

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

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

HEARING ON JURISDICTION AND THE MERITS

Thursday, May 21, 2009

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

The hearing in the above-entitled matter
 came on, pursuant to notice, at 9:03 a.m. before:

 PROF. FRANCISCO ORREGO VICUÑA, President

 MR. J. WILLIAM ROWLEY, QC, Arbitrator

 PROF. KENNETH W. DAM, Arbitrator

Also Present:

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

Court Reporter:

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

2 (Confidential session.)

3 PRESIDENT ORREGO VICUÑA: Fine, good
4 morning to you all. We are ready to resume with the
5 examination of Mr. Low.

6 ROBERT LOW, INVESTOR'S WITNESS, RESUMED

7 MR. LITTLE: Yes, thank you. Good morning,
8 Mr. President.

9 PRESIDENT ORREGO VICUÑA: Good morning,
10 Mr. Little.

11 MR. LITTLE: Just a couple of preliminary
12 matters. We are just providing a summary of what
13 Canada takes the position is new evidence from
14 yesterday's hearing. And, secondly, there is a new
15 Tab 15 to the Core Bundle of the cross-examination
16 of Mr. Low, and that has been included in the
17 witness's binders and the Tribunal's binders.

18 Mr. Appleton has a copy as well.

19 CONTINUED CROSS-EXAMINATION

20 BY MR. LITTLE:

21 Q. Good morning, Mr. Low.

22 A. Good morning.

09:06:34 1 Q. Mr. Low, yesterday we were discussing the
2 issue of Best Market Prices, and I wanted take just
3 a little bit closer of a look at Best Market Prices
4 in the raft analysis. And, specifically, I would
5 ask you to keep in mind the Best Market Price of
6 \$91.89 that we were looking at in the raft analysis
7 yesterday. So, you can keep the raft analysis at
8 hand, and it will be helpful.

9 A. Yes.

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

12 Do you recognize this document, sir?

13 A. Yes, I do.

14 Q. And what is it?

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

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

21 A. That's correct.

22 Q. So, would you agree that this document sets

09:08:00 1 out the Log Sale Agreements that were used for the
2 Best Market Prices for specific species and sorts in
3 a given quarter over the years 2006 and 2007?

4 A. Yes.

5 Q. Okay. Could you turn, please, to the
6 second page of the document.

7 A. Yes.

8 Q. If you look down 12 lines, there is a
9 highlighted row on the screen.

10 MR. LITTLE: One more matter,
11 Mr. President. I'm assuming that the session, as
12 it's continuing from yesterday is a closed session?

13 SECRETARY OBADIA: Yes.

14 MR. LITTLE: Thank you.

15 BY MR. LITTLE:

16 Q. All right. Looking down then 12 lines on
17 this document, sir, there is a highlighted row
18 commencing with the reference to Log Sale Agreement
19 2040, or 2040, and beside that Okuyama.

20 Do you see that?

21 A. Yes, I do.

22 Q. And this line also notes that it relates

09:09:38 1 quarter four of 2007 for the fir FH sort; correct?

2 A. Yes.

3 Q. And the price provided--well, there's a
4 couple of prices, but the first price is 610 U.S.
5 dollars Scribner; correct?

6 A. Yes, that's correct.

7 Q. And if you take it right over to the last
8 column, the Canadian dollar cubic meter price to
9 which the \$610 converts is \$91.89; correct?

10 A. Yes, that's correct.

11 Q. Okay. So, this line tells us that the best
12 market price for the fir FH sort for Q4 of 2007 was
13 calculated at \$91.89 per cubic meter Canadian;
14 correct?

15 A. Yes.

16 Q. Okay. And it also tells us that this Best
17 Market Price for the FH sort of Q4 of 2007 is from
18 log sale agreement number 2040 with Okuyama?

19 A. Yes, that's correct.

20 Q. Okay. If we look back, just looking back
21 at the line in the raft analysis that we were
22 looking at yesterday, would you agree with me that

09:10:51 1 the line we just looked at in Tab 6 represents the
2 Log Sale Agreement behind the Best Market Price used
3 to calculate the damages in the raft analysis?

4 A. Yes, I would, yes.

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

8 A. Yes, it is.

9 Q. And it's Log Sales Agreement 2040?

10 A. Yes, it is.

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

13 A. Yes, it is.

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

17 A. Yes, that's correct.

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

20 A. Yes, that's correct.

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

09:12:38 1 A. Yes.

2 Q. Okay. Would you agree with me that this is
3 the agreement on which the Best Market Price of
4 91.89 that we looked at in the raft analysis was
5 based?

6 A. I believe that's correct.

7 Q. Okay. And on which damages were
8 calculated?

9 A. Yes.

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

13 A. Yes, it does say that.

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

19 A. Just give me a minute because I'm trying to
20 recall these boom numbers.

21 I think that the boom numbers may not
22 relate to Merrill & Ring, but the source says

09:14:15 1 Canada, so I'll go along that these came from
2 Canada.

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

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

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

09:16:10 1 reference price. So, on--if that was a Canadian
2 boom and it was sourced from Canada, there wouldn't
3 be any damages on it.

4 Q. Okay.

5 A. Which happens.

6 Q. All right. And to be clear, the raft
7 analysis calls this the Best Market Price, not the
8 Fair Market Price. You keep referring to Fair
9 Market Price.

10 A. The raft analysis that was initially
11 created by Merrill & Ring, and as I'd indicated,
12 several years of it preceded when this actual
13 litigation started, used the term best market.
14 Before my involvement that had been provided to
15 Canada, so we maintained that description.

16 And I believe the way it was done and the
17 way the calculations were done, the term target
18 market for a sort is a better terminology, best
19 market, target market; and the prices were intended
20 to be a fair, as I've characterized it, a fair price
21 based on Log Sale Agreement in that target market.

22 Q. Okay. Let's just for clarity go to Page 19

09:17:36 1 of your Report, Mr. Low. Best Market Price?

2 A. Yes, I have it.

3 Q. Paragraph B, we went over this yesterday,
4 but how do you reconcile what you just told me with
5 the definition of Best Market Price in Paragraph B
6 on Page 19, which provides that it's the price per
7 cubic meter that Merrill & Ring could have received
8 on absent the Procedures. It's based on actual
9 selling prices for logs from U.S. properties
10 achieved by the Merrill & Ring Group in the same
11 month or quarter for sorts sorted less frequently
12 for the same species and sort.

13 A. The words in that paragraph, based on these
14 examples of where a Canadian raft was used as the
15 source don't absolutely comply with that
16 terminology, and it was something that I had missed
17 in the writing of the Report.

18 Q. Okay. But you prepared that paragraph?

19 A. I absolutely prepared this Report.

20 Q. Thank you.

21 And you will agree also that one other
22 distinction to be drawn from this paragraph is that

09:19:08 1 it's not Merrill & Ring's logs that we're looking at
2 in the example here with Log Sale Agreement 2040;
3 correct?

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

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

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

09:20:49 1 foreign exchange conversions, which is what was
2 adapted into it, but the balance of the history, the
3 tracking, the dating, prices, customers, locations,
4 all of that was a standing business document, in
5 effect, prior to the litigation commencing. It was
6 adopted from that, obviously maintained up to the
7 end of the December 2008 time period.

8 So, some portions of it were prepared or
9 continued to be prepared subsequent to the
10 commencement of the litigation.

11 Q. Okay. And so effectively it was broken
12 into two. There was an existing raft analysis some
13 time ago, and then when the litigation began it was
14 updated, so to speak, for the purposes of this
15 arbitration?

