.

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

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

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

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

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

15 A. You want to get the log--no two logs are  
16 the same, and that's what people that don't  
17 understand the business don't realize that each log  
18 is different. Each log has different  
19 characteristics, whether it's the rate that it's  
20 grown, the knot size, the rot, all those things.  
21 There is no such thing as two logs the same.

22 So, a buyer will look at those logs, and he

14:13:54 1 will say that's the log that I want to buy, and if  
2 the seller can say, well, you know, I've got a log,  
3 they're not exactly the same but I think they will  
4 work for you, have a look at these. That's  
5 negotiations. That's how it's done.

6 Q. And that's the negotiation and the deal is  
7 that, listen, if you give me these logs I won't put  
8 an offer in on these logs. Is that basically true?

9 A. What you're saying is let's work together  
10 on this. We want to both win on this, and this goes  
11 back to one of the original streams I said. You're  
12 not out to try and disrupt the seller's business.  
13 You are not trying to put impediments in the way,  
14 you're trying to work with them, so you want two  
15 winners. You want to win and you want them to also  
16 be a win. If they lose, they are not going to do  
17 business with you. And you don't kill your  
18 customer. You want to establish a good business  
19 relationship where you're both winning and that's  
20 what the business is about. That's where the  
21 negotiation is.

22 Q. I get it.

14:14:53 1           The way the exporter wins is by getting his  
2 logs out. They're free to go now because the buyer  
3 in that scenario has not put an offer up. Fair  
4 enough?

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

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

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

16       Q.    I'm not trying to do that.

17       A.    Well, what he's done is like I said is he's  
18 basically--he's freed up those logs to try and sell  
19 them to the customer that he had targeted because he  
20 may have put extra costs into them like I explained  
21 earlier. He may have cut them to different lengths,  
22 he may have sorted them to different sizes and all



14:15:49 1 kinds of different things, so he doesn't want to  
2 sell those to a customer that he hasn't been  
3 targeting.

4 Q. Right.

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

15 A. It goes back to the basic premise of Notice  
16 102 of the Federal Lands. It's a Surplus Test. And  
17 anybody that's been in the business that's got the  
18 experience knows that's how the--what they have to  
19 do is make volumes available to the buyer in order  
20 that there isn't deemed to be a shortage.

21 Q. At a price set in relation to the Committee  
22 or by the Committee?

14:16:59 1       A.    The price isn't set by the Committee..  
2       This is what negotiation is.  Negotiation is setting  
3       the price.  You've got a buyer, the seller.  The two  
4       negotiate.  The Committee has got nothing to do with  
5       setting the price.  Which Committee are you  
6       talking--

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

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

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

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

19      Q.    That's why you have been sequestered.

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

21            Now I have lost my train of thought.  Could  
22      you restate the question.

14:17:49 1 Q. You were talking about logs not going to  
2 FTEAC, and I think where you were going with that is  
3 that there are logs, this first batch of logs that  
4 has been negotiated away to allow the other batch of  
5 logs to be exported.

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

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

17 A. Before?

18 Q. Before.

19 A. Certainly.

20 Q. Before FTEAC meets.

21 A. Sure, that's just another one of the ways  
22 of negotiating. You can negotiate when prior to

14:18:43 1 putting the--like I mentioned there's the two  
2 options. Prior to going out and looking at the  
3 booms, or you can negotiate prior to putting the  
4 letter in. Or the letter can be submitted, but it's  
5 a dangerous game if you do that because you have to  
6 get the log--the offer has to be withdrawn by the  
7 seller. And the seller isn't necessarily going to  
8 do that. Like most experienced people won't go that  
9 route because there isn't enough time for the seller  
10 to go out and look at the logs.

11 Q. Are you talking about the buyer here?

12 A. I said the buyer. Seller.

13 (Simultaneous conversation.)

14 A. The buyer, if the logs are--if a buyer has  
15 submitted an offer on the logs and the seller comes  
16 to him after the offer has been submitted to FTEAC,  
17 my point--this is a dangerous way to do this because  
18 the buyer will look at that offer, and he will not  
19 have enough time to get out and inspect the logs  
20 prior to FTEAC making its decision. So, the seller  
21 will ask the buyer, you know, we want to work with  
22 you, will you consider removing your offer. In some

14:20:20 1 cases if the buyer and the seller have a  
2 historically a good working relationship and they  
3 trust each other, then they will do that. If on the  
4 other side if they have in the past they  
5 haven't--don't have that good well established  
6 relationship, then the buyer may not want to  
7 withdraw his offer because once he's withdrawn the  
8 offer, he has no assurance that he's going to get a  
9 boom of equal quality and equal volume. For  
10 instance, the volume that may be offered may be too  
11 small a diameter like maybe his mill wants a log  
12 that big, only offers this guy, the seller offers  
13 him logs that big. That isn't suitable.

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

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

21 A. The--

22 Q. How many million cubic meters would you be

14:21:31 1 pulling together in a year?

2       A.    It depended on the year.  The company that  
3 I worked for was, because of the very difficult  
4 economic situation was reducing the number of  
5 sawmills, so the number of sawmills in 19--say, 2001  
6 might have been--I'm not sure if it's six sawmills  
7 probably averaging somewhere between four and  
8 600,000 meters per year.

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

11       A.    Or could be--probably more.

12       Q.    Even a bit more.

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

18       A.    Yes.

19       Q.    Right.

20                And so, in terms of the developing  
21 strategies, you scope out markets, you think about  
22 who the log suppliers might be.  You think about

14:22:40 1 where you can get logs either in the open market or  
2 with specific suppliers, where you can get your own  
3 logs. All that true?

4 A. Yes. Most large companies have budgets,  
5 and they're constantly updating those budgets  
6 financially probably--well, they do it every quarter  
7 in a major, and in my situation the logs, it was  
8 dynamic spreadsheet that was being monitored weekly.

9 Q. And as part of that strategy, you would be  
10 looking at each of the markets to see which is the  
11 most likely source of logs that your mill supplied  
12 to see--and to monitor them?

13 A. You would have customers that you would  
14 expect to be able to buy logs from, correct.

15 Q. Suppliers that you could buy logs from?

16 A. Suppliers--customers meaning suppliers.

17 Q. Right.

18 And the negotiation around the export  
19 destined logs would be just part of that strategy;  
20 is that fair?

21 A. Yeah, but the problem with the export logs  
22 is you never knew whether they were going to be--how

14:23:44 1 many logs were going to become available. So, it  
2 wasn't your first choice. You always went to the  
3 customer that's out there logging or the small  
4 business sale that's doing some logging or somebody  
5 wants to trade something. That was your primary  
6 source of wood. When you're doing one month or six  
7 month budget, you have no idea how many logs that  
8 the exporter is going to try to put up. The export  
9 was done--you looked--it was more of a need at the  
10 time. They're an incremental volume at the time  
11 that sort of filled the hole. They weren't your  
12 main--they couldn't be your main source of wood.

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

17 A. When I was doing the budgeting, when I was  
18 putting those down, I would very seldomly put down  
19 an export, somebody that was exporting the logs with  
20 the volume attached to them because I had no idea.  
21 I only--you deal with facts, you try to look at what  
22 your most likely place you're going to get the wood



14:24:52 1 from, and that's what you deal with.

2           Now, if you're weren't able to get the wood  
3 or the competition was buying the wood or there was  
4 all kinds of dynamics happening, the mills are  
5 running at a faster rate, then you looked at the  
6 alternate supply. One of the alternate supplies was  
7 the test on the Surplus Test. Were those logs--they  
8 were tested., were they surplus to the domestic and  
9 if you needed them, then you would look at them.

10       Q.   And that's a component of your overall  
11 strategy to fulfill the log supply needs of the  
12 mills?

13       A.   Overall to me sort of implies longer term.  
14 Looking on the Surplus Test was a short term.

15       Q.   A short term?

16       A.   Yeah. You looked at the biweekly. You  
17 didn't know what--like I mentioned, you only knew it  
18 was available that week. Two weeks you didn't know  
19 it was available, and so you couldn't rely on it.  
20 When you're running an organization and investment  
21 that you've got, you've got to get dependable  
22 supplies, and you can't--the mill cannot run out of

14:25:49 1 wood. It cannot run out of wood, so if it's looking  
2 to buy, so you want to go with the people you know  
3 that it worked. Getting wood off the Surplus Test  
4 was not--not always available.

5 Q. And would you be looking at that on a  
6 particular week-by-week basis at the possibility?

7 A. If you were--if your mill was short,  
8 desperately short of logs, which happens, you would  
9 looking at it day-by-day basis.

10 Q. And there must be a certain intelligence in  
11 the forestry community about who is doing what and  
12 what supply they might have and what supply they  
13 might want to get out and what supply they want to  
14 leave and so on. You must monitor that?

15 A. There's a very--people work very hard at  
16 networking with people, so you are always phoning  
17 people asking them what they're doing with their  
18 logging program. Do you see any logs for sale this  
19 week or next week out, and you're constantly  
20 monitoring that. That's part of the--that's the log  
21 trader's function.

22 Q. You refer in your statement to blockmail,

14:27:02 1 blocking and blockmail.

2 A. Which paragraph is that?

3 Q. Go to Paragraph 20.

4 A. Okay.

5 Q. And it's really just blockmailing to be  
6 here. You say that Merrill & Ring and some private  
7 landowners use the term blockmail to describe the  
8 situation where domestic log processors are  
9 apparently threatening to make offers on advertised  
10 logs if the log producers do not supply them with  
11 the logs they want. The choice of the term  
12 blockmailing with its clearly negative connotations  
13 illustrates their frustration with being required to  
14 assure adequate supply of the domestic log before  
15 being allowed to export their logs.

16 So, you've heard of this term?

17 A. The first part of the first sentence in the  
18 statement that I made, Paragraph 20, if you refer to  
19 it, it's a quote from Paragraph 8 of Mr. Ringma's  
20 statement. I didn't make that statement. I just  
21 repeated his statement.

22 The choice of the term blockmailing, I

14:28:20 1 would say is--clearly has negative connotations. It  
2 implies some wrongdoing. There is no wrongdoing. I  
3 have elaborated at great length in the first part of  
4 our discussion on negotiations.

5           The negotiations are when the log seller  
6 puts logs up for to test the Surplus Test, and he  
7 puts on the list, out comes the list, the Bi-Weekly  
8 List, these logs are available for the Surplus Test.  
9 The buyer goes out and looks at them. They start  
10 negotiations. Then he phones either the buyer or  
11 seller, make contact. That's what the negotiations  
12 are. It's not blockmailing. Blockmailing is just  
13 like I say it's a negative term that doesn't  
14 indicate what's going on. What's going on is  
15 negotiations.

16           ARBITRATOR ROWLEY: Mr. Bustard, thank you  
17 for that, but the question you were asked was, had  
18 you heard of the term blockmailing? You weren't  
19 asked for a description of the paragraph.

20           THE WITNESS: Okay.

21           Yes, I have heard of the term blockmailing.

22           BY MR. NASH:

14:29:35 1 Q. And you're heard of that term in the  
2 context of the very kind of negotiations we are  
3 talking about; isn't that right?

4 A. The term--I hadn't heard the term until  
5 probably the last five years is when the term  
6 started coming up.

7 Q. And it became a term to describe what is  
8 going on by some at least, what they feel is going  
9 on in this negotiation process to get their logs  
10 freed for export.

11 A. It's a term that I don't use. It's a term  
12 that some people have chosen to use because of its  
13 negative connotations and maybe their frustrations  
14 with having to deal with the Surplus Test, which  
15 tests the--whether there is surplus on the domestic  
16 need.

17 Q. Let's leave aside any impugning of anybody  
18 and any nefarious or negative connotations and just  
19 look at the process.

20 Can you understand the seller's frustration  
21 in having to sell domestic--internationally destined  
22 logs that they want to sell domestically for a lower

14:30:45 1 price in the domestic market? Can you understand  
2 that frustration?

3 A. The frustration is self-induced.

4 The--under Notice 102, there is called the Surplus  
5 Test. In order for the logs to be deemed surplus,  
6 they have to go through the Surplus Test.

7 Now, if a seller is frustrated, I would  
8 suggest that maybe he doesn't know the requirements  
9 under Notice 102. The people that the successful  
10 negotiations are carried out when both parties  
11 understand Notice 102.

12 Q. Are you aware of TEAC changing the rule  
13 regarding being in the penalty box? Have you heard  
14 that term, the "penalty box"?

15 A. Yes.

16 Q. And where are you familiar with that term  
17 from?

18 A. It's a description that's used when--if  
19 someone is exporting logs, has been granted an  
20 Export Permit, under the regulations they are not  
21 allowed to offer on the Surplus Test for a period of  
22 90 days until such time as the logs have either left

14:32:10 1 the country or the permit's been granted.

2 Q. And are you aware of a change in the rule  
3 regarding the penalty box made in the last few  
4 years?

5 A. In which year?

6 Q. 2006 or 2007.

7 A. 2007? 2007, I don't know. If you tell me  
8 what it is, maybe I can refresh my memory.

9 Q. I'm just asking if you're aware of a  
10 change.

11 A. 2007--I usually have a pretty good memory,  
12 but I don't remember something at that point.

13 Q. Perhaps I can assist, but do you recall in  
14 early 2006 your company being in the "penalty box"?

15 A. There was a period where Interfor was  
16 deemed--I believe what it was we were indirectly  
17 exporting logs to the States.

18 Q. And that was through Timberwolf?

19 A. I don't remember. It was through a broker.  
20 I don't remember the exact situation.

21 Q. And in Interfor, your previous company had  
22 operations down in the States; correct?

14:33:32 1 MS. TABET: I don't mean to interrupt, but  
2 just two points here. First of all, this is not  
3 related to his Affidavit. I will let you continue  
4 to a certain extent, but if you're going to refer to  
5 any restricted information, then obviously be  
6 careful about that.

7 MR. NASH: Yes. I'm not going to refer to  
8 specifically to any meeting, but this does arise  
9 from Mr. Bustard's statement.

10 MS. TABET: Where?

11 MR. NASH: And in respect to his direct  
12 evidence as well this morning. Relations with  
13 Government, whether Government has a part in the  
14 negotiations and so on, which was led by  
15 Mr. Dumberry.

16 THE WITNESS: By who?

17 MR. NASH: Mr. Dumberry.

18 MS. TABET: I mean, again, I wish you to be  
19 careful because I don't believe that part of the  
20 earlier discussion about penalty box and Interfor  
21 was something that should be of knowledge to your  
22 clients.



14:34:26 1 MR. NASH: I'm quite happy to make the  
2 session nonpublic and private at this stage.

3 MS. TABET: But also again this is not part  
4 of Mr. Bustard's Affidavit.

5 MR. NASH: We addressed that point, but I  
6 think our clients would have--a closed session.

7 PRESIDENT ORREGO VICUÑA: Yeah, that can be  
8 done, but the question is whether it is connected or  
9 not. In your view, what's the connection between  
10 what you are being asked and your own statement?

11 THE WITNESS: I see no connection  
12 whatsoever and what I have written in my Witness  
13 Statement to any reference to the company that I was  
14 formerly employed by being in the penalty box. I  
15 don't see any connection.

16 MR. NASH: It's in regards to the  
17 relationship between buyers and sellers in the  
18 market which he's given a lot of evidence about in  
19 his statement, the impact on buyers when they don't  
20 comply with the rules that are in place, the  
21 position of Government in that process, and the way  
22 rules are changed.

14:35:34 1           PRESIDENT ORREGO VICUÑA: Well, to the  
2 extent that you feel, Mr. Bustard, that it's not  
3 part of your statement, you just say so.

4           THE WITNESS: Okay.

5           PRESIDENT ORREGO VICUÑA: And we move on.

6           BY MR. NASH:

7           Q. I gather you don't think it's part of your  
8 statement?

9           A. It's not part of my statement.

10          Q. I'm going to suggest to you that there is a  
11 game strategy that goes on here, whereby buyers  
12 using the system as it exists have a strategy to get  
13 logs at a price that's favorable to them in order  
14 for sellers to get their logs out for export. Isn't  
15 that really what's going on--it's a game going on,  
16 isn't it?

17          A. There is no game. It's serious business,  
18 and it's serious money involved in buying logs.  
19 It's not a game. In my mind it's a very serious  
20 business, and I'm not quite sure what you're asking  
21 me.

22          Q. Well, it's a game whereby the buyers get

14:36:27 1 logs cheaper and the sellers get their logs  
2 liberated for the export market. Don't you agree  
3 with that?

4 A. The--under Notice 102, in order to get an  
5 Export Permit, you have to test the domestic market  
6 for a surplus. The--when the logs are put up under  
7 the Surplus Test, the buyer has the opportunity to  
8 look at those logs if he requires them. That's not  
9 a game. That's the regulations under which logs are  
10 given the opportunity to be exported out of the  
11 country is that there first has to be deemed a  
12 surplus. And in order to be deemed a surplus, the  
13 domestic sawmill has an opportunity to look at those  
14 logs that are put up for export and make a decision  
15 whether those are suitable for them.

16 Q. Did you discuss in your company's  
17 participation in this process the buyer and seller,  
18 did you discuss the strategies with Mr. McCutcheon?

19 A. My company is Vanlog Forestry.

20 Q. The previous company that you were with,  
21 the previous company.

22 MS. TABET: Mr. Nash, again not related to

14:37:34 1 his Affidavit.

2           MR. NASH: Mr. President, Mr. Bustard has  
3 given examples of what has happened in his own  
4 experience in his statement, and it's in the context  
5 of what's happening between buyers and sellers.  
6 Part of that experience will have been in the  
7 context of what he was doing for seven years prior  
8 to leaving his previous employer. We don't have to  
9 name the previous employer if there are  
10 sensitivities around that, but he can't speak to his  
11 experience in this relationship with buyers--between  
12 buyers and sellers with him in the position of buyer  
13 without going to what his experience was and how he  
14 came to the understanding which he's described in  
15 relatively theoretically terms where a buyer and a  
16 seller, how he came to that understanding of what  
17 that relationship is and how business is conducted  
18 and how it operates.

19           PRESIDENT ORREGO VICUÑA: That is what  
20 Mr. Bustard is discussing, and he may discuss all of  
21 that, but not in the context of the activities of a  
22 company that's not part of this case. He may say my

14:38:44 1 experience is whatever it was, as we have been  
2 hearing, and that would be it, but whether there was  
3 a company doing this or doing that, that's  
4 different.

5 MR. NASH: My only comment would be that we  
6 have to test his experience as against the construct  
7 that he's developed in his statement, and that is to  
8 establish and assess the credibility of the witness.

9 PRESIDENT ORREGO VICUÑA: Well, we have  
10 done--we have discussed the points at various times  
11 now, Mr. Nash.

12 MR. NASH: I think you ruled against me.

13 PRESIDENT ORREGO VICUÑA: I'm not ruling  
14 against you. What I'm ruling is that you have to  
15 keep to what the witness is discussing in his  
16 statement, and from there you can ask the questions,  
17 but then does not relate to whether company A or B  
18 did C or D.

19 BY MR. NASH:

20 Q. Could you turn to your statement, please,  
21 Mr. Bustard, at Page 7 at the top, second full  
22 sentence--actually, I'm sorry, let's go back to the

14:40:14 1 bottom of Page 6, Paragraph 22, and at the very  
2 bottom, if a boom is of equal volume and quality,  
3 the buyer will be satisfied, just on that point.  
4 That's the boom--that's the substitution boom;  
5 right?

6 A. That's correct.

7 Q. Okay. This removes the possibility that  
8 the buyer might make an offer on the advertised  
9 export boom and prevent its export. That's the logs  
10 that are being liberated for export?

11 A. That's the win-win.

12 Q. That's the--those are the logs that are  
13 being liberated for export by the buyer not putting  
14 up an offer; right?

15 A. That's right.

16 Q. Or withdrawing an offer?

17 A. There was a substitute boom that was  
18 purchased, so he did not follow through with his  
19 offer on export.

20 Q. Then it says, "It has been my experience  
21 that this arrangement works between two companies  
22 that understand that logs cannot be exported from

14:41:04 1 British Columbia unless they are surplus to the  
2 needs of the domestic market."

3           Now, just going back to that, in your  
4 experience, you're suggesting that these two  
5 parties, the party that wants to get their logs out  
6 and the party that wants to get these other logs,  
7 the buyer, are parties of equal bargaining power?

8           A.    What I'm suggesting is that the party--the  
9 seller would like to get his logs to be able to  
10 export his logs, and the buyer requires logs for his  
11 sawmill, so this is--this has been satisfied when  
12 both--when a substitution boom is purchased by the  
13 buyer.

14          Q.    Do you consider the two parties in an equal  
15 bargaining position?

16          A.    The power to the seller is that the buyer  
17 may go through and spend a lot of expenses and  
18 effort searching out the boom, determining what the  
19 boom is suitable for his mill at great expense like  
20 I mentioned, water taxi, flying up, et cetera, and  
21 the--but the buyer doesn't--the seller doesn't have  
22 to sell that boom to the buyer, so the buyer spent

14:42:25 1 all this money determining whether this boom is  
2 suitable only to have the seller decide not to sell  
3 it to him.

4 Q. Well, couldn't the buyer put in a lowball  
5 offer without doing any inspection and await the  
6 outcome, the duration of the period between the  
7 close of the 14-day period and the TEAC meeting and  
8 then withdraw it at the last minute?

9 A. Could I put a question to you? Would you  
10 buy a used car without looking at it first? You do  
11 not buy a boom of logs without looking at it. There  
12 is too much involved. There are--no experienced log  
13 buyer will put an offer in. You just can't do it.  
14 There is--you're--the mill is depending. You have  
15 hundreds of people working in the mill depending on  
16 the buyer to get out, look at those logs based on  
17 his experience and make the right decision. You  
18 can't put in an offer just to--because to try and  
19 finesse a boom.

20 Q. What about a lowball offer that has no  
21 chance of being accepted by the seller, the TEAC  
22 meeting is four, five, six weeks away, and the



14:43:28 1 offeror puts in the offer, lowball offer. It's not  
2 going to be accepted?

3 A. Right.

4 Q. And using that as a negotiation tactic  
5 during that four- or five-week period to get some  
6 cheap logs? Is that completely theoretical?

7 A. But then what kind of relationship are you  
8 going to have with the buyer and seller?

9 Q. A bad one.

10 A. Yeah, that's right. That's why I say that  
11 buyers and sellers that understand the log market  
12 don't do that because they've got to get long.  
13 They've both got their strengths and weaknesses, and  
14 you want a win-win situation. You're not going to  
15 do something that's going to leave a really, really  
16 bad taste in the seller's mouth because he's never  
17 going to deal with you, so you may as well write him  
18 off.

19 Q. And you said you were, in response to  
20 Mr. Dumberry's question about the role of Government  
21 in this negotiation, you said that Government is not  
22 involved, but Government has a Committee, an

14:44:21 1 Advisory Committee that's waiting at the end of the  
2 day that's going to pass judgment on whether  
3 those--whether those logs can be liberated for  
4 export. Isn't that fair?

5 A. My understanding of the statement from  
6 Mr. Dumberry was, were they involved in the  
7 negotiations, in the negotiation process for the  
8 purchase of logs, and I said no, and we don't want  
9 them involved.

10 Q. But rising just on the role of Government,  
11 the Government has an impact on these negotiations;  
12 isn't that fair?

13 A. Could you explain why? How does it have an  
14 impact? To me the Government has no impact. The  
15 only impact is the Government has--they have a  
16 Committee which makes recommendations, but those  
17 recommendations are after the negotiations is  
18 basically--has failed, so then it goes to the next  
19 step which is the Government. That's not the  
20 negotiations. At that stage, the negotiations are  
21 done.

22 Q. Well, they're indirectly--

14:45:17 1 A. There are two losers then.

2 Q. The committee being an Advisory Committee  
3 for Government is waiting to have its meeting, and  
4 it may not be directly involved in the negotiation,  
5 but it certainly impacts the negotiation because the  
6 exporter might not be able to get those logs out if  
7 the Committee says no.

8 A. Well, that's all semantics.

9 Q. Isn't that fair?

10 A. To me, the Committee, that's the last step.  
11 The negotiations are all over by the time it gets to  
12 the Committee.

13 Q. Yet the negotiations are, indeed, over by  
14 the time it gets to committee.

15 A. Right.

16 Q. There is that whole four- to six-week  
17 period which is open for negotiations for the seller  
18 to negotiate with the buyer and the buyer to say I  
19 will pay you this for that, and I will let those  
20 through.

21 A. My memory doesn't serve my quite right, but  
22 I think there is a two-week, 14-day period, I may be

14:46:10 1 wrong on this, but I think it's 14 days from the  
2 time that the biweekly offer comes out until the  
3 buyer has to make his offer.

4 Q. The offer is in the 14-day period, but the  
5 negotiation after the offer is posted and not  
6 withdrawn sits there waiting to be considered by  
7 FTEAC?

8 A. You're right. There is an additional.

9 Q. Four to six-week period; right?

10 A. I'm not sure that the amount. I can't  
11 answer that. I don't know that, but there is a  
12 period in there. Yeah.

13 Q. And that's when the offer can be withdrawn?  
14 You could pull your offer?

15 A. It has to be withdrawn prior to FTEAC  
16 making its ruling.

17 Q. Right.

18 And sometimes these offers could be  
19 withdrawn the day before the meeting; right?

20 A. There is a schedule that it lists on the  
21 schedule that the time that it has to--the date that  
22 it has to be withdrawn by, so that's a well-known

14:47:02 1 number.

2 Q. Could you turn to Tab 37, please, of the  
3 Investor's Schedule of Documents. I would like to  
4 turn you to page 766.

5 Are you with me?

6 A. Yeah.

7 Q. This is an examination of Mr. McCutcheon in  
8 the proceeding involving TimberWest, and starting at  
9 766, "To get back to this concept of a game that is  
10 being played, I think you have agreed with me that  
11 you played the game when you were a log buyer in  
12 order to get fibre, to get the logs that you needed  
13 for your various businesses; correct?

14 "ANSWER: Yes.

15 "QUESTION: If it weren't for that  
16 need, you wouldn't be playing this game?

17 "ANSWER: Unless I was in one of my  
18 previous position or went for my own  
19 company and I was trying to export. I had  
20 been in the game all along. I played both  
21 sides.

22 (Pause.)

14:48:21 1           "QUESTION: To get back to this  
2           concept of a game that is being played, I  
3           think you have agreed with me that you  
4           played the game when you were a log buyer  
5           in order to get fibre, to get the logs that  
6           you needed for your various businesses;  
7           correct?

8           "ANSWER: Yes.

9           "QUESTION: And if it weren't for that  
10          need, you wouldn't be playing this game.

11          "ANSWER: Unless I was in one of my  
12          previous positions or went for my own  
13          company and I was trying to export. I have  
14          been in the game all along. I have played  
15          both sides.

16          "QUESTION: Right, but looking at your  
17          log buyer hat, when you were a log buyer?

18          "ANSWER: Yes.

19          "QUESTION: You were playing this game  
20          in order to get supply; correct?

21          "ANSWER: If I needed it, yes

22          "QUESTION: Right. And you regarded

14:49:08 1           the game as something of a necessary evil  
2           to get the supply?

3                   "ANSWER: Absolutely, and I say that  
4           in the sense that I never liked the game,  
5           not because I thought I was doing anything  
6           wrong because you have an opportunity to  
7           make an offer, but I didn't like the game.

8                   "QUESTION: But it was important that  
9           the game be there because it enabled you as  
10          a log buyer to get the wood that you  
11          needed?

12                   "ANSWER: If there was no other way to  
13          buy wood.

14                   "QUESTION: And there would be times  
15          if that system, that game weren't there  
16          that you wouldn't have been able to get the  
17          wood that you needed?

18                   "ANSWER: That's true. The only other  
19          way to get it would be to increase your  
20          price to get people to log more.

21                   "QUESTION: Exactly.

22                   "ANSWER: Yes."

14:49:52 1           Now, did you have any discussions in your  
2 experience with Mr. McCutcheon along the way which  
3 reflect his approach to this negotiation process?

4           THE WITNESS: Well, my first--

5           MS. TABET: Excuse me, what's the  
6 relationship to Mr. Bustard's Affidavit?

7           MR. NASH: Mr. McCutcheon is.

8           MS. TABET: You will ask general questions  
9 about the approach of negotiations?

10          MR. NASH: About the negotiations, yes.

11          BY MR. NASH:

12          Q. Go ahead please.

13          A. Mr. McCutcheon, prior to working with me  
14 and for me in that order had his--he had worked  
15 several companies, with several companies before. I  
16 have no idea what time frame he's talking about,  
17 what company he's talking about.

18                 There--my discussion--okay. I don't  
19 understand--to me this is something out of--I don't  
20 understand the details of it behind it.

21          Q. Well, to give you a temporal indication, he  
22 says at Line 8 of Page 767, I have been in the game



14:50:53 1 all along. I play both sides, and he's stating this  
2 in June of 2006.

3 A. I don't know if he's referring back to 1980  
4 or 1985 or 1990. I have no idea.

5 Q. Do you recall having discussions with  
6 Mr. McCutcheon along these lines?

7 A. I don't--I don't recall.

8 Q. Okay. Thank you. Those are my questions.

9 PRESIDENT ORREGO VICUÑA: Thank you,  
10 Mr. Nash.

11 Is there any redirect?

12 MS. TABET: No.

13 PRESIDENT ORREGO VICUÑA: I have just one  
14 question.

15 THE WITNESS: Certainly.

16 PRESIDENT ORREGO VICUÑA: For Mr. Bustard  
17 to clarify my own mind.

18 QUESTIONS FROM THE TRIBUNAL

19 PRESIDENT ORREGO VICUÑA: Assuming that the  
20 game is a fair game, there is still the question of  
21 the Regime having been put in place to guarantee,  
22 assure the supply of wood logs to the processors.

14:52:10 1 That's the essence, and that's the meaning of the  
2 Surplus Test and everything else that we have heard  
3 about.

4           Now, here comes a question of the  
5 substitution. If you have a boom that it's intended  
6 for export, on which the rest of the offers and so  
7 can play, but at the same time you can find another  
8 boom which will be substituted for the first, it  
9 means that you have two supplies of the same boom  
10 for the processor. Is that not so? You have two  
11 sources of the same kind of or equivalent kind of  
12 logs, so where is the shortage?

13           THE WITNESS: The one boom is going to have  
14 the opportunity to be exported, and the other boom  
15 you will cut in your mill, so that volume that  
16 you're cutting your mill makes up for the volume of  
17 the perceived shortage.