16 A. It wasn't that it was updated, and it's
17 been noted that there are some changes, apparent
18 changes, between December 2003, '4, '5, and
19 December 2006, '7, and '8. And the reasons for that
20 is that the original person who maintained the
21 document prepared it, kept it up-to-date, retired,
22 and, therefore, there is an element of change in the

09:22:22 1 way it was maintained beyond that.

2 Q. Okay. So it was--more than one person has
3 prepared the raft analysis?

4 A. There was certainly a person up to 2005,
5 and then there is--after the claim started there was
6 somebody different because the first person retired,
7 and it was, once the litigation started, to my
8 understanding, under the review of Norm Schaaf.

9 Q. Okay. So, it was under the review of
10 Mr. Schaaf. Does that mean Mr. Schaaf prepared it?

11 A. I would doubt that Mr. Schaaf entered the
12 data on a daily or whatever basis of maintaining the
13 raft detail, but he certainly had involvement in the
14 selection of the target market issues and best
15 prices in those target markets.

16 Q. Okay. But he doesn't mention this in his
17 Witness Statement, does he?

18 A. No, he didn't--let me think.

19 I don't believe it's in his Witness
20 Statement, but he did give evidence about it while
21 he was in attendance at the hearing.

22 Q. Okay. That was evidence about the raft

09:23:57 1 analysis that Mr. Schaaf gave earlier this week?

2 A. That's my recollection, yes.

3 Q. Okay. Was the raft analysis used

4 for--before the litigation, what was it used for?

5 Marketing?

6 A. It was used, to my understanding, as simply

7 a recordkeeping document of activities out of

8 Merrill & Ring Canada, was maintained on a raft

9 basis, and the data was accumulated so that it was

10 in one spot related to customers, volume,

11 quantities, prices, locations, all of the data that

12 resides there.

13 Q. Okay. And just to confirm, the person that

14 prepared the raft analysis that retired was not here

15 this week?

16 A. No, that person is not here.

17 Q. The columns that state damages in the raft

18 analysis, were those columns there before the

19 litigation commenced?

20 A. No.

21 Q. Okay.

22 A. The columns that were added--basically,

09:25:11 1 this was a historical document in its initial form.
2 It was then amended, as I indicated, to include a
3 determination of the target market or best market,
4 the Target Market Price, the foreign exchange
5 adjustments, the freight adjustment.

6 I mean, those things weren't contemplated
7 in its initial form. It was a business document
8 that has been amended to become a method of
9 calculating the Lost Export Premium in this matter.

10 So, to specifically answer your question,
11 the damages column was obviously added.

12 Q. Okay. Looking back at the line of the raft
13 analysis, Mr. Low, that we were just examining,
14 there's two lines underneath it that are
15 highlighted. Do you see those?

16 A. There are three lines highlighted, yes.

17 Q. Right. We have been looking at the top
18 line that was highlighted, and then below it there's
19 two more; correct?

20 A. Yes, that's correct.

21 Q. All right. Would you agree with me that
22 the Log Sale Agreement that we have just been

09:26:44 1 looking at, number 2040, with Canadian source logs
2 subject to the Regime were also used or--sorry, was
3 also used in calculating damages in these two lines?

4 A. Yes, that's correct. They all fall in the
5 same quarter, which was how this was done at that
6 time, in that time frame of 2007.

7 Q. Okay. Could we look back, Mr. Low, to
8 Tab 6. That's the summary of Best Market Prices for
9 Log Sales Agreements in 2006 and 2007.

10 A. Yes.

11 Q. Now, just a question here: Is the
12 2006-2007 period the dividing point between when the
13 raft analysis was prepared for the purposes of the
14 arbitration? Because Canada didn't receive a
15 similar summary for the previous years of Best
16 Market Prices.

17 A. That's correct. The litigation commenced
18 December 27, 2006. My understanding, the person
19 retired at the end of 2000--wait a minute. Let me
20 get this right. 2005. So, you're correct. There
21 is a change in personnel who maintained the raft
22 schedule from pre-the end of 2005 and then 2006, '7,

09:28:28 1 and '8. And, therefore, the methodology of its
2 maintenance changed at that time still prior to the
3 litigation, but it did change.

4 Q. Okay. Could we look at the port column in
5 the document at Tab 6, please, Mr. Low.

6 A. Yes.

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

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

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

21 A. There are, yes.

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

09:29:54 1 if you look down in Footnote 53, this is from the
2 Supplemental Affidavit of Mr. Jendro. He provides
3 with respect to this document, which is document
4 5619 at Appendix C, that out of the 201 Best Market
5 Prices listed in this document, 101 are for logs
6 harvested in B.C., and the remaining one are for
7 logs harvested in Washington.

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

12 A. If I scan the two pages that are included
13 in Tab 6, I would say it looks like it's not far off
14 50/50, so I would agree.

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

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

20 Q. Okay. So, how do you reconcile the large
21 number of Canadian-based Best Market Prices with
22 your claim earlier that the rafts that were exported

09:31:19 1 from Canada suffered damages due to delay or not
2 being able to sort properly or suboptimal cuts and
3 not being able to enter into long-term contracts?

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

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

09:33:15 1 activity going on, which I think is consistent with
2 the conclusions that are in our Report.

3 Q. Okay, but you didn't explain all of what
4 you've just provided to me now in your Report, did
5 you?

6 A. No, I must admit I did not, and it is a
7 mischaracterization of the description for Best
8 Market Price.

9 Q. Okay. I'm going to suggest to you,
10 Mr. Low, that you first learned about Best Market
11 Prices being based on Canadian sales after the
12 filing of Canada's Rejoinder. Would that be
13 correct?

14 A. No, that absolutely isn't correct.

15 Q. When did you learn?

16 A. I learned about it during our testing
17 process. There is a reference in our Report to the
18 fact that we did a test of the data. That test was
19 based on a statistical sampling of the largest
20 losses on booms and then a randomly determined
21 sample thereafter.

22 And that sample detected that there were

09:34:29 1 some Canadian rafts being used.

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

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

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

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

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

19 A. It's in the testing binder that was largely
20 prepared by people under my supervision, but I
21 reviewed it. I understood what they did. I
22 monitored their activity as the testing was done,

09:35:44 1 and so I'd seen this document at that time, which is
2 before this document was written, before my Report
3 was written.

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

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

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

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

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

09:37:13 1 A. It's not complete and it's not accurate,
2 and it is a descriptive error in the approach that
3 we took.

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

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

20 Q. Okay. Well, my question is: What is your
21 reference point in calculating compensation for the
22 damages done to Merrill & Ring? What's the scenario

09:38:29 1 that you see?

2 A. The scenario that I see is that there are
3 breaches of various articles under NAFTA. Those
4 breaches caused certain things to occur in the way
5 the business of Merrill & Ring was operated, caused
6 Merrill & Ring to not realize Export Premiums that
7 otherwise would have been realizable, and caused
8 them to incur costs that otherwise would not have
9 been incurred.

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

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

19 A. Under the articles, one of the breaches as
20 we characterized it and as counsel has also advised
21 us, the breach would be that there are other parties
22 who, for instance, might obtain a standing green or

09:40:33 1 standing exemption and, therefore, can circumvent
2 some of the impacts of the Notice 102 requirements,
3 or there are other places in Canada where Notice 102
4 doesn't apply; and, therefore, from that cause,
5 there are consequences, and that's an inability to
6 access the export market.