18           You don't--you don't enter into  
19 negotiations for the purchase of a boom that's  
20 advertised unless you have a need for it, and so you  
21 look at it--sure you would like to get both booms  
22 and you might need both booms, but you'd rather--if

14:53:52 1 you can get one, you're better off than none, so you  
2 will try to get the one boom, and that means the  
3 other boom is going to be--going to be exported,  
4 then you have lost the opportunity in that boom, but  
5 at least you've got half of it, so you've got a  
6 portion.

7 PRESIDENT ORREGO VICUÑA: My point is  
8 slightly different.

9 THE WITNESS: Okay.

10 PRESIDENT ORREGO VICUÑA: It is that if you  
11 have one source of supply--call it boom one--

12 THE WITNESS: Okay.

13 PRESIDENT ORREGO VICUÑA: --and that's what  
14 the processors did, they need one boom of supply;  
15 right? Now, the seller comes in and tells them  
16 look, forget about that one because I have a  
17 separate interest, but here you have boom number  
18 two, which will satisfy your needs on equivalent  
19 terms.

20 THE WITNESS: Right.

21 PRESIDENT ORREGO VICUÑA: So, is it not  
22 that there are two booms and then two sources of

14:54:52 1 supply for the same demand.

2           THE WITNESS: But you're just looking at  
3 one player. There may be several players involved  
4 also buying, and so the seller may, if the boom that  
5 he is giving you in exchange, he may sell that to  
6 somebody else, so it doesn't satisfy your  
7 requirement. It's not like there is only one player  
8 like there is many players out there buying that  
9 could be buying the same type of log. I don't know  
10 if I've addressed that properly.

11           PRESIDENT ORREGO VICUÑA: Well, that's  
12 certainly a different scenario. Here we are talking  
13 of one buyer/one seller. Of course, if you have 10  
14 buyers, most probably they will not be addressing  
15 one boom. They would be addressing 10 booms. And  
16 then if for those 10 booms the sellers, either the  
17 same or different sellers come in and say, wait,  
18 wait, here you have another 10 to substitute for,  
19 then it means you have 20. Is that not the right  
20 math?

21           THE WITNESS: Well, there is a limit to  
22 the--unless they have the opportunity to--unless

14:56:25 1 they're able to have additional volumes for--to  
2 substitute for it, there is a limit to what they can  
3 do.

4 PRESIDENT ORREGO VICUÑA: That's an  
5 assumption that there is something to substitute  
6 for.

7 THE WITNESS: Right.

8 PRESIDENT ORREGO VICUÑA: Okay, fine.  
9 Thanks very much, Mr. Bustard, for coming.

10 (Witness steps down.)

11 PRESIDENT ORREGO VICUÑA: We are ready to  
12 proceed with the next participant, who is an expert  
13 witness, Mr. Robert Low.

14 ROBERT LOW, INVESTOR'S WITNESS, CALLED

15 PRESIDENT ORREGO VICUÑA: Good afternoon,  
16 Mr. Low. Would you please care to read the Expert  
17 Statement that you have in front of you.

18 THE WITNESS: Yes, sir.

19 I solemnly declare upon my honor and  
20 conscience that I shall speak the truth, the whole  
21 truth, and nothing but the truth.

22 PRESIDENT ORREGO VICUÑA: Thank you.

14:58:40 1 Mr. Low.

2           You will now be examined first by

3 Mr. Appleton.

4           MR. APPLETON: Great, good afternoon,

5 Mr. President, Members of the Tribunal.

6                           DIRECT EXAMINATION

7           BY MR. APPLETON:

8           Q. And good afternoon, Mr. Low.

9           Mr. Low, I asked you to prepare an  
10 Independent Valuation Report of the damages caused  
11 to Merrill & Ring by the Log Expert Control Regime.

12           Your Report is set out in a binder in front  
13 of you. You see this binder?

14           A. Yes, I do.

15           Q. Could I ask you to turn, please, to Tab 1?

16           MR. APPLETON: And Members of the Tribunal,  
17 you have a binder as well? Very good.

18           BY MR. APPLETON:

19           Q. Now, you have included your curriculum  
20 vitae at Page 66, if I could just ask you to turn to  
21 the back of your Report. And I will put it up on  
22 the screen.

14:59:31 1           I see that you're a Chartered Accountant  
2   and a Chartered Business Valuator.  Could you just  
3   please tell the Tribunal what a Chartered Business  
4   Valuator does, please.

5       A.  A Chartered Business Valuator is a person  
6   in Canada who has qualified under a professional  
7   designation with a program of study and examination  
8   and experience, and that indicates a specialization  
9   in business valuations and damage quantification.

10      Q.  I see that you have published many articles  
11   in the field of business valuation and damage  
12   quantification.

13           How long have you worked in the area of the  
14   quantification of damages?

15      A.  I have practiced exclusively in this field  
16   for the last 31 years.

17      Q.  Would you please explain to the Tribunal  
18   the premise of your Report, the Report that's here  
19   before us.  Perhaps you could look at the slide on  
20   the screen here.

21           Is this slide an accurate depiction of the  
22   methodology used in your Report?  I put this

15:00:37 1 together myself, so it's relatively simple.

2       A.    The methodology in this Report, although  
3 there is a great deal of detail one should drill  
4 down on a raft-by-raft basis, really can be stated  
5 quite simply.  The damages in this case are a  
6 measure of the Export Premium that has been  
7 quantified on a raft-by-raft basis.  That Export  
8 Premium is then multiplied by the volume of each of  
9 those rafts that had been affected by the Regime.  
10 And to that amount which is then each of the rafts  
11 is summed into a total, we added the compliance  
12 costs or the costs incurred by Merrill & Ring in  
13 complying with and meeting the requirements of the  
14 Regime.

15           The analysis was based on two time periods,  
16 the first time period being the past historical time  
17 period and retrospective past, but the past time  
18 period runs from December 27, 2006, when the claim  
19 was filed, until the end of 2008, which is the  
20 approximate time at which my Report was prepared.

21           The future time period relates to the  
22 period beyond December 31, 2008, and covers the



15:02:19 1 period 2009 through 2016, which is the period during  
2 which Merrill & Ring intends to deplete its forest  
3 assets.

4 Q. Now, if we turn to Tab 3 of the binder  
5 before you, you will find a copy of Mr. Bowie's  
6 Report. I will give you a moment to turn to that.

7 A. I have it.

8 Q. Now, he has summarized the methodology you  
9 used in your Report and the damages that you  
10 identified, and he set this out in his Report at  
11 Page 17. I replicated that page and put it up here  
12 on the screen.

13 Could you please explain this summary to  
14 the Tribunal. I just point out this is the summary  
15 that was done by Mr. Bowie of your Report, so  
16 perhaps you might tell us if it's an accurate  
17 summary, and then we might use it to go through a  
18 few things.

19 A. Certainly.

20 The summary is accurate in all respects  
21 except for one, and that is that this heading here  
22 is not a correct description of what I've done.

15:03:35 1 Q. Excuse me, for the record, could you just  
2 explain what the "this" is here, sir.

3 A. I will.

4 The column here is for Article 1110, and  
5 the date that's referenced there is March 27, I  
6 think, 2006. And that date should, in fact, be and  
7 according to my Report is December 27, 2006, being  
8 the date of the claim. Other than that, the numbers  
9 that are depicted here and the descriptions coincide  
10 with my Report.

11 And this happened to be a useful way to  
12 look at the conclusions because it breaks some  
13 things out that are included in the schedules of my  
14 Report, and rather than having to flip back and  
15 forth, Mr. Bowie set them out in a little different  
16 fashion, and they're summarized on one page.

17 Q. Now, if I could just get you to look at the  
18 large screen for a moment, I see that there are a  
19 number of total losses figures at the bottom. There  
20 are three columns. At the bottom of each column  
21 there is a total, and I see the totals are somewhat  
22 different. Could you please tell the Tribunal why

15:04:53 1 there are differences in the total damages in terms  
2 of the calculations of each NAFTA violation, please.

3 A. Certainly.

4 Each of these columns represents a  
5 different or a combination of Articles under NAFTA,  
6 and the descriptions down this side apply to  
7 virtually all of them.

8 The descriptions relate to the lost Export  
9 Premium that we've quantified and the costs being  
10 incurred, and then broken into two periods being the  
11 past and the future.

12 And these totals agree with my Report.  
13 They are consistent with what my conclusions are.  
14 And Article 1102 and 1105, in my opinion, result in  
15 the same damages, the same nature of breaches. And,  
16 accordingly, I came to the same conclusion with  
17 respect to both the Lost Export Premiums and the  
18 costs incurred.

19 Under Article 1106, the numbers are almost  
20 the same, except that we have excluded the claim for  
21 the cost related to payments for the fee-in-lieu  
22 that have been paid to the Province, and that amount

15:06:23 1 is indicated here. That is really the only  
2 difference--

3           ARBITRATOR ROWLEY: Could I just interrupt.  
4 When you say "here"--and you have done it a few  
5 times--you really must say where; otherwise, the  
6 record will be incomplete, and the transcript will  
7 be useless to me when I go back and look at it.

8           THE WITNESS: Thank you very much for that  
9 reminder. Sorry.

10           Under the Article 1102 and 1105 column, the  
11 difference between that and the Article 1106 column  
12 is that the 1106 column does not include the  
13 fee-in-lieu payments that were included in the 1102  
14 and 1105 column as a cost attributable to the  
15 breach.

16           Article 1110, the right-most column, is  
17 comprised principally of the same numbers, but the  
18 concept is different. Effectively, rather than  
19 breaking this into a past and future lost with a  
20 segregation of December 31, 2008, the damages under  
21 an expropriation claim are determined at the date of  
22 the breach, so effectively all of the damages,

15:07:47 1 whether they are now in the past or the future, were  
2 present-valued or discounted back to  
3 December 31--December 27, 2006. And then to that  
4 number this item in just above the middle of the  
5 right-hand column has compound interest being added  
6 to the claim in some two-odd million dollars, and  
7 that compound interest is added pursuant to  
8 Article 1110, where interest is added at a  
9 commercial rate from the date of the expropriation  
10 until the amount is paid.

11           That is the single biggest difference  
12 between these give or take 16 million-dollar columns  
13 under 1102, 1105, and 1106, and the \$18 million  
14 under Article 1110. It's a little more complicated  
15 than that because of present valuing, but the  
16 biggest single difference is the application of  
17 compound interest.

18           BY MR. APPLETON:

19           Q. Now, Mr. Low, I'm going to start from the  
20 top of the chart. I see that this methodology  
21 refers to the term "Export Premium." Would you  
22 please explain to the Tribunal what you mean by the

15:09:16 1 term "Export Premium," and can you explain to the  
2 Tribunal how it's calculated, please.

3 A. Yes, I can.

4 The Export Premium that has been developed  
5 in this methodology is to determine a fair export  
6 market price for a raft of logs and subtract from  
7 that the price that was obtained in the real  
8 circumstance by Merrill & Ring for that same raft of  
9 logs with the only adjustment thereto being the  
10 transportation difference. In other words, if the  
11 Fair Market Price is in a different market--for  
12 instance, the United States being a U.S. customer  
13 versus the actual transaction was a Canadian  
14 domestic sale--we adjusted that difference by the  
15 difference in transportation costs to get that raft  
16 to the relevant market.

17 How we went about this was that it was  
18 based off a raft schedule so that each raft was  
19 dealt with individually over this time period of  
20 some four years. And this was based off a schedule  
21 that was developed by Merrill & Ring prior to this  
22 claim being brought. So, a lot of the data was

15:10:50 1 accumulated at least up until December 27, 2006,  
2 absent any consideration of this Tribunal. And it  
3 included a lot of data on the raft itself, the  
4 process, what market it was sold into, and all of  
5 this detail.

6           And the only thing that was added to it was  
7 for each raft there is--and in this analysis was an  
8 indication of what the appropriate sort was.  
9 Merrill & Ring assigns a sort to a raft, and this  
10 sort is a very specific sort. We've heard evidence  
11 from Mr. Schaaf and Mr. Stutesman with respect to  
12 the amount of information and the consistency that  
13 goes into their sort description.

14           And for each sort--

15       Q.   Excuse me, I'm very afraid I didn't realize  
16 that we are open and we have the private financial  
17 data which is being live-fed and everything else,  
18 and I'm sorry that--if you pause for a moment, we  
19 are going to have to close the session at this  
20 point, and I'm going to ask you will deal with that  
21 and those people who can't be shared will have to  
22 go. But I want to make sure we are going to dive

15:12:13 1 into much more, and I just thought we had better  
2 deal with this now at the outset. I'm very sorry.  
3 I have been so desirous to go as far as I can and  
4 leave this as open as I can.

5 (Comment off microphone.)

6 MR. APPLETON: Yes, I did. Thank you,  
7 Mr. Rowley, for reminding me of my omission. I hope  
8 it's the least of my sins today, sir.

9 (End of open session. Confidential  
10 business information redacted.)

11

12

13

14

15

16

17

18

19

20

21

22



15:12:40 1

## CONFIDENTIAL SESSION

2 BY MR. APPLETON:

3 Q. I'm very sorry, Mr. Low. I really did not  
4 want to interrupt you. I could try and look back in  
5 the record from where you were--

6 A. I think I could pick it up.

7 Q. I really apologize. Would you please pick  
8 it up from where you left it.

9 A. From this raft schedule, what was added to  
10 it was, based on this sort, there was a  
11 determination of where to use the term "the target  
12 market" for that sort was, where typically that sort  
13 market went. So, if it's hemlock, it's Asia. If  
14 it's something else, it's the United States. And  
15 there are sorts that are destined for Canada, as  
16 well.

17 So, the sorts had already been assigned  
18 because that's how they run their business. The  
19 target market was then assigned based on the sort,  
20 and it was then applied consistently throughout this  
21 four years of data.

22 At that point, typically a Log Sale

15:14:40 1 Agreement that had been entered into by the Merrill  
2 & Ring Group with an arm's length third-party  
3 customer was selected, and the price in the target  
4 market and the price on that Log Sale Agreement was  
5 used as this fair market in this so-called "best  
6 market" or "target market" for that raft.

7           And the intent was that that not be an  
8 exceptional price, not be an aberrant price as there  
9 are aberrant transactions from time to time, but  
10 representative of a Fair Market Price at that time  
11 of when the actual transaction, sale transaction,  
12 occurred in the relevant target market. And that is  
13 how we then determined this Target Market Price,  
14 adjusted for freight, and then subtract the actual  
15 price that was realized to determine the Export  
16 Premium.

17       Q.   Mr. Low, again, I apologize for  
18 interrupting--we won't have to do that again--but  
19 could you tell me why you believe that there is an  
20 Export Premium, like why it exists?

21       A.   As I'd indicated in my Report, I believe  
22 that there is a general recognition in the industry,

15:16:10 1 forestry industry, in British Columbia that there is  
2 an Export Premium, and I had a number of sources in  
3 trying to confirm that belief. Certainly, we've  
4 heard the Merrill & Ring witnesses here--Mr. Schaaf,  
5 Mr. Stutesman, Mr. Kurucz and, sorry,  
6 Mr. Ringma--all identify the Export Premium concept.

7           In addition, Deloitte, the firm that I'm a  
8 partner with, being as large as it is, has a very  
9 substantial Vancouver office, and I had discussions  
10 with two of my partners who deal extensively in the  
11 forestry business in British Columbia, and they  
12 indicated an understanding that this Export Premium  
13 did, in fact, exist.

14           And there were then two other sources.  
15 There is a public company that publishes an Annual  
16 Report and, in fact, Quarterly Report, that  
17 discusses the Export Premium that they are able to  
18 realize each year and the significance of that to  
19 their operations.

20           And then, lastly, I gave consideration to  
21 the determination of the fee-in-lieu that prior to  
22 2004 was, in fact, premised on 100 percent of the

15:17:50 1 difference between the export price that's realized  
2 and the Vancouver Log Market price. So, a  
3 recognition, I believe, that there is an Export  
4 Premium.

5 All of those led me to believe that the  
6 Export Premium existed, was known to exist, and our  
7 approach was attempting to take a fact-based  
8 historical amount analysis in trying to quantify  
9 what was lost by Merrill & Ring due to the Regime.

10 Q. Mr. Low, just to close the loop, do you  
11 know for a fact that there was ever any monies  
12 collected by the Government of British Columbia  
13 during that time period when the fee-in-lieu was  
14 based entirely on the Export Premium?

15 A. Yes, I am aware of that. And, in fact, in  
16 the record here, there are payments made by Merrill  
17 & Ring on that basis.

18 Q. And during that time period?

19 A. During that time period.

20 Q. Okay.

21 Mr. Schaaf has testified that there are  
22 occasional instances when the price realized by

15:19:03 1 Merrill & Ring actually exceeded the fair export  
2 market price. This is referred to in Mr. Bowie's  
3 Supplemental Report as instances of Negative Export  
4 Premium.

5           Did you consider this Negative Export  
6 Premium in your Report, sir?

7       A. Yes, I considered it.

8           The suggestion in both Mr. Bowie's Report  
9 and Mr. Jendro's Report is that these Negative  
10 Export Premiums should be accumulated and deducted  
11 from the Positive Export Premiums that I'd  
12 calculated. And I don't believe that that's  
13 correct, and there are a number of reasons for that.

14           First of all, the market periodically  
15 presents opportunities to Merrill & Ring that  
16 perhaps a raft can be sold in a different market  
17 than the target market we selected. And, on an  
18 opportunistic basis, if the price is better, Merrill  
19 & Ring is going to take up--take advantage of that  
20 opportunity and perhaps realize a price that's  
21 higher than the Target Market Price that was  
22 selected based on the typical sort and the typical

15:20:35 1 market that that sort goes to.

2           There is nothing that I have seen in the  
3 Regime in the way it's managed and operated that  
4 would suggest that the Regime creates a positive  
5 factor where Merrill & Ring can do better than its  
6 target market, certainly not that it wouldn't be  
7 able to realize absent the Regime in any event. So,  
8 I think these negatives do occur, and they occur  
9 simply on happenings in the marketplace shouldn't be  
10 deducted on that basis.

11           Secondly, the approach that we took here  
12 was to look at a specific Log Sale Agreement with a  
13 customer in the target market. There is no range of  
14 price around that price that's in that Log Sale  
15 Agreement. It's a specific amount. And the belief,  
16 in my understanding and my opinion because of the  
17 way I adopted this, is that Merrill & Ring would be  
18 able to sell additional volume into that contract,  
19 realize that price in that target market; and,  
20 accordingly, these positive or--sorry--negative  
21 premiums--that's the easiest way to think about  
22 it--really don't come into play. They're simply an

15:22:06 1 opportunistic happening that would have happened in  
2 any event, and the Log Sale Agreement price is a  
3 fixed amount, and that's the amount that's relevant  
4 at that period in time.

5 Q. I want to make sure I understand. Could  
6 you explain what you mean when you say that Merrill  
7 & Ring could have sold more into certain Log Sale  
8 Agreements? Because Canada asserts that there would  
9 not be demand for additional volumes of wood, so  
10 could you just explain your view to the Tribunal so  
11 we are perfectly clear.

12 A. Yes, I can.

13 I'm not suggesting that Merrill & Ring  
14 Canada could sell additional volume into a Merrill &  
15 Ring Group Log Sale Agreement necessarily over and  
16 above the volume. Maybe the customer would want  
17 more of it, but perhaps not.

18 What I'm suggesting is that the Merrill &  
19 Ring volume out of Canada could be sold into the  
20 existing contract volume and, in fact, replace  
21 volume that Merrill & Ring sorts--sources on a  
22 contract basis from other companies. They, in fact,

15:23:18 1 are a trader of wood, a contract trader, and instead  
2 of supplying contract volume into these Log Sale  
3 Agreements could substitute it or have substituted  
4 it if could get out of Canada with this Merrill &  
5 Ring volume that we believe has been affected by the  
6 Regime.

7           And, accordingly, what Mr. Stutesman, in  
8 fact, said the other day was he had instructions  
9 from both Norm and their respective boss that  
10 Merrill & Ring volume came ahead of the trading  
11 volume that they did, and therefore I think it's  
12 very appropriate to say that volume could have been  
13 sold into these contracts.

14       Q.   Mr. Bowie, in his Report, has referred to  
15 the retrospective past harvests. You also referred  
16 to that earlier in your testimony today.

17           Could you please explain this concept,  
18 Mr. Low.

19       A.   The retrospective past harvest is an amount  
20 of harvest that Merrill & Ring and its consultant,  
21 Mr. Ruffle, with respect to the Harvest Plan believe  
22 would have been harvested in these years between



15:24:41 1 2004 and 2008, absent the Regime. The market during  
2 that time period was a good market. And absent the  
3 restrictions, absent the blockmailing, Merrill &  
4 Ring believes that it would have harvested more and  
5 sold into that market.

6           And the concept is consistent with a  
7 but-for type of analysis of but for the Regime and  
8 the way it's operated with impacts with  
9 blockmailing, Merrill & Ring would have harvested  
10 more in the past.

11       Q.    So, why is it necessary for this Tribunal,  
12 then, to consider the retrospective past harvest?

13       A.    It was an example of a result of the  
14 operation of the Regime. And what we are trying to  
15 do is say, absent the Regime, what would Merrill &  
16 Ring have done? How would it have sold differently?  
17 A, it would have exported more; B, it wouldn't have  
18 incurred costs; C, it would have harvested more in  
19 the past.

20       Q.    Now, Mr. Low, I'm going to ask you to look  
21 again at the chart, but I'm going to look at it on  
22 the large screen.

15:26:08 1           That third column under Article 1110, the  
2 expropriation column, you pointed out to us the  
3 issue about interest.

4       A.    Yes.

5       Q.    I've got my pointer on it, mid-level, and  
6 how you have applied interest in this case.

7            Could you please explain the basis upon  
8 which you've come up with a rate for interest in  
9 this case.

10       A.   Article 1110 describes a requirement to add  
11 interest at a commercially reasonable rate from the  
12 date of the expropriation, and I selected a rate of  
13 6 percent, which, at December 27, 2006, was the  
14 Canadian Bank Prime Rate at the time.

15       Q.    Would you explain to the Tribunal why it  
16 could be appropriate to add interest to the other  
17 heads of damages if they so decide in this case,  
18 Mr. Low?

19       A.    If the Tribunal decided it was appropriate  
20 to add interest, that would be within my  
21 understanding of their power to do so. The reason  
22 it's in Article 1110 and not the other ones is that

15:27:23 1 it is a component of that article, whereas it's not  
2 in the other two.

3 Q. Would it be acceptable for them to rely on  
4 the commercially reasonable rate schedule and  
5 information you put in your Report with respect to  
6 the other heads as well, if they so decided?

7 A. If the Tribunal so decided, I think it  
8 would be appropriate, yes.

9 Q. All right. Now, you say that you have  
10 calculated your values on a but-for model of  
11 causation. You explained already a little bit what  
12 that means already. I want to focus on one point  
13 that Canada has particularly raised about your  
14 Report.

15 You calculated damages on the basis that  
16 the Regime did not apply to Merrill & Ring but that  
17 it continues to apply to others. Now, why did you  
18 do this, sir?

19 A. That really is not the correct  
20 characterization of what I have done. We have not  
21 taken an assumption that the Regime is not going to  
22 apply to Merrill & Ring. It's not a case where the

15:28:37 1 Tribunal has the ability to strike down at least  
2 against Merrill & Ring the Regime. The Regime has  
3 existed in the past. The Regime is going to exist  
4 into the future, to my understanding in any event.

5           And what we have done is simply determine  
6 if there is a breach of these Articles of NAFTA, as  
7 has been alleged, what the damages would be that the  
8 Tribunal could award as compensation for the damage  
9 done to Merrill & Ring.

10       Q.    Just to make sure I understand you, and I'm  
11 going to do this from memory of the NAFTA, I think  
12 what you're suggesting is that under Article 1135 of  
13 the NAFTA the Tribunal doesn't have the authority to  
14 strike down laws. It only has the authority to  
15 award monetary compensation. Is that a way of  
16 summarizing what you're saying here?

17       A.    Yes, I think that's absolutely right.

18           In fact, the expressions of surprise on the  
19 part of Canada's experts kind of came as a surprise  
20 to me, but the but-for type of analysis, I think, is  
21 not only recognized from judicial decisions that  
22 I've read, but is a very common and normal type of

15:29:59 1 analysis to do in this type of case.

2 Q. Okay. I'm going to turn to just a slightly  
3 different set of issues. I would like to turn to  
4 the issue of Georgia Basins.

5 Now, Mr. Schaaf gave some testimony at the  
6 beginning of our hearing about the transfer of the  
7 real property, of certain properties--these are the  
8 Squamish and Menzies Bay properties that were held  
9 by Merrill & Ring Forestry L.P. over to another  
10 company called Georgia Basins. If you recall, they  
11 transferred the real estate but they retained the  
12 Forest Tenure for a period of time, and they  
13 transferred the property to, I believe he said, the  
14 next generation or other generations of Merrill &  
15 Ring descendants into this company.

16 I wonder if you could explain to me  
17 something about the calculation of damages from  
18 these two properties--that's Menzies Bay and  
19 Squamish. First, let's look at the period before  
20 December of--maybe December 31, whatever the date  
21 December 2006, let's start there and work our way  
22 along.

15:31:17 1           A.    It's my understanding that although these  
2 properties had been sold to Georgia Basin, Merrill &  
3 Ring had, in fact, retained the forestry rights for  
4 a period of time that effectively expired at the  
5 beginning of 2007.

6                   And absent the Regime, Merrill & Ring and  
7 Mr. Ruffle are of the opinion that volume of logs  
8 would have been harvested from those properties  
9 prior to that time, and that's a component of the  
10 retrospective past harvest, that volume would have  
11 been taken on a but-for type of assumption absent  
12 the Regime from the Georgia Basin properties before  
13 the expiry of the forestry license or ability.

14           Q.    Could you then explain to the Tribunal the  
15 calculation of damages applicable to logs from these  
16 same two properties after December 31, 2006.

17           A.    There is in the calculations here no damage  
18 attributable to any forest products off the Georgia  
19 Basin properties after the December 1, 2007. The  
20 only impact is in the retrospective past harvest;  
21 and, indeed, is separately identified.

22           Q.    Excuse me, just for the transcript I was

15:32:50 1 looking at and your answer, I was asking you about  
2 December 31, 2006, and I see in the record you used  
3 the date 2007. Which is it? Whatever answer it is  
4 it is, but I just want to make sure that you ought  
5 to answer my question or I understand what you're  
6 saying.

7           Is it December 31, 2006, or are you  
8 referring to another date in 2007?

9           A. If I referred to 2007, my apologies. I  
10 would have--what I was trying to get at was January  
11 1, 2007, so the same temporal date, the end of 2006.

12          Q. I understand.

13                 And why is there no damage to Merrill &  
14 Ring Forestry L.P. after that date at the end of  
15 2006 from these particular properties?

16          A. From these properties, the right to harvest  
17 on those properties ceased at that date.

18          Q. So, it's not theirs anymore?

19          A. It's not theirs anymore.

20          Q. Okay. Let's turn to something else. I  
21 think I understand this now.

22                 Mr. Bowie states that 32 percent of the

15:34:01 1 damages for Lost Export Premiums that you've  
2 assessed in your Report relate to rafts that were  
3 exported.

4           Can I take you to Table 3 of your Report on  
5 Page 27. And we can see from the table that this is  
6 a summary of actual Past Losses by Actual and Target  
7 Market.

8           Can you explain the basis for Mr. Bowie's  
9 claim.

10         A. Yes, I certainly can.

11           And Mr. Bowie's comment in this regard is,  
12 in fact, correct. If I could start by explaining  
13 this chart and then get into these percentages.

14           Down the left-hand side of this chart, we  
15 have pairs of destinations, if you will. The very  
16 first one is Canada-U.S. The first destination  
17 there, Canada, is, in fact, the market in which the  
18 raft was actually sold.

19           The second geographic destination in the  
20 first line being the U.S. is the target market, so  
21 where this particular raft for all intents and  
22 purposes should have gone absent the Regime.



15:35:35 1           The second line on the left, Canada/Asia,  
2 is again where the raft was actually sold in Canada  
3 but was intended by sort to have an Asia  
4 destination.

5           If I then proceed all the way across to the  
6 second column from the right, that is the sum from  
7 each of the years on the schedule for the Lost  
8 Export Premium--

9           Q.   Excuse me, you mean the column entitled  
10 "Total"?

11          A.   Yes, the column entitled "Total."

12           --is the Lost Export Premium relevant to  
13 each of those circumstances.

14           So, for the first line, Canada being the  
15 actual where the product--where the raft was sold,  
16 should have been sold in the United States. The  
17 total damages in our Past Loss, actual not  
18 retrospective, just the Past Loss of what was  
19 actually sold, is 1,637,000, I think that is.

20          Q.   My eyes might be better than yours.

21          A.   A million-six.

22           And if I take those top two lines being the

15:36:53 1 million-six and million-222 together, that  
2 represents 68 percent of the total of \$4,201,000.

3           The portion that Mr. Bowie is referring to  
4 in his Report of where we're claiming that Merrill &  
5 Ring incurred damages on rafts it did, indeed,  
6 export are the four lines that followed after the  
7 first two.

8           So, on the left-hand column, the third line  
9 down is Asia/Asia. So, what that description says,  
10 from all this analysis of all the rafts, is that  
11 those raft, indeed, were sold into the Asian market,  
12 should have been sold into the Asian market, but  
13 there were damages. There were Lost Export Premiums  
14 relative to those.

15           And then the same for the other three where  
16 it was actually sold into the U.S., should have been  
17 into Asia, actual U.S.--target market was U.S., and  
18 the last one actual market Asia should have been in  
19 the U.S. All of these pairings came out of this  
20 target market analysis versus actual.

21           If you sum those last four items under  
22 total below the first two columns, the first two

15:38:32 1 lines starting at a million dollars and running down  
2 to \$10,000, they sum to the 32 percent that  
3 Mr. Bowie referred to of the \$4.2 million Past Loss.

4           So, Merrill & Ring was able to sell those  
5 into an export market, sometimes even the correct  
6 export market-based on sort, but with not a complete  
7 realization of the Export Premium that was expected.

8           If I could refer the Tribunal to the last  
9 column on the right, it says "weighted average per  
10 meter cubed--cubic meter, sorry, the first two being  
11 where Merrill & Ring was not permitted to export to  
12 the target export market. The average loss per  
13 cubic meter is between, call it, 20 and \$33 per  
14 cubic meter.