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

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

18 Q. And what do the consequences arise out of?

19 A. The consequence of the administration of
20 Notice 102 and the blocking, ransoming, inability to
21 get a standing exemption all result in Merrill &
22 Ring on some of its rafts not being able to access

09:42:34 1 the export market and, therefore, not obtaining the
2 Export Premium that it would realize had it been
3 able to access that market.

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

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

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

09:44:07 1 A. No, it doesn't contemplate that. There
2 are--there is a significant volume of Merrill & Ring
3 logs that are appropriate to Canadian market and
4 would remain in Canada and stay in Canada, and
5 that's the best target market for them.

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

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

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

19 A. Sorry, would you repeat the question?

20 Q. Would you agree with me that in the raft
21 analysis, the comparable transactions to which the
22 transactions that the subject logs were in are

09:45:46 1 export transactions, sir?

2 A. I'm sorry, there must be something in the
3 way you're asking me the question. Could you try
4 one more time. I apologize.

5 Q. The raft analysis has comparable
6 transactions to which the subject sales are
7 compared. Would you agree with that?

8 A. Where there is a target market sale, yes.

9 Q. Well, there is a target market sale in
10 every line of the raft analysis; correct?

11 A. Okay, yes.

12 Q. Okay. Every one of these target markets is
13 an export market; correct?

14 A. No, it shouldn't be because there is
15 Canadian-Canadian: Canadian actual market, Canadian
16 target market rafts.

17 Q. Would you turn to Page 27 of your Report.

18 A. Yes.

19 Q. Okay. Starting at 4.9, you've got Actual
20 Market: Canada, Target Market: U.S. There is one
21 classification of damages; correct?

22 A. Yes.

09:47:22 1 Q. And turning the page over, you've got
2 Actual Market: Canada, Target Market: Asia; correct?
3 A. Yes.
4 Q. Then you've got Actual Market: Asia, Target
5 Market: Asia; correct?
6 A. Yes.
7 Q. You've got Actual Market: U.S., Target
8 Market: Asia; correct?
9 A. Yes.
10 Q. You've got Actual Market: U.S., Target
11 Market: U.S.; correct?
12 A. Yes.
13 Q. And you've got Actual Target: Asia, Target
14 Market: U.S.; correct?
15 A. Yes.
16 Q. And is that the totality of the
17 permutations in the raft analysis?
18 A. No.
19 Q. Okay. Can you explain.
20 A. There is another category which is
21 Canada-Canada, where there are rafts that are sold
22 in Canada and intended to be sold in Canada that

09:48:21 1 that's the target market. There is that activity in
2 Merrill & Ring.

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

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

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

11 A. Yes.

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

15 A. No. They are a function of, if we can use
16 the analysis, the top third of the tree that is
17 appropriate for pulp, and the best market for pulp
18 logs is the Canadian market, and so as that's
19 produced, it isn't intended for export, that's not
20 the appropriate market, so it would simply
21 use--Merrill & Ring would use the Canadian market
22 the way anybody else would.

09:49:41 1 Q. Okay. So, there are some logs that Merrill
2 & Ring wants to sell to the Canadian market. For
3 all the logs that Merrill & Ring wants to export,
4 does your but-for approach envision that Merrill &
5 Ring is free to export all those logs?

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

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

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

15 Q. You mean in the U.S.?

16 A. No, in Canada.

17 Q. Can you repeat your question--your answer,
18 sorry.

19 A. It contemplates that under various
20 circumstances because there is a lot of reasons here
21 and a lot of rationale, that either they can export
22 or that they can export in a fashion that the sort,

09:51:08 1 cut, and delay--and delay is diminished. Obviously
2 it takes time to cut a tree down and get it to the
3 client, the customer, but the undue delay due to the
4 Procedures would not be there.

5 Q. Let's put it another way where the target
6 market in the raft analysis is the export market,
7 you--or the raft analysis, sorry, assumes that
8 Merrill & Ring can export whatever it wants to that
9 target market in order to calculate damages;
10 correct?

11 A. It assumes that the restrictions that come
12 into play and the consequences of the administration
13 of it are not there, and, therefore, they can
14 incur--realize the Export Premiums.

15 Q. Just one more question on that. Does that
16 response take into account that there still can be
17 log export controls, Mr. Low?

18 A. I expect there will be log export controls,
19 and this is simply a consequence of the
20 administration and the effects of how it is dealt
21 with and how the rule causes the market to react in
22 Canada with the blockmailing, forcing Merrill & Ring

09:53:06 1 to sell logs into the Canadian market that otherwise
2 should have been intended for an export market
3 because of the way the rule works and the ability of
4 a Canadian competitor/customer/mill to enter a
5 block.

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

16 Q. Okay. You're mentioning blackmailing and
17 gaming and ransom. Are you familiar with these
18 practices?

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

21 Q. Who made you familiar with them or how did
22 you become familiar with them?

09:54:48 1 A. I became familiar with them through
2 discussions with Norm Schaaf, Mr. Stutesman.
3 Mr. Kurucz, Doug Ruffle, the forestry consultant who
4 is yet to be heard; partners in my office who deal
5 in the forestry industry in Vancouver, discussions
6 with people, Mr. Ringma at another forestry company.

7 I think that's probably a good summary of
8 the sources of my knowledge of how it works and how
9 it happens.

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

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

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

09:56:52 1 do, so it's--something happens, and so there is a
2 cause and effect, and that's what we are dealing
3 with here. So, but for the cause, we have this
4 effect.

5 I'm not sure I answered your question,
6 though.

7 Q. I guess the question I have is that I don't
8 see that your but-for analysis includes or
9 contemplates that log export controls could still
10 exist. Would you agree with that proposition?

11 A. They exist. These are the consequences of
12 their existence and how they are administered.

13 Q. And in what form do they exist?

14 A. Notice 102 exists, will continue to exist.
15 It's just that because of the preferences given to
16 others, the administration of the system and the
17 resultant blockmailing activities that go on, the
18 company will continue to not earn what it otherwise
19 could.

20 Q. Okay. Let's move on. I just have a few
21 more questions regarding your responses to the
22 questions on cedar and alder rafts which I will try

09:58:48 1 to go through quickly.

2 Now, yesterday you noted that the price
3 selected as the Best Market Price was not intended
4 to be the highest price; correct?

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

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

16 Q. So, the highest transactions were avoided?

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

19 Q. Okay. And you also stated your view that
20 an M&R or Merrill & Ring sort code was refined
21 enough so that rafts of the same sort code are not
22 significantly different from one another; correct?

10:00:11 1 A. Yes.

2 Q. And, therefore, that in comparing the rafts
3 of the same sort code, you're comparing apples to
4 apples; correct?

5 A. That is correct.

6 Q. Okay. Could we go back to Tab 6 that we
7 have been looking at this morning.

8 All right. 21 lines down, I won't ask you
9 to count it, but there is Agreement 258.

10 A. Yes.

11 Q. That's Log Sale Agreement 258.

12 And if you look across the line, it
13 provides that the Best Market Price for the cedar
14 sort, which we talked about yesterday, and in
15 respect of the conclusions of Mr. Jendro which you
16 disagreed, the cedar sort Quarter 2 of the year
17 2007, the price was \$1,500 U.S. Scribner; correct?

18 A. Yes.

19 Q. And that's the Best Market Price on cedar
20 for that quarter in that year; correct?

21 A. That is correct.

22 Q. Okay. Can we turn, please, to Tab 15,

10:01:40 1 Mr. Low. Tab 15 is at the back of your Core Bundle
2 of Documents.