15           The following four categories where Merrill  
16 & Ring was allowed to export reflect a significantly  
17 lower loss per cubic meter. So, rather than in the  
18 first two lines being prevented from exporting, the  
19 Regime for the next four lines has caused some  
20 realization to be less than the expected realization  
21 of the Log Sale Agreement that was appropriate.

22           And why does that happen? It happens

15:40:19 1 because the cut-and-sort obligation pursuant to the  
2 Regime prevents the raft from being cut to the  
3 customer's specifications, and therefore they're not  
4 perhaps going to pay the best price that they would  
5 pay if it was cut to suit. So, we are having a case  
6 here where there is suboptimization of what's being  
7 delivered to the customer.

8           Secondly, if Merrill & Ring can enter into  
9 a supply agreement for a period of time even three  
10 months, there is an ability to, with security of  
11 supply, have a slightly higher payment by the  
12 customer under that contract, and that has been  
13 missed here on these rafts because we've had no  
14 security of supply because of the Regime.

15           And then lastly, the delay from the Regime  
16 because of the time period involved from cutting to  
17 delivery to a customer is so long there is damage  
18 that occurs that wouldn't occur absent the Regime  
19 situation. The damage is from sun, it's from water,  
20 it's from teredos, et cetera. And the customer will  
21 discount what might have been an agreed price on  
22 that basis.

15:42:08 1           The concept here is these Log Sale  
2    Agreements had a price, and some of them were for  
3    three months, and they're for a sort, HK, whatever  
4    the sort is, and there is a price for that sort on  
5    either a cubic meter or board foot basis, and these  
6    customers on that basis are prepared to commit to  
7    that price without inspecting the logs because  
8    they're not going to be delivered for some period of  
9    time.

10           So, the customer is prepared to deliver to  
11    a Merrill & Ring sort based on its description; and,  
12    when that arrives, they are going to make sure they  
13    fit into that sort category, but they are prepared  
14    to commit to a price in advance based on the Merrill  
15    & Ring sort.

16        Q.    Mr. Bowie has criticized your assessment of  
17    the volume of logs that would attract incremental  
18    costs.  Could you comment on that and explain this  
19    issue to the Tribunal, Mr. Low.

20        A.    Yes, I can.

21           This is one of the main differences between  
22    Mr. Bowie and myself with respect to incremental

15:43:28 1 costs due to the Regime.

2           Mr. Bowie, relative to the amount of volume  
3 that I think has been affected by the Regime, has  
4 come up with a lower volume, and I can describe it  
5 pretty simply. Mr. Bowie's volume is made up of  
6 logs that were exported and logs that were not given  
7 an Export Permit, not given an export letter, an  
8 authorization letter. So, they were deemed not  
9 surplus.

10           Those are the two categories that he has  
11 included and said these are the logs that are  
12 impacted by the costs of the Regime, and the nature  
13 of those costs are set out in the Report.

14           But there is a third category of log that  
15 is impacted by these costs, and the third category  
16 are what has been termed here as "ransomed logs."  
17 So, they are logs that entered into the system, the  
18 export market system, and they have been  
19 advertised--sorry, they have been cut and sort  
20 according to the Regime requirements, the normal  
21 B.C. standard. They have been rafted from remote  
22 locations. They have been put on the advertising,

15:45:08 1 two-week advertising. Maybe there has been an  
2 offer, maybe there hasn't, but rather than  
3 proceeding to the end of the system at that point,  
4 they have been ransomed, traded off so that other  
5 logs could get exported. But they started into the  
6 system, and starting into the system and getting to  
7 the advertising point is where you realized all of  
8 these incremental costs.

9           So, there are two sources for the data that  
10 we used to determine this incremental amount of logs  
11 or rafts that were affected. One was the raft sheet  
12 itself, this lengthy analysis of all the rafts that  
13 were sold by Merrill & Ring during this time period,  
14 and there was a column on that analysis that  
15 indicated a ransom status for the rafts.

16           And there is another test, and the other  
17 test, in fact, can be derived from Mr. Bowie's  
18 Report, and that is that there is an analysis in his  
19 Report of all of the rafts that were advertised by  
20 Merrill & Ring. Well, if they were advertised, they  
21 were in the system. They were subject to the  
22 Regime; otherwise, they wouldn't have been

15:46:35 1 advertised in the Regime, and the costs had been  
2 incurred.

3           And if I look at his analysis which I think  
4 came from Ms. Korecky of the numbers, the number of  
5 rafts that were advertised, in fact, agree to the  
6 number of rafts that are included in my analysis of  
7 damages related to incremental costs. And,  
8 therefore, I think they entered the system, they  
9 were advertised, they've incurred losses, and it  
10 comes under the three categories of what happened to  
11 the logs.

12       Q.   There is yet another significant issue that  
13 was identified by Mr. Bowie. He's identified two  
14 areas of the Regime, and I just put it up on the  
15 screen here. Two areas of the Regime that there  
16 would be additional delays as a result of compliance  
17 with the Log Export Control Regime.

18       A.   Yes.

19       Q.   Do you agree that these two areas would be  
20 the only areas where there would be additional delay  
21 caused by the Regime?

22       A.   No, I don't. The two areas that were



15:47:49 1 identified, and from Mr. Bowie's Report were  
2 identified based on discussions he had with--or the  
3 Affidavit of Ms. Korecky are solely the period from  
4 the beginning of the advertising biweekly period,  
5 two weeks, plus the time thereafter to receive the  
6 Surplus Letter, whether it's positive or negative.  
7 So, 21 days there, approximately 14 days of  
8 advertising, seven days to receive the letter was  
9 the time frame given to him; and then, plus, an  
10 eight-day time period to obtain the Export Permit  
11 once it was applied for.

12           So, Mr. Bowie in his Report identified 29  
13 days, and we have the reference there from his  
14 Report as to where that was, that he rounded up, and  
15 he used a delay period of 35 days, I think being  
16 20 percent more than 29, but those were the only  
17 components that he identified.

18           My Report, which was issued before  
19 Mr. Bowie's, indicated that our opinion was that the  
20 delay due to the Regime was, in fact, 60 days.

21       Q.   Now, Mr. Low, I understand that you've  
22 actually prepared a more detailed analysis

15:49:19 1 specifically responding to Mr. Bowie, and that we  
2 can either discuss it individually--don't put it up  
3 yet please--but I would rather use this  
4 demonstration aid and have the numbers. It's much  
5 easier than taking somebody through. It makes a  
6 terrible transcript for all the numbers, so I would  
7 like to distribute that right now. We will give it  
8 to Canada first. We could give it a number, and  
9 then we will give it to the Tribunal and to the  
10 witness.

11           And I would just like you to explain the  
12 differences between your approach and Mr. Bowie's  
13 approach, to highlight it and make it as simple,  
14 please, as possible so we could understand it. We  
15 will distribute it over to the Tribunal.

16           (Pause.)

17           MR. APPLETON: While we have this document  
18 here, let's take a short break and resume.

19           Ten minutes, Mr. President? Excellent,  
20 thank you.

21           (Brief recess.)

22           PRESIDENT ORREGO VICUÑA: Fine. We are

16:12:08 1 ready to resume.

2           We have an hour and 20 minutes, if you can  
3 figure that out as to organize yourselves.

4           MR. APPLETON: Just before we go back on  
5 the record, that last item needs to be given an  
6 exhibit number, and so I've asked the Secretary if  
7 she will give that.

8           I believe the next number is Exhibit 3, if  
9 I'm correct. That's the number, SO this should be  
10 Exhibit 3?

11           SECRETARY OBADIA: Exhibit 3.

12           MR. APPLETON: That way we could refer to  
13 it in the record and make a nice, clean record for  
14 everyone.

15           So, do we need to mark that on the record,  
16 or can we just assume it is now marked? Let's  
17 assume it's marked and I can proceed, yes? Okay.

18           BY MR. APPLETON:

19           Q. So, we will just start again from here.

20           Mr. Low, before the break, you were about  
21 to explain the demonstration aid discussing your  
22 views about the issue of delay attributable to the

16:13:21 1 Log Export Control Regime Procedures. We had set  
2 out Mr. Bowie's points and you had commented on it,  
3 and we then took our break. I hope that situates  
4 from where we are. Would you comment, then,  
5 Mr. Low, on your views with respect to the time.

6 A. Yes.

7 As is indicated on what is now Exhibit 3,  
8 in the bottom right-hand corner, you can see the  
9 reference to 60 days of delay; that was the view  
10 that was expressed in my Report. And we had gone  
11 through this analysis and had looked at not only the  
12 time periods that were identified by Mr. Bowie and  
13 Ms. Korecky, but the other impacts of the Regime on  
14 the process of starting from cutting the tree right  
15 to delivery of the customer.

16 The difference, if you will, there are  
17 three columns "Per Deloitte" here, is what the  
18 typical time is with the "Procedures in Place," the  
19 next column is "Absent the Procedures," with then  
20 the third column on the right-hand side being the  
21 "Difference Due to the Procedures."

22 And the analogy that we are drawing is,

16:14:46 1 rather than being subject to the Procedures, that  
2 Merrill & Ring in Canada would operate in a similar  
3 fashion to its Washington operations where the  
4 customer, in fact, goes to the property, selects the  
5 trees or views the trees, and then they cut to suit  
6 and do all of that sort according to the customer's  
7 requirements.

8           And then this series of delays occur, for  
9 instance, in the very first line of harvest, buck,  
10 sort, scale and accumulate volume, it takes time to  
11 accumulate the volume in order to ship from these  
12 more northerly remote areas according to the sorts  
13 that the Government mandates and the way the rafts  
14 must be accumulated. That would be more efficient  
15 under a non-Regime, so that's, for instance, where  
16 the first seven days comes from. And we went  
17 through that analysis right from the beginning to  
18 end and determined that, in fact, there seemed to be  
19 a 67-day delay period due to the Regime when one  
20 considered all of the factors which we rounded down  
21 to two months or 60 days.

22       Q.    Okay. I think that's very clear. It makes

16:16:18 1 it much easier to have it on a piece of paper.

2           Mr. Low, Mr. Jendro in his Report says that  
3 you used quarterly exchange rates to determine the  
4 Best Market Prices that caused a portion of the  
5 price difference claimed as a shortfall. Do you  
6 agree with his assessment?

7       A. No, I don't.

8           One of the things in Mr. Jendro's Report is  
9 he, to my reading of it, perhaps finds an error,  
10 which he did find an error in one of the quarters,  
11 and then makes an attribution of that error to the  
12 Report but never really--and says, "Oh, it's  
13 contributing to a systemic error," but doesn't  
14 quantify it.

15           So, with his objection to this use of  
16 quarterly foreign exchange rates to do the  
17 determination of the Target Market Prices, what I  
18 did was go back and re-do the analysis using Monthly  
19 Exchange Rates. And when I did that over the rafts  
20 that are component of the loss or contribute to the  
21 loss, the impact was .16 of 1 percent of the  
22 accumulated premiums. It was an extraordinarily

16:17:57 1 small amount.

2           So, the impact of his criticism of  
3 Quarterly Exchange Rates, in fact, was unfounded,  
4 that in the end the Quarterly Exchange Rates were a  
5 good proxy for Monthly Exchange Rates.

6       Q.   Let's continue to focus on some things with  
7 Mr. Jendro's Report for just a couple of minutes.

8           Mr. Jendro has criticized your Report,  
9 saying that you did not use complete scaling  
10 information. Can you comment to the Tribunal on  
11 that characterization, sir.

12       A.   Yes, I can.

13           There's a component here where the Canadian  
14 market uses a cubic meter scale. The foreign or  
15 export markets use a scribner scale or a thousand  
16 board feet. So, some of our data on the Log Sale  
17 Agreements--target market is in scribner or thousand  
18 board feet--some of it has been converted along the  
19 way and is shown in cubic meters.

20           And where rafts under the actual sale were  
21 process, were part of the logs the Log Export  
22 Regime, they had to be dual-scaled, so we had actual

16:19:37 1 data with respect to a raft that was subject to the  
2 Regime in both cubic meters, as required under the  
3 Regime, and scribner, as required by a customer.

4           What Mr. Jendro said again was that he  
5 believed we had a systemic error where the  
6 conversion rate that we used, which was based on a  
7 long-term average, years of data, of conversions  
8 between metric and scribner that had been  
9 accumulated, we had converted these into then  
10 Canadian prices so we could determine the Canadian  
11 dollar loss in cubic meters, and he thought we had a  
12 systemic error because of these conversion factors  
13 that he determined were too low.

14           In fact, it's a broader problem than that,  
15 that Mr. Jendro believes that sorts don't adequately  
16 reflect criteria of how it then ties to prices of  
17 various rafts. His principal argument is it is a  
18 diameter argument where he thinks all the diameters  
19 are messed up and the rafts actually result in--that  
20 are used for target markets are larger and therefore  
21 they're generating higher prices. What Mr. Jendro  
22 has failed to understand and has been discussed by



16:21:24 1 Mr. Schaaf and Mr. Stutesman and Mr. Kurucz are that  
2 the Merrill & Ring sorts are far more particular,  
3 far more encompassing than are the Canadian standard  
4 sorts, for example.

5           And as I'd indicated before, customers,  
6 based on a sort, are, in fact, prepared to commit to  
7 a price in advance, based on that sort description.  
8 And not having appreciated that, and certainly the  
9 comments written in his Report, I think he's  
10 misunderstood why we didn't have to do a scale. He  
11 thinks every single raft should be dual-scaled and  
12 the comparator should be scaled, and that  
13 information just wasn't available. So, we used  
14 these long-term averages.

15           What I did with his criticism was I took  
16 all of the rafts that had dual-scale data and had  
17 thousand-board-feet prices for the Target Market  
18 Prices, re-did the analysis using then actual  
19 conversions on these actual rafts. And they  
20 accounted for approximately 30 percent of the total  
21 damages of \$4.2 million. So, a significant test.

22           What I found when I re-did the calculations

16:23:04 1 based on the exact conversion rates between scribner  
2 and board feet was that, in fact, the damages on  
3 that 30 percent went up by 3 percent. They didn't  
4 go down. We didn't have systemic error. The  
5 long-term average was a good proxy for doing exact  
6 raft calculations.

7 Q. While we are on this issue of scaling,  
8 Mr. Low, Canada has stated that you made an error by  
9 assuming that metric scaling was not  
10 required--sorry, that--well, yeah, that metric  
11 scaling was not required by the Province of British  
12 Columbia. Do you agree with that?

13 A. I think--

14 Q. Do you want me to repeat the question? I  
15 will do it.

16 A. No. I think I know where you're going, but  
17 I don't think it's stated quite right.

18 Q. All right. Canada says that you made a  
19 mistake because you seemed to have assumed that  
20 there was no requirement to engage in metric scaling  
21 in British Columbia; and, therefore, you have sought  
22 some damages with respect to the costs of dual

16:24:20 1 scaling between scribner and metric for export

2 rafts. Is that any clearer?

3 A. Yes, yes, it is.

4 Q. Okay. So, can you tell me--can you comment

5 for the Tribunal as to whether or not that is an

6 accurate criticism?

7 A. Yes, I can.

8 And I don't agree with Canada's experts in

9 this regard. Dual scaling results because the

10 Regime requires metric scaling. The export

11 customers for these target markets aren't interested

12 in metric. They deal in scribner or thousands of

13 board feet. And, accordingly, for every raft that

14 Merrill & Ring wants to export, they have to incur a

15 cost of scaling in both: one for the Government, one

16 for their customers.