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

4 Yes.

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

7 A. Yes.

8 Q. It's Log Sale Agreement Number 258?

9 A. Yes.

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

12 A. Yes.

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

16 A. Yes.

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

19 A. Yes.

20 Q. And within the red cedar sort under the
21 column sort, you can see there is a spruce heading,
22 and then there is a red cedar heading; correct?

10:03:02 1 A. Yes.

2 Q. And you can see there the Best Market Price
3 of \$1,500 that was noted in the summary of Best
4 Market Prices; correct?

5 A. Yes.

6 Q. And this Best Market Prices for logs of 36
7 to 40-foot lengths; correct?

8 A. Yes.

9 Q. Can you tell me, Mr. Low, if the
10 1,500-dollar price is the low price, a medium price,
11 or the highest price for the cedar logs in the sort
12 in this Log Sale Agreement?

13 A. This particular agreement specified
14 different prices by length rather than an average
15 price over a number of lengths.

16 Q. Okay. Can you tell me, is the 1,500-dollar
17 price the low price, a medium price, or the highest
18 price for the cedar logs in the sort?

19 A. It is the high price on this Log Sale
20 Agreement because it is the longest logs.

21 Q. Okay. It's the highest price?

22 A. Yes, it is the highest price because it is

10:04:14 1 longest logs.

2 Q. Okay. So, you're agreeing with me then
3 also. Because it's for the longest log, it fetches
4 the highest price; correct?

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

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

10 A. Yes.

11 Q. Okay. And these--this length, 36 to
12 40-foot, \$1,500, was the logs that was used for the
13 Best Market Price in Quarter 2 of 2007; correct?

14 A. That's correct.

15 Q. Okay. Let's go back to Tab 6. If you go
16 down three lines on this page in Tab 6, Mr. Low, you
17 can see a reference to Log Sale Agreement Number
18 201.

19 Do you see that?

20 A. Yes, just let me get something to--yes, I
21 have it.

22 Q. And this provides a Best Market Price for

10:05:32 1 alder, the alder AS sort for Q3 of 2006; correct?

2 A. Yes, it does.

3 Q. And the price provided in the price column
4 is \$850 U.S. Scribner; correct?

5 A. Yes.

6 Q. Okay. Are you aware that the raft analysis
7 only uses one sort, the AS sort, to compare all
8 subject logs?

9 A. Yes, I am.

10 Q. Okay. Can we look at Tab 15, and it's the
11 second Log Sales Agreement in Tab 15, Mr. Low. And
12 that's Log Sales Agreement number 201; correct?

13 A. Yes.

14 Q. And that's the agreement that we just
15 looked at in Tab 6; right?

16 A. Yes, it is.

17 Q. And in this agreement we can see a number
18 of alder logs that were sold by Merrill & Ring to
19 Northwest Hardwoods; correct?

20 A. Yes.

21 Q. And we can see the Best Market Price of
22 \$850 U.S. Scribner; right?

10:06:57 1 A. That's correct.

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

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

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

10 A. The way this is written, yes.

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

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

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

21 A. Yes.

22 Q. Okay. Let's go back to Tab 6. If you look

10:08:28 1 down four lines in the page that we were looking at,
2 you can see Log Sale Agreement Number 1933; correct?

3 A. Yes.

4 Q. And it's a sale to Port Angeles Hardwood?

5 A. That's correct.

6 Q. And it provides a Best Market Price for the
7 alder AS sort for Q4 of 2006; right?

8 A. Yes.

9 Q. And the price in this instance is 950 U.S.
10 dollars Scribner; correct?

11 A. Yes.

12 Q. Okay. Can we look at Tab 15, please, and
13 I'm looking particularly at the third Log Sale
14 Agreement in Tab 15. This is Log Sale Agreement
15 number 1933; correct?

16 A. Yes.

17 Q. It's the one that was referred to in the
18 listing of Best Market Prices; right?

19 A. Yes.

20 Q. And looking at this Log Sale Agreement, we
21 can see a number of alder logs that were sold by
22 Merrill & Ring to Port Angeles Hardwoods; correct?

10:09:57 1 A. Yes.

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

4 A. That's correct.

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

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

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

11 A. Yes.

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

14 A. That's correct.

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

19 A. On this particular agreement that, again,
20 is indicated by diameters. It's a larger diameter
21 when split out of the sort, and it is the higher
22 number.

10:10:52 1 Q. It's the highest number; correct?
2 A. It's the highest number.
3 Q. And it relates to the largest logs;
4 correct?
5 A. Yes.
6 Q. Okay. And again, this was the price, \$950,
7 that was used for the AS sort Best Market Price in
8 the raft analysis for this quarter in this year;
9 correct?
10 A. That's correct.
11 Q. Okay. Thank you. Those are my question,
12 Mr. Low.
13 A. I would like to offer an explanation at
14 least on one of these. I can't offer it on all of
15 them.
16 Q. Okay.
17 A. With respect to the first one--
18 Q. The cedar?
19 A. --the Log Sale Agreement 258, which was for
20 cedar, this particular one--and as I indicated, we
21 performed a test of the log--of the raft analysis.
22 The test was done on the basis of the largest losses

10:12:02 1 plus a sample, random sample of the balance of the
2 rafts. And that was done on a statistically valid
3 basis of having a I think it was 95 percent
4 certainty that the data was correct.

5 As we went through that, this particular
6 Log Sale Agreement came up, and the reason I know
7 that is because I have seen it. The other two I
8 would tell you I haven't seen. This particular
9 agreement came up and was flagged as being perhaps
10 an issue. The issue was discussed, and we had
11 determined that the price that should have been
12 picked up in the analysis should have been something
13 in the 13, 1,400-dollar range to be applied to
14 those. The error that resulted was calculated, and
15 all of the errors that were accumulated because the
16 sample that we did in the end sampled 60 percent of
17 the losses by virtue of taking the largest ones in
18 the sample of the balance, and the--while there was
19 an error on this one in our view, the accumulation
20 of the errors that were both positive and negative
21 through the analysis yielded a difference or an
22 error factor that was within the limit of the

10:14:19 1 sampling methodology and which--I'm trying to
2 remember what the numbers were--something like
3 \$150,000 of errors in our calculations yielded
4 something like \$138,000 of errors overall that we
5 tested.

6 And, accordingly, the conclusion from that
7 was that the raft analysis was accurate for the
8 purposes of the loss determination. It doesn't
9 indicate that we looked at every document because we
10 didn't, and we said we didn't, but there is a
11 statistical validity that the raft schedule is
12 accurate within a sufficiently valid statistical
13 limit. There are, in this kind of analysis, always
14 going to be an element of error plus and minus.
15 There's--without going into the other ones that may
16 go the other way.

17 The determination of damages in a case such
18 as this are the best estimate that one can come to.
19 And unless you were there and you tracked every
20 single thing that happened, which you can't do--I
21 have never seen in any case anybody can do--you do
22 the best analysis that's possible and to the highest

10:16:15 1 degree of accuracy possible. And that's what I
2 think happened here.

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

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

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

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

18 (Pause.)

19 PRESIDENT ORREGO VICUÑA: Mr. Watchmaker,
20 please.

21 MR. WATCHMAKER: Thank you, Mr. President.

22 BY MR. WATCHMAKER:

10:25:15 1 Q. Good morning, Mr. Low.

2 A. Good morning.

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

6 A. I have it.

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

11 A. Yes.

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

15 A. That's correct.

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

18 Here you say at the third sentence that
19 each year there is a premium charged by Progressive
20 for rafts that are intended for export as they
21 recognize that additional work is required to
22 fulfill these obligations. We are talking about

10:26:15 1 timber management.