17 The Government's experts have suggested

18 that dual scaling or metric scaling is required for

19 other reasons; and, therefore, this dual scaling is

20 not solely a cost attributable to the Regime, and

21 have made reference to property tax in British

22 Columbia requiring a scaling measure.

16:25:48 1           In fact, the Forest Act in British Columbia  
2 contains a clause where a company, an owner, of  
3 forest properties can apply for an exemption from  
4 metric scaling. That exemption can be given. And  
5 because the Province and, indeed, the Federal  
6 Government is revenue-neutral on that, there isn't a  
7 tax related to that metric measure, they shouldn't  
8 particularly care about the metric measure.

9           So, the provision could be granted. The  
10 property tax, in fact, can be done, since we are  
11 going to scale in board feet, board feet with a  
12 conversion back to metric if that's what they want.  
13 And, accordingly, I still believe that dual scaling  
14 is a cost to Merrill & Ring that's solely a result  
15 of the Regime. And Merrill & Ring or, to my  
16 knowledge, other forestry companies haven't applied  
17 for this exemption because they're required under  
18 the Act to scale, in any event.

19       Q.    You mean under "the Act," you mean the Log  
20 Expert Control Regime?

21       A.    That's correct.

22       Q.    Notice 102, all the other things we have

16:27:18 1 been talking about?

2 A. Right.

3 Q. Okay. I just wanted to be sure we are all  
4 clear.

5 Now, early this afternoon you discussed the  
6 Negative Export Premium. Do you remember that  
7 discussion?

8 A. Yes, I do.

9 Q. In that context, I asked you some questions  
10 with respect to Mr. Bowie's observations of your  
11 Report, and Mr. Jendro's section, and Mr. Jendro  
12 also comments about that. He says that the Negative  
13 Export Premium should be eliminated; that is,  
14 eliminated from your calculation of damages. Can  
15 you comment on Mr. Jendro's comments and give some  
16 context to this for the Tribunal.

17 A. Yes, I can.

18 Mr. Jendro goes through an analysis of the  
19 amount of negative premium that he believes should  
20 be offset against our conclusions, in addition to a  
21 number of other criticisms, many of which I have now  
22 talked about.

16:28:19 1           He quantifies an amount that should be  
2 deducted of approximately \$600,000 of Negative  
3 Premium. His calculation was, in fact, based on an  
4 analysis of quarter time periods, so three-month  
5 time periods during this analysis in the four years  
6 that we have looked at.

7           And the negatives where negatives and  
8 positives occur within that four month by sort, so  
9 within a sort there is both the negative and a  
10 positive, he's accumulated and said those should be  
11 deducted from our conclusion, that that's a systemic  
12 thing of you're going to get positives and negatives  
13 in the market.

14           So, in addition to all of the comments I  
15 made before, that because of the Log Sale Agreement  
16 and the specific value being ascribed to the target  
17 market, I went back and looked at his calculation  
18 and said, "Quarters aren't really relevant. You  
19 should do the analysis on a monthly basis if you're  
20 going to do it," which would then be consistent with  
21 his foreign exchange criticism and other comments.  
22 And if you do this analysis of offsetting the

16:29:44 1 positive export premiums with the Negative Export  
2 Premiums, but looking at it monthly by sort, in  
3 fact, the amount of negative that should be deducted  
4 on that theory drops to \$228,000. And out of a  
5 calculation of some-odd \$12 million of Lost Export  
6 Premium, 228,000 is certainly not hugely significant  
7 if it were to be deducted. I just don't think it's  
8 appropriate to deduct it in any event.

9 Q. Mr. Low, you will be thankful to know this  
10 is my last question about Mr. Jendro's Report, not  
11 my last question.

12 Mr. Jendro quotes a report prepared for the  
13 Government of British Columbia which says that the  
14 value of logs exported to the United States is  
15 higher than the value of logs sold on the domestic,  
16 I guess, B.C. market because of quality variance and  
17 not because of the operation of the Log Export  
18 Control Regime. Mr. Reishus also refers to the same  
19 quotation from that same Report.

20 Do you have any comments?

21 A. Yes, I do.

22 In part, I concur with the comment,

16:31:10 1 if--particularly with all of the information we've  
2 heard over the last two days about what happens in  
3 British Columbia and the nature of the wood product  
4 that is retained--in fact, in some cases where that  
5 product is more suited to British Columbia than it  
6 is to be exported--such that, in our analysis of  
7 actual market and target market, we would refer to  
8 that as Canada/Canada, should be here.

9           If you look at what gets exported and what  
10 gets retained, the lower value log material on  
11 average they use in Canada. From Mr. Rowley's  
12 discussion of the buck versus the middle and the top  
13 part of the tree, the pulp part lower value stays in  
14 Canada. There is a market for it here.

15           So, the comment that the average value  
16 that's being exported is higher than the average  
17 value that's staying in British Columbia is  
18 absolutely reasonable and rational. What we are  
19 trying to come to is not this difference in quality  
20 but taking a raft that has a stated quality and  
21 saying what does that raft fetch in the Canadian  
22 market versus an export market?



16:32:43 1           And, in fact, the same report--in the same  
2 area of the report that that quote came from refers  
3 to actual reasons why an export premium would exist.  
4 And in this case there is at least three of the  
5 reasons that are cited there that I think are  
6 relevant. One is that the difference in  
7 transportation costs can cause a difference in  
8 price. Well, what we have done in our analysis is  
9 take that into account. If you recall, I said we  
10 made a transportation adjustment. If a raft was  
11 sold in Canada, should have been sold in Washington,  
12 we've deducted that extra transportation cost from  
13 the Washington price to get it there.

14           There are two other reasons that come out  
15 of this Report. One is Government intervention, and  
16 in this case we know that there is an export tariff  
17 on lumber. And these mills in Canada are producing  
18 lumber that fetches a world price. So, if the  
19 United States producers are not paying that, the  
20 Canadian producer gets the same price in the world  
21 market but has to pay in this case a 15 percent  
22 duty. Their net revenue is 15 percent lower than an

16:34:18 1 equivalent U.S. mill. The Canadian mills have to  
2 have a return on their investment, have to try to  
3 make money. They're going to try to get that out of  
4 somewhere. They're going to try to get it out of  
5 their log purchases.

6           Secondly, as we've heard in this hearing,  
7 the Canadian mills have become somewhat antiquated  
8 relative to export mills, and certainly the labor  
9 costs in British Columbia are significantly higher  
10 than the labor costs in Washington. And those  
11 factors again contribute to the fact that the  
12 Canadian mills can accord to pay less than can the  
13 export markets.

14           So, the export differential--the export  
15 premium is, in fact, being economically driven,  
16 isn't necessarily being created by the Regime, the  
17 Log Export Regime. But what the Regime does is  
18 cause Merrill & Ring to have an inability to access  
19 that market. It prevents--if you go back to the  
20 slide that we were showing before where it's Canada  
21 actual U.S. target, Merrill & Ring has been  
22 prevented from exporting those logs and realizing

16:35:52 1 that premium. So, it's a case where the Regime has  
2 prevented access to an export market. The Regime  
3 contributes to Lost Export Premium in other ways due  
4 to delays, cut and sort, those things, but there is  
5 a significant component of it that is simply causing  
6 an inability to access the export market.

7 Q. Mr. Low, aren't there any changes or  
8 corrections that you would like to make to your  
9 Report?

10 A. Yes, there is.

11 Q. I understand that you've prepared another  
12 demonstration aid on this. Would you distribute  
13 this to Mr. Low and to the others. We will need to  
14 do it to the other side first. I will put it on the  
15 screen for Mr. Low. Put it on the screen, please.

16 And could you explain what this is. And  
17 I'm going to ask this be marked as Exhibit Number 4,  
18 these.

19 A. Yes, I can explain what this is.

20 The demonstration aid that's up on the  
21 screen, the top half of Damages Summary, Low Report,  
22 Executive Summary, Page 4, is a reference to the

16:37:13 1 first four pages of my Report, which is a summary  
2 letter. And on the fourth page is the top half of  
3 this page and the conclusions that we reached for  
4 each Article: 1102, 1105, 1106 and 1110. These are  
5 the amounts that agreed to the Bowie analysis that  
6 was up on the screen before.

7           In Mr. Bowie's Report, one of his  
8 criticisms was that in coming to the cost  
9 attributable to the Regime with respect to boom  
10 materials and log inventory cost, so we are now  
11 talking about carrying costs of having boom  
12 materials tied up for months around rafts of logs,  
13 and at any point in time the amount of inventory  
14 that has to be carried relative to the longer  
15 holding period for export control-affected rafts  
16 than domestic rafts, we had calculated that against  
17 the entire inventory amounts.

18           Mr. Bowie in his Report correctly pointed  
19 out that the Canadian portion of those inventories  
20 that Canada actual, Canada target market, legitimate  
21 Canadian inventory and boom materials aren't  
22 affected by the Regime, and that we had

16:38:54 1 overcompensated in the damage claim.

2           What I have done on this in the bottom half  
3 is indicate the change to my conclusions based on a  
4 revision to take out the Canadian inventory portion  
5 of holding costs relative to boom materials and  
6 inventory. And the amount is approximately \$103,000  
7 for Article 1102--looks like 103-and-a-half--and  
8 1105 and 1106, and the amount for 1110 is  
9 approximately 18682 now becomes 18555 is \$127,000,  
10 which is a higher amount due to the interest factor  
11 being applied. So, the 18 million is higher than  
12 16. The adjustment relative to these amounts is  
13 higher, so \$127,000 instead of 103.

14           And the bottom half of this page labeled  
15 "Revised" is, indeed, the revised conclusions that  
16 should be taken from my Report.

17       Q. Do these corrections affect your  
18 conclusions generally in your Report, Mr. Low?

19       A. No, they simply affect this one item.

20       Q. Okay. Thank you very much, Mr. Low.

21           Counsel for Canada may have some questions  
22 for you now.

16:40:39 1           PRESIDENT ORREGO VICUÑA: Thank you,

2 Mr. Appleton.

3           Who will conduct the cross-examination?

4           MR. LITTLE: Good afternoon, Mr. President.

5 My name is Scott Little.

6           PRESIDENT ORREGO VICUÑA: Thank you.

7                           CROSS-EXAMINATION

8           BY MR. LITTLE:

9           Q. Good afternoon, Mr. Low.

10          A. Good afternoon.

11          Q. I am going to be asking you some questions  
12 on your damage assessment today, and in particular  
13 the damages claim based on Merrill & Ring's raft  
14 analysis. And when I'm finished, my colleague,  
15 Mr. Watchmaker, will have some questions for you  
16 regarding the damages claim based on the cost of  
17 compliance with the Regime.

18                 So, Mr. Low, you prepared an Expert Witness  
19 Report in these proceedings; correct?

20          A. Yes, I did.

21          Q. All right. And we've heard a lot of new  
22 evidence in your testimony this afternoon. I want

16:42:23 1 to focus on what's in the Report.

2           And I want to, first of all, just confirm  
3 the materials that you based your Report upon, and I  
4 believe that's set out at Page 46 of your Report,  
5 Section 9.

6       A.    Yes, that's correct.

7       Q.    Okay.  Let's briefly go over the approach  
8 to calculation of damages in the case.  You've  
9 provided some testimony on that this afternoon.  
10 Could you please turn to Tab 1 of the Core Bundle of  
11 the documents, please, that you have just been  
12 provided.

13      A.    Yes, I have it.

14      Q.    Can you identify this letter, please.

15      A.    Yes.  This is the first four-page letter  
16 that precedes the detail of my Report.

17      Q.    All right.  And could you turn to Page 3,  
18 please.

19      A.    Yes, I have it.

20      Q.    Okay.  At the bottom of Page 3, you've  
21 provided a chart setting out the categories and the  
22 amounts of damages calculated under NAFTA's

16:43:43 1 Article 1102 and 1105; correct?

2 A. Yes.

3 Q. And the chart is broken out into three  
4 categories; correct?

5 A. Yes, it is.

6 Q. And those are Past Losses, Costs of the  
7 Procedures, and Future Losses; correct?

8 A. Yes.

9 Q. And there is a corresponding amount  
10 pertaining to each category of cost?

11 A. Yes, there is.

12 Q. And as you've highlighted and just amended  
13 slightly, the total amount for these three  
14 categories of loss at the time of this letter, sir,  
15 was \$16,804,068; is that correct?

16 A. That is correct.

17 Q. Okay. And these are the damages being  
18 claimed under Articles 1102 and 1105; correct?

19 A. Yes.

20 Q. So, they're identical?

21 A. They are.

22 Q. Okay. Looking back to Page 3, the Past



16:44:40 1 Losses, the claim for Past Losses is 9.1 million?

2 A. Yes.

3 Q. All right. You said in testimony earlier  
4 today that the Past Loss Period runs from  
5 December 27, 2006, when the claim was filed, until  
6 the end of 2008, until the time that your Report was  
7 prepared; is that correct?

8 A. Yes.

9 Q. Okay. I just want to clarify this because  
10 at the top of Page 4 you do state that Past Losses  
11 relate to the Lost Export Premiums on rafts sold and  
12 logs that could have been sold between November 2003  
13 and December 2008, so I just want to be clear.

14 A. I'm sorry, that was an error on my part  
15 when I spoke this morning.

16 Q. Okay.

17 A. The Past Loss Period runs from three years  
18 before December 2006.

19 Q. Okay. Thank you.

20 Now, looking back on the chart on Page 3,  
21 there is also a claim for the Cost of Procedures;  
22 correct?

16:45:39 1 A. Yes, there is.

2 Q. In the amount of 4.7 million?

3 A. That's correct.

4 Q. All right. And moving back to the top of  
5 Page 4, you say that "Costs of Procedures are for  
6 additional costs incurred, and to be incurred, by  
7 Merrill & Ring to comply with the Procedures."

8 Correct?

9 A. Yes.

10 Q. And that's for the period 2003 to 2016?

11 A. That's also correct.

12 Q. Okay. And then looking back at the chart,  
13 there is a claim for Future Losses in the amount of  
14 2.97 million; correct?

15 A. Yes.

16 Q. And you provide a description for those at  
17 the top of Page 4, as well. The Future Losses  
18 relate to the Lost Export Premiums anticipated to  
19 arise between 2009 and 2016; is that accurate?

20 A. Yes, it is.

21 Q. Okay. So, is it fair to say there is  
22 really two elements, then, of the damages claim?

16:46:42 1 First of all, the claim for Lost Export Premiums,  
2 and second of all the claim for costs to comply with  
3 the Procedures? Is that a fair assessment?

4 A. It could be characterized that way, yes.

5 Q. Okay. Can we turn to Page 7 of your Expert  
6 Report.

7 A. Yes.

8 Q. Okay. Now, starting at Paragraph 1.34, you  
9 explained the basis on which you calculate damages  
10 under each NAFTA Article; correct?

11 A. Yes.

12 Q. And at Paragraph 1.37, we've got under  
13 Article 1102 national treatment. You set out the  
14 reasons for why the Procedures contravene  
15 Article 1102?

16 A. Yes.

17 Q. And I note that the heading for  
18 Paragraph 1.37, for example, you state that Merrill  
19 & Ring is subject to different rules than other  
20 timber companies.

21 A. Yes.

22 Q. Okay. And you provide a list of six

16:47:52 1 elements of the Regime that Merrill & Ring claims  
2 contravene Article 1102--correct?--in  
3 Paragraph 1.37.

4 A. Yes.

5 Q. And then turning the page over to  
6 Paragraph 1.38, here you state that "the losses  
7 related to the breach of Article 1102 include," and  
8 then you go through a list of losses: One, the Lost  
9 Export Premiums.

10 Do you see that?

11 A. Yes.

12 Q. Okay. Secondly, the costs incurred due to  
13 the procedures on federally and provincially  
14 regulated timber; correct?

15 A. Yes.

16 Q. Third, the costs incurred to comply with  
17 the Procedures regarding timber harvested in remote  
18 Coastal areas?

19 A. Yes.

20 Q. And, finally, the fee-in-lieu paid on  
21 export sales of provincially regulated logs; right?

22 A. That's correct.

16:48:49 1 Q. Okay. Now we've got Article 1105, and in  
2 Paragraph 4.41 you set out the reasons why the  
3 Procedures breached this Article; correct?

4 A. That's correct.

5 Q. And these reasons are identical to the ones  
6 provided under Article 1102?

7 A. They are, yes. They're stated the same  
8 way.

9 Q. Okay. And if you look at Paragraph 1.42,  
10 you state that "the losses related to Article 1105  
11 include," and it's the exact same four elements that  
12 were listed under Article 1102; correct?

13 A. That is correct.

14 Q. Okay. And we confirmed that the damages  
15 claim for Article 1102 are identical to those for  
16 Article 1105 breaches; right?

17 A. That's correct.

18 Q. Okay. Let's move on to Article 1106. In  
19 Paragraph 1.45, you set out the reasons for why the  
20 Procedures contravene Article 1106; correct?

21 A. Yes.

22 Q. And these reasons aren't identical to the

16:50:05 1 reasons provided for why the Procedures contravene  
2 Articles 1102 or 1105, are they?

3 A. No, they're not.

4 Q. Okay. One of reasons, for example,  
5 provided for why the Procedures contravene 1102 or  
6 1105 that isn't provided under Article 1106 is the  
7 requirement to be subject to Surplus Testing prior  
8 to being granted an exemption to export?

9 A. That's correct.

10 Q. Would you agree?

11 A. Yes.

12 Q. Okay. But at the bottom of page--that  
13 paragraph, sorry, Paragraph 1.46, you state that "We  
14 have considered the loss related to Article 1106 to  
15 be equal to the loss calculated pursuant to  
16 Article 1105 less the fee-in-lieu of payments that  
17 are not considered attributable to performance  
18 requirements."

19 So, to be clear, the amount claimed under  
20 Article 1106 is basically just the same as the  
21 amount claimed under Article 1102 or 1105 with just  
22 the fee-in-lieu payment backed out of it; is that

16:51:13 1 right?

2 A. That is correct.

3 Q. And that's about \$48,000, I calculated.

4 A. Yes, that's correct.

5 Q. Okay. So, this means that the amount  
6 claimed under Article 1106 for the breach of  
7 prohibited performance requirements includes the  
8 entire claim for Past Losses based on the Lost  
9 Export Premium claim; is that right?

10 A. Yes, that's correct.

11 Q. Okay. And the Article 1106 claim is also  
12 made up of Merrill & Ring's claims for costs of  
13 compliance, as well. For example, you're familiar  
14 with the cost of sales commissions paid to the  
15 affiliated party of Merrill & Ring?

16 A. Yes.

17 Q. Okay. And it's your position that  
18 that's--that's properly included in the quantum of  
19 the Article 1106 claim?

20 A. Yes.

21 Q. Okay. Can you tell me, is it Merrill &  
22 Ring's position that all of the other costs of

16:52:04 1 compliance included in the claims under  
2 Articles 1105 and 1102--I accept the exception of  
3 the fee-in-lieu--are properly included in the claim  
4 under Article 1106?

5 A. Just give me a moment, please.

6 Q. Okay.

7 (Witness reviews document.)

8 A. Yes.

9 Q. That all the other costs of compliance are  
10 properly included in the Article 1106 claim?

11 A. Yes.

12 Q. Okay. All right. We will just complete  
13 the framework.

14 In your witness Report at Paragraph 1.48,  
15 you set out the basis for the expropriation claim,  
16 and again the claim for lost export premiums forms  
17 part of the amount claimed for breach of  
18 Article 1110?

19 A. Yes.

20 Q. And the claim for the breach of  
21 Article 1110 also concludes a claim for all of the  
22 costs of compliance; right?



16:53:32 1 A. That's correct.

2 Q. And you also explained earlier today it  
3 includes an amount for interest calculated from the  
4 date of expropriation?

5 A. Yes.

6 Q. Okay. All right. I want to turn to  
7 Merrill & Ring's calculation of its claim for Lost  
8 Export Premiums.

9 If you could, turn to Page 35, please, of  
10 your Expert Witness Report.

11 A. Yes, I have it.

12 Q. All right. Paragraph 4.65, you state  
13 that--you state your understanding that there is a  
14 general recognition in the B.C. forestry industry  
15 that premiums for exported logs relative to B.C.  
16 domestic prices have and continue to exist for  
17 like-quality logs, and that these premiums exist due  
18 to the Procedures.

19 And you also state here that your view was  
20 confirmed through discussions that you had with  
21 Messrs. Norm Schaaf, Paul Stutesman of Merrill &  
22 Ring, and with Mr. Doug Ruffle; correct?

16:54:52 1 A. Yes, that's correct.

2 Q. So, you have a belief of a general  
3 recognition there exists an export premium, and  
4 you've confirmed this understanding through  
5 conversations with Mr. Schaaf, Mr. Stutesman, and  
6 Mr. Ruffle, and also you mentioned some other people  
7 that you have spoken with this week and people from  
8 your office, I believe, as well; correct?

9 A. That is correct.

10 Q. Okay. And these discussions confirmed your  
11 view that there is premiums for exported logs  
12 relative to B.C. domestic prices; correct?

13 A. Yes.

14 Q. Okay. And that the premiums exist due to  
15 the Procedures?

16 A. As I indicated, the premiums--the lost  
17 premiums, in part, are a direct result of the  
18 Procedures, and the premiums are also attributable  
19 to the Procedures by virtue of prohibiting or not  
20 allowing Merrill & Ring to access the premiums by  
21 forcing them to sell in the Canadian market.

22 Q. Okay. Can you turn to Page 14 of your

16:56:02 1 Report, Mr. Low. And I'm looking--

2 A. I have it.

3 Q. I'm looking at Paragraph 2.19.

4 Now, here you list the reasons why there  
5 are premiums for logs exported from B.C.; right?

6 A. Yes.

7 Q. Okay.

8 A. Well, it's the reasons that the Market  
9 Price is greater or on export than domestic, yes.

10 Q. Okay. And that "greaterness," if I could  
11 create a word, is the Lost Export Premium; correct?

12 A. Yes.

13 Q. Let's look at one of the reasons. You  
14 state in Paragraph C that the Procedures create  
15 ambiguity in the ability to export rafts, thus  
16 precluding Merrill & Ring from entering into  
17 long-term contracts that would command a premium due  
18 to their ability to provide certainty over supply.

19 So, did you make that determination, or  
20 were you told it by Merrill & Ring?

21 A. I had discussions with representatives of  
22 Merrill & Ring with respect to that item and

16:57:26 1 satisfied myself that that was correct.

2 Q. And Paragraph 2.19(g), you state, "The  
3 delays caused by the Procedures can result in damage  
4 to the rafts that cause Merrill & Ring to give  
5 discounts to customers to compensate for sun damage,  
6 water damage, loss or teredo damage."

7 Again, did you make that determination, or  
8 were you told it by Merrill & Ring?

9 A. Again, I had discussions with Merrill &  
10 Ring, with Mr. Ruffle, who was engaged as an  
11 independent expert, and I have some knowledge of  
12 that from other work that I've done that that  
13 happens.

14 Q. Okay. Were you provided with documentary  
15 evidence or anything of discounts arising from loss  
16 or damage to logs that were sitting there for too  
17 long?

18 A. There is evidence of discounts in some of  
19 the Canadian invoices that can be attributed to  
20 quality issues due to damage and other items, yes.

21 Q. Okay. All right. Let's look at the  
22 quantification of Lost Export Premiums.

16:58:52 1           Now, just to get a general understanding of  
2 your approach, you explained it some today but I  
3 want to explore it a little bit further. The claim  
4 for Lost Export Premiums is based on what's called a  
5 "raft analysis"; right?

6       A.    That was the underlying document, yes.

7       Q.    Okay. If you could look at Tab 2, please,  
8 of the Core Bundle, Mr. Low.

9           What I have done is I have created, I put  
10 together--we were provided the raft analysis in a  
11 spreadsheet cut in half. I thought it would be  
12 easier to put those two pages together so that it's  
13 as if we are looking at one spreadsheet. I provided  
14 the two pages that I have put together in the form  
15 that they were provided to us, Mr. Low and  
16 Mr. Appleton, at the back of Tab 2, but it will  
17 probably be easier to look at this larger  
18 legal-sized piece of paper.

19       A.    Yes.

20       Q.    Okay. There is three highlighted rows on  
21 this page, and I want to just look at the first of  
22 the three that begins with the raft number MRR-7-17.

17:00:12 1 Do you see that?

2 A. Yes.

3 Q. Okay. Now, the raft analysis sets out the  
4 actual price at which logs of a given sort which  
5 were subject to the Regime were sold in a given  
6 transaction; correct?

7 A. That's one of the things that it would set  
8 out is the actual transaction amounts, yes.

9 Q. Okay. I am going to take you through it,  
10 so I will cover the other things that maybe you are  
11 wondering about whether I should raise or not.

12 So, for the logs that were subject to the  
13 rematch, we will just call those the "subject logs"  
14 for ease of reference.

15 Okay. Now, the subject logs in this case  
16 are represented here by raft MRR-7-17; correct?

17 A. Those three lines or some other lines as  
18 well, but yes.

19 Q. Yeah. And just to be clear, I'm looking at  
20 the first of the three highlighted lines for what  
21 I'm reviewing with you right now.

22 A. I can see them, yes.

17:01:28 1 Q. Okay. And the price that was paid for the  
2 subject logs under the Regime can be seen under the  
3 column that is entitled "C\$M3," which is cubic  
4 meter; is that right?

5 A. That's a calculated amount. The price that  
6 was paid for the raft is the column to the left of  
7 the one you've referred me to that's just "C\$," so  
8 that's the price.

9 Q. Right, okay.

10 A. The column you referred me to is the  
11 Canadian dollar per cubic meter amount.

12 Q. That's derived from that ultimate price?

13 A. That's correct.

14 Q. Okay. And if we look at the column  
15 entitled "Customer," the customer to which this  
16 particular raft was sold was TimberWest; correct?

17 A. Yeah, that's correct.

18 Q. Okay. And the raft analysis then compares  
19 the price on the domestic sale of subject logs which  
20 I believe you introduced earlier today as a Fair  
21 Market Price. It compares what you call a Fair  
22 Market Price for logs that were, say, exported from

17:02:51 1 the United States to this Subject Log Price;

2 correct?

3 A. I'm sorry, would you restate that?

4 Q. Maybe we could go to your Witness Statement

5 because it's going to make it a little bit easier.

6 If you could turn to--turn to Page 19 of your

7 Witness Statement, sir.

8 A. Yes, I have it.

9 Q. Okay. You've got--at Page 19 there is a

10 paragraph beginning B at the top, and it says "Best

11 Market Price." That's, I believe, what you referred

12 to earlier today as the Fair Market Price, but in

13 your Report you call it the Best Market Price, and

14 you state that "this is the price per cubic meter

15 that Merrill & Ring could have received absent the

16 Procedures. This is based on actual selling prices

17 for logs from U.S. properties achieved by the

18 Merrill & Ring Group in the same month (or quarter

19 for sorts sold less frequently), for the same

20 species and sort."

21 So, that's the price that's compared to

22 your sale price of subject logs; correct?



17:04:09 1 A. That's correct.

2 Q. Okay. And it's the price that Merrill &  
3 Ring contends it could have received absent the  
4 Procedures; correct?

5 A. That's correct.

6 Q. Okay. Now, looking back at the raft  
7 analysis, Mr. Low, the Best Market Price in the raft  
8 analysis is provided under the column "Best Market  
9 ADJ," which I assume stands for "adjusted." Would  
10 you agree with me?

11 A. I'm sorry, you lost me on that one.

12 Q. The Best Market Price to which the price of  
13 the subject logs is compared is included under the  
14 heading "Best Market ADJ"?

15 A. That's correct. That has the  
16 transportation adjustment part of it.

17 Q. Exactly.

18 And that price is \$91.89; correct?

19 A. That's correct.

20 Q. And that's Canadian dollars per cubic meter  
21 price; correct?

22 A. That is correct.

17:05:26 1 Q. Okay. Now, where the price of subject logs  
2 is lower than the comparable Best Market Price, this  
3 represents the Lost Export Premium; right?

4 A. Yes.

5 Q. Okay. And in the line we are looking at,  
6 sir, there is a Lost Export Premium because the Best  
7 Market Price of \$91.89 is greater than the actual  
8 selling price of the subject logs of \$55. Would you  
9 agree with me?

10 A. That's correct.

11 Q. Okay. And this difference can be seen in  
12 the column entitled "Difference Per Meter Cubed";  
13 correct?

14 A. There is an amount per meter cubed, and  
15 there is an amount, yes.

16 Q. Okay. And that's \$36.90 differential, I  
17 believe, in this case; correct?

18 A. Yes.

19 Q. Okay. And that differential is multiplied  
20 by the volume of the actual sale of subject logs to  
21 arrive at the Lost Export Premium; right?

22 A. Yes.

17:06:30 1 Q. Okay. And that can be seen under the  
2 second column called "Damages," which is right  
3 beside the "difference per meter cubed" column;  
4 right?

5 A. Yes.

6 Q. Okay. And just to be clear, that's the  
7 amount of \$15,235 on this particular sale.

8 A. Yes.

9 Q. Okay. Now, in this sale, damages were  
10 based on a domestic sale of subject logs--right?--to  
11 divest TimberWest.

12 A. The actual sale on this raft was to  
13 TimberWest in domestic sale, yes.

14 Q. I'm sorry, that question wasn't very clear.  
15 You've actually clarified it for me.

16 And today that you mention that damages  
17 were also calculated--sorry, that they were  
18 calculated on domestic sales where Merrill & Ring  
19 wasn't permitted to export; right?

20 A. Effectively, if it was a Canadian sale and  
21 the target market was an export market, that's  
22 correct.

17:07:31 1 Q. Okay. But there are instances in which  
2 Merrill & Ring chooses to make a sale domestically.  
3 Would you agree with me on that?

4 A. Yes, there are sorts that are intended to  
5 be domestic sorts.

6 Q. Okay. So, it's not accurate, I think, to  
7 say that Merrill & Ring wasn't permitted to export  
8 on all of these sales in which you've calculated  
9 damages?

10 A. No, that's correct, there are damages  
11 related to rafts that were exported--I talked about  
12 that earlier--that have lesser amounts of damages  
13 due to damage during delay, not being able to sort  
14 properly, suboptimal cuts, so not being able to  
15 enter into contract, those types of issues.