2 A. That's right.

3 Q. "Absent the procedure, Merrill & Ring's
4 logs would only be subject to the lower rate charged
5 by Progressive."

6 Do you see that, sir?

7 A. Yes, I do.

8 Q. And you further say that, "As per Norm
9 Schaaf's Witness Statement dated December 12, 2008,
10 we understand that in the absence of the Procedures,
11 the fee paid to Progressive would be reduced by one
12 dollar per cubic meter for export rafts."

13 Is that right?

14 A. That's correct.

15 Q. And further down the page you say that you
16 applied this one dollar and you applied it for all
17 the years from 2004 to 2016 in your evaluation; is
18 that right?

19 A. That's correct.

20 Q. So, when you wrote your Report, Mr. Low,
21 was it your understanding that the difference
22 between the fee your client pays Progressive for

10:27:01 1 export logs was one dollar per cubic meter higher
2 than what they would otherwise have paid?

3 A. That is my understanding, yes.

4 Q. Okay.

5 A. Or should I say, it was my understanding.

6 Q. And it's your understanding that this was
7 the difference that was due to the Regime?

8 A. That's correct.

9 Q. Okay. Sir, I would like to turn to
10 Mr. Schaaf's testimony on this matter earlier this
11 week.

12 You were present for Mr. Schaaf's
13 testimony, were you not?

14 A. Yes, I was.

15 Q. Okay. Now, in response to a question I
16 posed Mr. Schaaf as to whether this alleged
17 incremental cost was a premium, as you say in your
18 independent Report, he said that it was not. Do you
19 recall that?

20 A. I frankly don't recall term premium, no.

21 Q. Okay. Well, you did think it was a premium
22 when you wrote your Report, though; is that right?

10:27:57 1 A. I think it is an incremental cost due to
2 the Regime.

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

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

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

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

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

15 A. That's correct.

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

18 A. This is an interesting point, actually.

19 When Mr. Schaaf gave his evidence and I
20 listened to it and I spoke to him afterwards, the
21 one dollar in the manner in which they charge
22 actually applies consistently to all rafts,

10:29:19 1 irrespective of whether they are domestic in the end
2 sales or export sales. That's simply the way it
3 gets charged for convenience.

4 In my damage analysis, I took the one
5 dollar and applied it in determining the incremental
6 costs solely to the raft's volume that we believed
7 were damaged or attributable to the Regime, so
8 400-some-odd thousand cubic meters out of 577,000.
9 I may have that numbers wrong. I'd have to look at
10 the report.

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

18 Q. And that explanation, that's not in your
19 Report, is it, sir?

20 A. The explanation of the characterization of
21 it isn't. The dollar is, and that it relates to
22 costs due to the Regime is.

10:30:53 1 Q. And that explanation is not in Mr. Schaaf's
2 written statement, is it, sir?

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

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

13 That's your recollection, sir?

14 A. Yes.

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

20 Do you recall that?

21 A. Yes, I can see that here.

22 Q. And he continued that previous contracts

10:31:54 1 had a slightly larger amount of fee paid for export
2 sales as an incentive to Progressive to help get
3 export sales through.

4 Do you recall that?

5 A. Yes.

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

11 Do you recall that testimony, sir?

12 A. Yes.

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

16 A. That's correct.

17 Q. Okay. Sir, you referred at Paragraph 4.3.6
18 of your Report to the contract with Progressive.

19 Do you see that?

20 A. Yes.

21 Q. I would like to take you to the only
22 contract we were able to find in the materials you

10:32:48 1 rely on. You will find it at Tab 12 of the Core
2 Bundle.

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

5 A. Just give me a moment, please.

6 (Pause.)

7 A. This is one of the contracts.

8 Just give me one moment, please.

9 (Pause.)

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

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

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

19 I will agree I have seen this one. What I
20 was doing was I went to Mr. Bowie's Report because
21 he talks about this; and you're right, he refers
22 tonal one contract, but he had details of other

10:34:51 1 years.

2 Q. Okay. Now, this is a contract between
3 Progressive Timber Sales, Mr. Kurucz, and Merrill &
4 Ring. It's titled, "Management Services Agreement."
5 Could you turn to Page 2 of this agreement, sir.

6 A. Yes.

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

10 A. Yes.

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

13 (Witness reviews document.)

14 A. Yes, I've read it.

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

20 A. No, I don't.

21 Q. Why not?

22 A. If you look at 2(a), and I will read it,

10:36:17 1 "Progressive will assist in the supervision of the
2 contractors working on the lands and in the quality
3 control with respect to the timber harvested from
4 the lands." In my discussions with Mr. Kurucz, the
5 scaling requirements and the log sort requirements
6 under Notice 102 require significantly more effort
7 in monitoring than would be required under--an
8 ability like a standing green where you could cut
9 and sort and ship it as you desired, and because of
10 the different sort codes that are used that you must
11 comply with in order to meet the requirements of
12 Article 102. So, there is time and effort spent
13 there.

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

18 A. The administrative effort that is incurred
19 would be with respect to the Export Permits. There
20 is no doubt about that. But in (e) also with
21 respect to accounting functions, that would relate
22 to inventory requirements and the additional

10:38:23 1 transportation requirements following where product
2 is, and therefore some of that would relate to
3 export to a greater degree than domestic.

4 Q. My apologies. I'm not being clear.

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

9 A. Yes.

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

12 A. No, it would not.

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

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

18 A. Yes.

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

21 A. Yes, I agree.

22 Q. Now, just below the rates the contract says

10:39:21 1 "Export sales will defined as any volume which
2 leaves Canada in log form."

3 Do you see that?

4 A. Yes.

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

9 A. Yes.

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

13 A. They stay.

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

16 A. That's correct.

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

19 A. The ransomed log would not incur that
20 25-cent cost. They would incur all of the costs
21 related to Progressive's monitoring of the export
22 control system, and that speaks to exactly what I

10:40:20 1 said, that the ransomed logs are logs that have
2 entered or been advertised. The incremental volume
3 that I talked about from my analysis compared to
4 Mr. Bowie's analysis relates to the volume of logs
5 that entered the export control system.

6 Q. Right.

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

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

10 A. No, that's correct.

11 Q. Okay.

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

17 And the reason for that, I think, is
18 absolutely consistent with what you're saying.
19 The--Progressive, in the to the degree they could
20 assist in arranging an export sale, was paid an
21 extra 25 cents. It was an incentive for them to
22 assist with selling export.

10:41:43 1 Q. Okay.

2 A. But that is not the cost that we are
3 calculating here. The cost we are calculating is an
4 administrative cost. It's not a sales incentive
5 cost, and they were two different things. They were
6 always intended to be two different things.

7 Q. That explanation is not in your Report, is
8 it, sir?

9 A. It is, actually.

10 Q. Could you please take me to it.

11 A. Sure.

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

19 Q. Okay. Let's turn back to Section 2 of this
20 contract, sir. This is the sum total of work under
21 the contract with Progressive Timber Sales for
22 timber management.

10:43:13 1 Now, you agreed with me that subsection (c)
2 is the only subsection that could exclusively apply
3 to export sales; correct?

4 A. Yes, I do agree with that.

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

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

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

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

20 Q. And neither you nor Mr. Schaaf--

21 A. And whatever else in D would apply.

22 Q. And neither you nor Mr. Schaaf actually

10:44:23 1 explain how to apportion that out, do you, sir?

2 A. I relied on Mr. Schaaf's Witness Statement
3 and his indication that the fee would be reduced by
4 a dollar in coming to my conclusion, but that is the
5 basis for it. It was the administration of the
6 system, not a sales incentive.

7 Q. Could you turn to Tab 13 of the Core
8 Bundle, sir.

9 A. I have it.

10 Q. Did you use this document in preparation of
11 your Report?

12 A. I have certainly seen it.

13 Q. You note the title of the document,
14 "Additional Costs Resulting from the Log Export
15 Restrictions"?

16 A. I'm trying to recall.

17 Q. I would like you to focus on the chart.

18 A. I have certainly seen it.

19 Q. The chart there is titled, "Progressive
20 Timber Sales Contract," and it appears to cover fees
21 from export sales and fees from domestic sales for
22 the period 2003 to October 2006.

10:45:41 1 Sir, I would like to take to you the 2004
2 row under the rate column. You will note the
3 figures are exactly the same as the numbers in the
4 contract we just looked at; isn't that right?

5 A. Yes.

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

8 A. Yes.

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

11 A. Yes.

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

14 A. That's true.

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

18 A. That's also correct.

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

10:46:26 1 is that right?

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

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

13 So, there is far more inherent logic in the
14 dollar being applied to all years as being
15 consistent than the approach that you're trying.
16 The intent of these incentives when they were there
17 was solely a sales incentive, not an administrative
18 incentive.

19 Q. Sir, did you or Mr. Schaaf explain this
20 inherent logic in your independent Report as to how
21 to apportion these costs, in particular in 2006,
22 where the fees are apparently the same to the

10:47:39 1 Regime? Did you explain that, sir?

2 A. We have--I have described exactly in my
3 Report what it refers to and that we are talking
4 about administrative costs, and I relied on
5 Mr. Schaaf's Witness Statement with respect to the
6 dollar.

7 Q. Okay. I would like to discuss with you one
8 more item.

9 You said the other day in direct testimony
10 that you suggested that the Tribunal should use an
11 interest rate if it found interest was warranted for
12 the Investor's Articles 1102, 1105, and 1106 claims,
13 and you suggested that the appropriate interest rate
14 would be 6 percent and that that was a commercially
15 reasonable rate. It's the one that you applied in
16 your Article 1110 analysis; is that right?

17 A. That's correct.

18 Q. Would you go to Paragraph 4.6.4 of your
19 Report, please.

20 You say here that you apply the prevailing
21 Bank of Canada Prime Rate at December 27, 2006; is
22 that right?

10:49:00 1 A. Yes.

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

4 A. Yes, it was.

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

7 A. To today, yes, it has.

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

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

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

17 Q. And I further understand that your client
18 claims it to be able to--claims it be able--it would
19 be able to use its own resources to market such logs
20 directly if it were not for the Log Export Control
21 Regime; is that right?

22 A. That is certainly the description that's in

10:49:49 1 the Report.

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

7 A. Sorry, Paragraph Number?

8 Q. I believe it's 3.2.3.

9 A. Oh, 3.2.3, sorry.

10 Yes.

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

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

21 Q. Well, certainly. It's his Reply Witness
22 Statement at Paragraph 5, if we could bring that to

10:50:54 1 the witness. It should be at--reminded that it
2 should be at Tab 11 of your Core Bundle.

3 A. Thank you.

4 Q. You see the third sentence, sir?

5 A. Yes. You're correct.

6 Q. Okay.

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

18 Q. Now, Mr. Schaaf also said the other day in
19 response to a question from me that there was a
20 contract on the record that explained these services
21 and sums.

22 Sir, I couldn't find a contract on the

10:52:40 1 record. Did you rely on one?

2 A. I don't recall him saying that, and there's
3 always a confusion between Progressive and the U.S.
4 affiliate. I don't believe I have seen a contract.
5 I have seen evidence of the charges and how they're
6 calculated, but I don't believe I have seen a
7 contract.

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

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

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

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

17 Q. Yes, that's right.

18 A. Yes.

19 And it's here again called a marketing fee,
20 which is why that characterization probably got
21 carried through, and part of it is marketing, but
22 it's the portion that's incremental is believed to

10:53:58 1 relate to administrative functions relative to
2 inventory and transportation issues.

3 Q. Okay. Well, Mr. Schaaf did say that there
4 was a contract, and he believed that it was on the
5 record, but what I would like to know, sir, is, did
6 you ask to see a contract?

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

12 Q. Okay.

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

16 PRESIDENT ORREGO VICUÑA: Thank you,
17 Mr. Watchmaker.

18 Mr. Appleton, do you have any redirect
19 questions?

20 MR. APPLETON: That won't be necessary.

21 PRESIDENT ORREGO VICUÑA: Right. Thank
22 you.

10:55:24 1

QUESTIONS FROM THE TRIBUNAL

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

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

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

14 THE WITNESS: Yes.

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

19 Have a look at this document in front of
20 you. It's the Bowie Supplemental Report at Page 17,
21 at Paragraph 49. And if you look at the descriptive
22 wording in the left-hand column, the second line

10:57:23 1 reads: "Alleged Lost Export Premiums, net of costs
2 to export, retrospective past harvest," and it's 4.9
3 million that you have assessed to be the damages
4 there--I'm rounding down under Articles 1102 and
5 1105.

6 THE WITNESS: Yes, sir.

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

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

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

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

22 ARBITRATOR ROWLEY: Yes, but he is not a

10:59:07 1 person who could tell us whether or not Merrill &
2 Ring would have done something had the Regime not
3 been in place. Do you agree with that? He might
4 say that it would have been a good idea that they
5 might have done so, but he's in no position to say
6 that's what they wanted to do or would have done had
7 it not been in place?

8 THE WITNESS: That's I think a fair
9 characterization, so that the reliance then in that
10 regard would go back to the management of Merrill &
11 Ring.

12 ARBITRATOR ROWLEY: And what did the
13 management of Merrill & Ring tell you that they
14 would have done, and when did they tell you that?

15 THE WITNESS: The management of Merrill &
16 Ring told me that they would have done that as
17 we--only since my own involvement in this matter,
18 and it would have been sometime in the couple of
19 months preceding the preparation of my Report as to
20 when that issue came forward as we were trying to
21 assess the but-for scenario and what would have
22 happened in that, and it came up as a concept that

11:00:52 1 was believed to be appropriate that with
2 the--particularly the time periods that some of that
3 is involved in, there was, to my understanding,
4 relatively extensive blocking and blockmailing going
5 on in that the market was--

6 ARBITRATOR ROWLEY: You don't know that?

7 THE WITNESS: Well, this is through my
8 discussions.

9 Because of the activity in the market at
10 the time, it was--if you go back into 2004, '5, '6
11 particularly, the market was very active and lots of
12 demand, and so it was more prevalent then.

13 What Mr. Schaaf has maintained is that they
14 harvested everything they believed they could, and I
15 believe Mr. Stutesman referred to this as well, that
16 when blocking became a significant issue and they
17 were having lots of problems, they would simply push
18 off the harvest and not do it rather than face the
19 consequences, and I think that's what is being
20 thought of here.

21 ARBITRATOR ROWLEY: Do we have that
22 testimony that you just gave in a witness statement

11:02:19 1 from anybody at Merrill & Ring in these proceedings?