16 Q. All right. I was just referring to your  
17 statement that Merrill & Ring wasn't permitted to  
18 export, and the point I was asking you to confirm  
19 with me was that not in every instance is Merrill &  
20 Ring not permitted to export. There are certainly  
21 instances in which Merrill & Ring chooses to sell  
22 domestically. Would you agree with me on that?

17:08:49 1       A.    I would agree with that, but there's two  
2    circumstances here, and maybe I'm being  
3    anticipatory, but the whole process to this analysis  
4    was that certain sorts are intended for certain  
5    markets.  That is the normal course of events that  
6    in this case I believe these refer would be intended  
7    for an Asia market.  That is typically where that  
8    product would go, and so that was the basis on which  
9    it was done.

10            The--there then can be a couple of reasons  
11    why it was sold domestically.  One is that  
12    a--approval was not given under the surplus testing,  
13    and the other is that these particular rafts would  
14    have fallen into the "been advertised but subject to  
15    blockmail" category where they weren't exported.

16        Q.    Okay.  All right.  Well, we have got  
17    damages being calculated on domestic sales, but the  
18    raft analysis also calculates damages on logs from  
19    British Columbia that were subject to the Regime and  
20    that were sold for export; right?  You've confirmed  
21    that; correct?

22        A.    That is correct.

17:10:23 1 Q. Okay. And it does so on the basis of the  
2 fact that there exists a higher Best Market Price on  
3 an export sale of logs of the same sort from Merrill  
4 & Ring's lands in the United States to Asia, for  
5 example?

6 A. That could be, yes, yep.

7 Q. Okay. The raft analysis basically presumes  
8 that the Log Export Control Regime in B.C. causes  
9 damages and loss on export sales of B.C. logs;  
10 right?

11 A. That's correct.

12 Q. Okay. When parties are negotiating over a  
13 sales of goods, would you agree with me that both  
14 the buyer and seller have different ideas of what  
15 the best price is?

16 A. They certainly could.

17 Q. Well, buyer typically wants to pay a lower  
18 price than what the seller is offering?

19 A. Typically, the seller wants the highest  
20 price and the purchaser wants the lowest price.

21 Q. Okay. So, it's fair to say that given  
22 factors like differences in the quality of goods

17:11:27 1 being sold that it would be unrealistic for a seller  
2 to assume that it can achieve its desired highest  
3 price a hundred percent of the time? Would you  
4 agree with that statement?

5 A. That would depend upon how you are  
6 characterizing the highest price, and in this  
7 case--and I think it's very important in this  
8 analysis to not use the term "highest price." What  
9 we have done is picked the target market. It was  
10 referred to when Merrill & Ring first prepared these  
11 schedules as the "Best Market," and for my purposes  
12 I tried to change that to "target market" because I  
13 think that's a better description of it. And the  
14 price that was selected was not intended to be the  
15 highest price that was ever sold for that product.  
16 It was intended to be the price in that target  
17 market that was fair and attributable to a contract  
18 that Merrill & Ring could sell into.

19 Q. Okay. Could you turn to Tab 3, please, of  
20 the Core Bundle, sir. Keep the raft analysis at  
21 hand, though, because we are going to go back to  
22 that. You can turn over the front page. This is

17:12:59 1 the Witness Statement of Mr. Reishus--his  
2 Supplemental Expert Affidavit, actually--and I'm  
3 looking at Paragraph 13. At the end of the  
4 Paragraph 13, Dr. Reishus states, "Absent unusual  
5 information, it is economically inappropriate for a  
6 seller to assume it would consistently realize an  
7 above-average price in the market, just as it would  
8 be economically inappropriate for a buyer to assume  
9 it consistently could realize a below-average  
10 price."

11           Would you agree with that statement?

12       A.    From an economic point of view, that's a  
13 pretty fair statement.

14       Q.    Okay.

15       A.    From the point of view of the approach that  
16 has been taken here, I think it's inapplicable.

17       Q.    Okay. Now, the raft analysis you mentioned  
18 was prepared by Merrill & Ring and not by yourself;  
19 correct?

20       A.    The raft analysis was prepared initially by  
21 Merrill & Ring, that's correct.

22       Q.    Okay. Can we turn to Page 13 of your



17:14:02 1 Report, sir.

2           In Paragraph 2.16 at the bottom, you state  
3 that "We have verified the data contained in the  
4 raft analysis against Merrill & Ring and Merrill &  
5 Ring Group documents on a test basis and are  
6 satisfied as to its accuracy for the purpose of our  
7 Report."

8           Right?

9         A.    Yes.

10        Q.    Okay. Now, while you verify the data  
11 contained in the raft analysis, you didn't examine  
12 the total population of Log Sale Agreements from  
13 which a Best Market Price for a given sort and in a  
14 given month was drawn, did you?

15        A.    No, we did not.

16        Q.    Okay. And you didn't verify how the size  
17 and quality of the logs chosen for a Best Market  
18 Price compared to the size and quality of logs in  
19 other Log Sale Agreements from which potential Best  
20 Market Prices could have been drawn, did you?

21        A.    Yes, we did.

22        Q.    You--

17:15:08 1       A.    We did that on the basis of the sort  
2    categorization that Merrill & Ring uses that is a  
3    very defined sort, that while there may be  
4    aberrations between one or two sorts over a number  
5    of sorts, they will fall into an acceptable category  
6    that their customers are prepared to commit to pay  
7    for in advance based on the sort.

8       Q.    Based entirely on just the sort--could we  
9    refer to it as a sort code?

10      A.    Sort code, yes.

11      Q.    All right.  Well, let's turn to Page 37,  
12    then, of your Report because you just hit on  
13    something I want to review with you.

14            In Paragraph 5.6, you state:  "Using the  
15    Market Price methodology as set out herein, all  
16    rafts are compared using Merrill & Ring sorts and  
17    grades, and the Market Price is provided from a Log  
18    Sale Agreement, including rafts of the same or  
19    similar species, sort and quality."

20            And then you say, "After discussion with  
21    Mr. Doug Ruffle, a Registered Professional Forester,  
22    and Mr. Norm Schaaf, we believe that the grades and

17:16:27 1 sorts have been adequately matched in this  
2 analysis."

3 Right?

4 A. That's correct.

5 Q. Okay. So, I asked you to keep at hand the  
6 Tab 2, the raft analysis, if we could just look back  
7 at that.

8 So, I take it that what you mean in  
9 Paragraph 5.6 and what you just told me is that the  
10 matching of sort codes for the logs representing the  
11 Best Market Prices and for the subject logs was  
12 sufficient for the exercise carried out in the raft  
13 analysis; correct?

14 A. Sorry, would you--I just need to hear the  
15 question again, please.

16 Q. From what you say in Paragraph 5.6, the  
17 matching of sort codes for the logs representing the  
18 Best Market Prices and for the subject logs was  
19 sufficient for the purposes of the comparative  
20 analysis that you have done in the raft analysis.

21 A. Yes, I believe that to be correct.

22 Q. Okay. So, looking at the lines we were

17:17:31 1 reviewing in the raft analysis, the sort code  
2 representing the Best Market Price of \$91.89  
3 adequately matches up to the sort code representing  
4 the subject log sale price of \$55; correct?

5 A. The sort code you're asking me here is  
6 adequately matched up to what was sold?

7 Q. Well, I'm asking if the sorts represented  
8 by the sale price of the subject logs and the Best  
9 Market Price, I'm asking you to confirm that you are  
10 comfortable that they were adequately matched up for  
11 the purposes of this analysis.

12 A. Yes.

13 Q. I.e., that you were comparing apples to  
14 apples.

15 A. That is my understanding and based on my  
16 test, yes.

17 Q. Okay. But you didn't dig into a sort code  
18 and verify how the size and quality mix of logs  
19 within a sort code may have compared to one another  
20 in this analysis? You based it entirely on the sort  
21 codes, is what I'm saying.

22 A. I based it on the sort codes, and that was

17:18:42 1 the purpose of the discussion with Mr. Schaaf and  
2 Mr. Ruffle, was to obtain an understanding of  
3 whether that was sufficient. And with the testing  
4 that we did and the testing that we have done in  
5 response to these Reports, I still believe that to  
6 be the case.

7 Q. Okay. The raft analysis calculates damages  
8 on many rafts of logs. Would you agree?

9 A. Yes.

10 Q. Okay. Would you agree with me that a large  
11 proportion of the damages claimed in the raft  
12 analysis can be attributed to the fact that many of  
13 the Best Market Prices were for logs of larger size  
14 and higher quality than the subject logs to which  
15 they were compared?

16 A. No.

17 Q. Have you reviewed the Supplemental  
18 Affidavit of Mr. Jendro in its entirety?

19 A. Yes, I have.

20 Q. Okay. Can you turn to Tab 4 of the Core  
21 Bundle, please. That's an excerpt from Mr. Jendro's  
22 Affidavit from Page A-30. And at Paragraph 2.1.4,

17:19:51 1 Mr. Jendro states that--I'm about four lines  
2 down--"The Best Market Prices selected by M&R to  
3 compare with subject cedar CX sort rafts were not  
4 transactions of CX sort cedar logs. Instead, the  
5 prices used by M&R as benchmarks for the subject CX  
6 sort rafts were taken from sales including much  
7 larger sized and more valuable cedar logs,  
8 primarily, if not exclusively, cedar CD sort. This  
9 error accounts for virtually all of the \$408,597 in  
10 price shortfall claimed by Merrill & Ring/Low on the  
11 subject red cedar rafts."

12           Do you consider this conclusion with  
13 respect to the damages calculation on the subject  
14 red cedar rafts to be fair?

15       A.    No.

16       Q.    Okay. Mr. Jendro makes other findings in  
17 his Supplemental Affidavit regarding the comparison  
18 in the raft analysis.

19           Can you turn to Tab 5. At the top of  
20 Tab 5, Mr. Jendro writes, "In choosing its Best  
21 Market Prices for alder, M&R/Low take no account of  
22 particular size and quality mix of each raft of

17:21:21 1 subject alder logs. M&R/Low selected benchmark  
2 prices from among the top prices obtained from the  
3 M&R Group for the best and highest quality of its  
4 alder logs sold to Washington sawmills. M&R/Low  
5 then compared those high-range prices to the actual  
6 prices for subject alder rafts without adjustment  
7 for differences in the size and quality mix of M&R's  
8 B.C.-sourced alder logs. As a consequence, their  
9 analysis alleges price shortfall even for those  
10 alder rafts that were sold on the export market to  
11 hardwood sawmills in Washington State."

12 Do you agree with the statement that M&R  
13 used the best and highest quality of its alder logs  
14 to use its Best Market Prices, Mr. Low?

15 A. No, I don't. I believe that M&R has  
16 consistently used and as verified by me a Log Sale  
17 Agreement with a sort code that is refined enough  
18 and includes enough characteristics that the raft  
19 within that sort code will not be significantly  
20 different than another draft--sorry, another raft  
21 with that sort code.

22 The problem with Mr. Jendro's analysis--and

17:22:52 1 it is throughout his conclusion--all of his  
2 calculations--his sole determinant is the diameter  
3 of a log, the sole thing he compares to over and  
4 over and over again. And Mr. Schaaf gave evidence  
5 and Mr. Stutesman gave evidence that that is not the  
6 sole determinant of value, and yet it is the single  
7 determinant in all of these analyses that has been  
8 done by Mr. Jendro. It's just not appropriate.

9 Q. Okay. Would you agree that it is a  
10 determinant of value, Mr. Low?

11 A. It is a component, but it is only one.  
12 There are many other quality characteristics that go  
13 into these sort codes that M&R uses.

14 Q. When you said it's a component of the  
15 determining value, does that mean that it's a  
16 determinant of value? That's what I asked you.

17 A. It is not the sole determinant that  
18 Mr. Jendro's analyses would lead you to believe. It  
19 is far from the most significant.

20 Q. Okay. But it can have an impact on value,  
21 sir?

22 A. I would not go so far as to say that



17:24:11 1 diameter does not have an impact.

2           Of course. It is a determinant of value, a  
3 component of it.

4       Q. Can you explain why you didn't accept  
5 Mr. Jendro's conclusion with respect to the red  
6 cedar rafts that we just reviewed at Tab 4.

7       A. I would have to go back to all of the  
8 underlying detail. I did at one point look at most,  
9 if not all, of these comparisons and discussed them  
10 with Mr. Schaaf or Mr. Stutesman, and our analysis  
11 was that there were other factors other than the  
12 diameters that would have impacted each of these  
13 diameter analyses that Mr. Jendro has undertaken.

14       Q. So that they would negate the impact of the  
15 diameter analyses that Mr. Jendro undertook?

16       A. Effectively, yes.

17       Q. Okay. But you didn't prepare any revision,  
18 or you didn't address this basically in your  
19 testimony earlier today? No?

20       A. No, I did address it. I indicated that the  
21 primary determinant is the sort code, and the sort  
22 code is refined enough and deals with many

17:26:09 1 characteristics being diameter, length, taper. And  
2 I'm going to get some of the words wrong. The  
3 amount of curvature in the log, the number of knots  
4 in the log, the--so, in other damage issues relative  
5 to a pure tree.

6 And all of those are considered within the  
7 sort codes that are used by Merrill & Ring such that  
8 you cannot solely rely on diameter.

9 Q. So, are all of those factors consistent  
10 within a sort code, Mr. Low?

11 A. They are blended into a sort code such that  
12 over a raft or a series of rafts there is  
13 commonality among them such that they are  
14 comparable.

15 MR. LITTLE: Mr. President, I'm not done,  
16 and this might be an appropriate point for me to  
17 break off today.

18 PRESIDENT ORREGO VICUÑA: Yes, that's  
19 correct, because we have to break now.

20 So, we will meet tomorrow at 9:00; is that  
21 right? And you continue your examination.

22 MR. LITTLE: Okay.

17:27:33 1           PRESIDENT ORREGO VICUÑA: And we go on to  
2 the other experts that are lined up.  
3           Thank you, Mr. Low. Tomorrow at 9:00.  
4 Thank you very much.  
5           MR. LITTLE: Excuse me, Mr. President.  
6           (Tribunal conferring.)  
7           MR. LITTLE: I have one request. We  
8 distributed our Core Bundle which obviously contains  
9 some of our mapping for our cross-examination, and I  
10 think it would be appropriate if the Core Bundles  
11 that were distributed could be returned to Canada  
12 for the purposes of this evening.  
13           PRESIDENT ORREGO VICUÑA: That's correct.  
14 That's right.  
15           MR. LITTLE: Thank you.  
16           PRESIDENT ORREGO VICUÑA: Now, Eloise will  
17 have for you the time. And this is becoming a bit  
18 pressing because you will have to try to fit the  
19 rest of the experts tomorrow and to have just  
20 Professor Howse on Friday morning. Right?  
21           So, Eloise, what's the situation?  
22           SECRETARY OBADIA: We have nine hours and

17:29:50 1 57 minutes for the Claimant, and three hours and 51  
2 minutes for Canada.

3           MR. APPLETON: Mr. President, before we go,  
4 there is one practical problem with respect to the  
5 request that has been made by Mr. Little, which is  
6 that I have made some annotations on the Core  
7 Bundle, so I'm going to ask if the Secretary could  
8 receive them in that way, if we could facilitate  
9 that? Thank you very much.

10           (Whereupon, at 5:31 p.m., the hearing was  
11 adjourned until 9:00 a.m. the following day.)

12

13

14

15

16

17

18

19

20

21

22

## 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