2 THE WITNESS: Let me just look at one
3 thing.

4 It is, sir, referred to in Mr. Schaaf's
5 December 12, 2008 Witness Statement that is
6 contained at Tab 11 of the Core Bundle that I was
7 provided with this morning, and is contained in
8 Section 3--I haven't read the whole thing, but at
9 least in Paragraph 6, and I think there is
10 discussion in Paragraph 7 and 8. That section, I
11 think, is attempting to discuss this issue with
12 respect to the retrospective past harvest.

13 ARBITRATOR ROWLEY: So, it says we would
14 have pushed up our harvest?

15 THE WITNESS: Yes.

16 ARBITRATOR ROWLEY: And we heard testimony
17 yesterday from Mrs. Korecky that 98 percent of all
18 logs for which a surplus application was sought was
19 granted. Does that--how does that evidence, if you
20 accept it--and I would ask you to accept it for
21 assumption purposes--how does that sit with your
22 suggestion that some five million extra or dollars'

11:04:46 1 worth of damage might flow from Merrill & Ring's
2 failing to harvest? Because, just so you take what
3 I'm considering that testimony for, it seems to me
4 that if 98 percent of the logs you seek surplus
5 designation for you get, then as a businessperson I
6 might say, well, if I want to make more money, I'll
7 take more harvest because maybe I will have to sell
8 2 percent, keep 2 percent back, but I can get
9 98 percent out.

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

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

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

11:06:22 1 THE WITNESS: Yes, significantly less.
2 If we start at a hundred percent of logs
3 that apply for the Surplus Letter, and let's say
4 it's 98--we will use that, 98 percent receive a
5 Surplus Letter, my recollection of the numbers is
6 that somewhere in the order of 60 or 70 percent
7 actually receive an Export Permit.
8 So, somewhere between receiving the
9 permission to export and what actually gets
10 exported, there is a significant drop.
11 ARBITRATOR ROWLEY: All right. Now, let me
12 ask you a question about that.
13 THE WITNESS: Yes.
14 ARBITRATOR ROWLEY: To me, the most logical
15 explanation of that having regard to all the other
16 testimony we've heard about the value of the
17 international market compared to the Canadian market
18 is that it doesn't make sense not to export if you
19 have the permit unless you have a better offer
20 domestically.
21 THE WITNESS: That--
22 ARBITRATOR ROWLEY: Is that illogical?

11:07:42 1 THE WITNESS: No, it's a logical statement.

2 The issue, though, as I have come to understand it,
3 is the issue of blockmailing and trying to get as
4 much volume out that you can and having to give up
5 volume into the domestic market to do it by virtue
6 of people saying we will block your logs if you
7 don't give us some portion of them.

8 So, let me try to cite an example. A raft
9 comes forward, enters the advertising period, and
10 let's say an offer is put on it. And the offer is
11 either before--well, let's say there is an offer put
12 on it. So, at that point that raft has to go to
13 FTEAC for Federal Lands. Sometime in that two- to
14 four-week time period from the end of the
15 advertising period when the offer must be in and the
16 FTEAC meeting, there are these negotiations that we
17 hear that go on. And with the number of rafts as I
18 understood the evidence to go in front of FTEAC is
19 minimal.

20 So, somewhere between the end of the
21 advertising period and the FTEAC meeting, a
22 significant number of offers are withdrawn, and I

11:09:40 1 think that's this negotiation process that's going
2 on, and at that point the letter, Surplus Letter, is
3 given. So, there's lots of Surplus Letters, but at
4 that point the raft has been diverted to the
5 Canadian market or another raft.

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

14 THE WITNESS: I think it--and again, that
15 should be--absent Notice 102 and the Surplus Test
16 should be what happens. And the only business
17 rationale that I can imagine that comes up with that
18 is simply a trade-off that Merrill & Ring or others
19 that are subject to this, because the numbers seem
20 to be pretty consistent, try to get out the very
21 best that they can and sacrifice some others in
22 order to do that.

11:11:25 1 And it's because of the ability to block
2 because, as you recall, as soon as you block, as
3 soon as you put an offer on a raft, that offer only
4 has to meet the Canadian Market Price. It doesn't
5 have to meet an export price, so as soon as there is
6 an offer, you've lost that difference, whatever it
7 is, because at that point at that point, provided
8 that that offer is within 5 percent or equal or
9 slightly above the Vancouver log market as
10 determined by FTEAC, you're going to get a domestic
11 price, not an export price.

12 ARBITRATOR ROWLEY: Anyway, I will try
13 again.

14 THE WITNESS: I'm sorry.

15 ARBITRATOR ROWLEY: Do you agree with my
16 logic?

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

11:12:42 1 Ring are doing is a trade-off of trying to prevent
2 as much of that as possible.

3 ARBITRATOR ROWLEY: You're explaining
4 Merrill & Ring's conduct, and that's not really what
5 I'm asking about. And I did say assume that they
6 had the logs, they would export them if they had a
7 surplus designation and an ability to get a permit
8 unless they preferred to sell them domestically. I
9 said assume they have the logs.

10 THE WITNESS: Merrill & Ring has the logs,
11 and they have an Export Permit because that happens
12 98 percent have--sorry, they don't have an Export
13 Permit. They have a Surplus Letter. Somewhere in
14 between in that process what I'm suggesting is a
15 dysfunctional thing that goes on that results in
16 because I have to agree with you. If you've got a
17 Surplus Letter, why aren't you exporting? And
18 you're not because you have been blackmailed into
19 not exporting.

20 ARBITRATOR ROWLEY: I'm sorry, you're not
21 listening to me. I said assume you have the logs
22 with which to export.

11:14:00 1 THE WITNESS: Yes.

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

5 THE WITNESS: Right.

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

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

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

20 Let me help you. Are you just assuming
21 that consequences of breach of 1102 are precisely
22 the same as a breach of 1105?

11:15:37 1 THE WITNESS: Yes.

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

7 THE WITNESS: Yes, sir.

8 ARBITRATOR ROWLEY: Make the assumption for
9 the moment because this is just theoretical, a
10 Tribunal asking an expert witness an opinion. Make
11 the assumption that there is no breach of 1102,
12 1106, or 1110. All right?

13 THE WITNESS: Yes, sir.

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

18 THE WITNESS: Yes.

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

11:16:57 1 me on the assumption so far?

2 THE WITNESS: Yes, I believe so.

3 ARBITRATOR ROWLEY: All right. In those
4 circumstance, how do we deal with your damages? Are
5 they still 16.8 million?

6 THE WITNESS: I believe that they are, and
7 the reason for that belief falls into a number of
8 areas.

9 Sorry, let me just gather my thoughts for a
10 second.

11 (Pause.)

12 THE WITNESS: The--

13 ARBITRATOR ROWLEY: Let me give you a
14 thought to think to to either help or hinder you.
15 I'm not intending to hinder you. I'm trying to get
16 your real assessment of this. But on this
17 assumption that I'm putting to you that a Log Export
18 Regime based on surplus is lawful and that there is
19 no other breach. Then if there is a breach of NAFTA
20 in the application of such a regime by Canada or by
21 British Columbia, it suggests that that breach will
22 have to do with the number of the items that have

11:18:28 1 been listed as concerns to Merrill & Ring about the
2 Regime.

3 THE WITNESS: Yes.

4 ARBITRATOR ROWLEY: So--

5 THE WITNESS: I understand. I was trying
6 to make sure that I wasn't going to drop back into
7 1102 arguments in my response, so that was the
8 delay. I wanted to try to get it clear in my mind.

9 ARBITRATOR ROWLEY: Might it help to you
10 have your own Report Page 8 in front of you.

11 THE WITNESS: Yes. Yes.

12 ARBITRATOR ROWLEY: And at 1.40 and
13 following you deal with the international law
14 standard of treatment.

15 THE WITNESS: Yes.

16 ARBITRATOR ROWLEY: All right. So, now
17 help me further.

18 THE WITNESS: Okay. As I looked at this
19 and began to understand the administration of this
20 Notice 102, there is a significant amount of either
21 lack of definitive information, misunderstanding,
22 secrecy, just uncertainty in the process that I

11:19:54 1 think ends up putting you in the same nature of
2 damages and not being able to deal with your
3 business. So, just as some of these,
4 Paragraph 1.41-A, we've at least heard a lot about
5 there being no definition of what remote is, and so
6 that has an impact--

7 ARBITRATOR ROWLEY: Well, let me deal with
8 that because let us say it were found that that, the
9 vagueness of dealing of the definition of
10 "remoteness" was a breach of the international law
11 standard, what's the consequence--what's the loss
12 from that breach? What's the loss that flows from
13 that breach? Because what is required from being in
14 a remote standard is that you raft in a certain way,
15 perhaps an uneconomic way compared to the way you
16 would otherwise wish to raft, but is that not the
17 loss that flows from that complaint?

18 THE WITNESS: That's correct. The loss
19 that would flow specifically from that one would
20 relate to incremental costs probably to a greater
21 degree than Lost Export Premium because you have--

22 ARBITRATOR ROWLEY: Say that again. I

11:21:33 1 didn't understand that.

2 THE WITNESS: Well, if that were the sole
3 breach of--

4 ARBITRATOR ROWLEY: I'm not suggesting it
5 is. We are just discussing it.

6 THE WITNESS: No, but you were looking for
7 a tie-in to damages.

8 ARBITRATOR ROWLEY: Well, I'm looking for
9 proximate causation actually.

10 THE WITNESS: Yes.

11 ARBITRATOR ROWLEY: I'm looking for breach
12 causing a loss. And if there is a breach based on
13 inadequate description of what remoteness is, I want
14 to know your view about what damage that causes.

15 THE WITNESS: Right. And certainly what
16 that causes in the case of remoteness is incremental
17 towing and storage costs as an absolute minimum

18 because that's the consequence of that where instead
19 you could advertise at the location rather than to
20 having to move them and store them.

21 ARBITRATOR ROWLEY: And have you done a
22 calculation of loss that is directly attributable to

11:22:36 1 a number of the listed complaints, in particular the
2 listed complaints you set out at 1.41?

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

7 ARBITRATOR ROWLEY: But what about the
8 requirement to scale all logs metrically? That
9 should be relatively simple.

10 THE WITNESS: That one also is relatively
11 simple, sir.

12 ARBITRATOR ROWLEY: And the requirement to
13 cut and sort timber from their federally regulated
14 properties to normal market practices, that's to
15 boom in accordance with the Vancouver Log Market or
16 the local log market as opposed to boom in
17 accordance with a preferred export log market, is it
18 not?

19 THE WITNESS: Yes, it is.

20 ARBITRATOR ROWLEY: Again, easy to
21 calculate.

22 THE WITNESS: No, that one is where it

11:23:39 1 begins to get much fuzzier because you have not only
2 incremental costs due to that, but you begin to get
3 into the issues of Lost Export Premium, and the
4 ramifications of is the cut and sort significant
5 enough to prevent an export sale or solely to
6 denigrate an export price, and it becomes difficult
7 to determine which piece that is.

8 ARBITRATOR ROWLEY: The difficulty is we
9 have no evidence before us as to when sorting in a
10 certain way makes an export sale impossible or how
11 much it affects price.

12 THE WITNESS: Strictly on sort and cut,
13 that's true. It gets blended into the Lost Export
14 Premium.

15 ARBITRATOR ROWLEY: And the requirement to
16 remit the fee-in-lieu on Provincial rafts that are
17 exported?

18 THE WITNESS: That's very identifiable.
19 It's a single number, and in this case it's
20 relatively small, \$48,000 or something.

21 ARBITRATOR ROWLEY: And that is the cost
22 attributable to the British Columbia Government

11:25:11 1 saying this is the tax you have to pay. Am I right?

2 THE WITNESS: I'm sorry, actually.

3 Oh, on 1105?

4 ARBITRATOR ROWLEY: Yes.

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

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

8 (Pause.)

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

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

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

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

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

11:27:22 1 THE WITNESS: That's correct.

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

5 THE WITNESS: That's correct.

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

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

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

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

21 ARBITRATOR ROWLEY: There may not be a
22 column there, but--

11:29:21 1 THE WITNESS: But I believe that
2 Ms. Korecky has provided detail in that regard of
3 what rafts were denied surplus status. So, I mean,
4 the information's available. I don't--I just don't
5 recall that there is a tick mark on the raft
6 schedule that deals with that.

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

9 THE WITNESS: Yes.

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

15 THE WITNESS: One could certainly--

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

19 THE WITNESS: One could correlate the two
20 lists and determine what damages arise from those
21 particular rafts. That could--that calculation
22 could be done.

11:30:43 1 ARBITRATOR ROWLEY: And would it be
2 difficult for you to do it?

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

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

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

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

16 ARBITRATOR ROWLEY: One of the difficulties
17 I had this morning, intellectual difficulties, was
18 squaring the concept that the best price is
19 generally in the international market with the fact
20 that just over 50 percent of the best prices you
21 used in your damage analysis was based on sales into
22 Canada. Can you help me there.

11:32:11 1 THE WITNESS: I think that's a
2 misunderstanding. It's not that they were based on
3 sales into Canada. They were based on export sales
4 out of Canada, so they were all based on export
5 sales.

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

10 THE WITNESS: Yes.

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

18 THE WITNESS: Yes, sir.

19 ARBITRATOR ROWLEY: And are you able to
20 tell us what the profits of Merrill & Ring were for
21 its Canadian operations for the period in question
22 for your past damages analysis?

11:33:37 1 THE WITNESS: I believe so. Just give me a
2 moment, please.

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

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

14 THE WITNESS: The principal years because
15 there is only a little stub period here in 2003, are
16 2004, '5, '6, '7, and '8, and I see that Mr. Bowie's
17 summary here includes 2004, '5, '6, '7.

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

20 THE WITNESS: Yes, it does.

21 ARBITRATOR ROWLEY: Can you just read those
22 into the record.

11:35:48 1 THE WITNESS: Certainly.
2 The gross profit in 2004 was
3 4--satisfactory if I round a little bit?
4 ARBITRATOR ROWLEY: Yes.
5 THE WITNESS: \$4,100,000.
6 2005, the gross profit was \$6.3 million.
7 2006, the gross profit was \$5 million.
8 2007, the gross profit was 4.4, and they
9 provide a total of 19.9 million for the four years.
10 ARBITRATOR ROWLEY: Thank you.
11 THE WITNESS: There was--may I go back to
12 one of your first questions where you were asking
13 about the retrospective past harvest?
14 ARBITRATOR ROWLEY: Of course, yes. The
15 loss that we have calculated there is not based on
16 an assumption that the entire harvest incurred
17 losses. Our analysis of the actual past indicates
18 that there were losses either of an entire Export
19 Premium or a denigration of premium on about
20 30 percent of the volume of total rafts, and it's
21 that portion that flowed through into the
22 retrospective past harvest, so it's not as if every

11:37:26 1 single tree in the past--in the retrospective
2 portion would have incurred damages. We took the
3 same kind of relationship in calculating the damage.

4 ARBITRATOR ROWLEY: Well, that's the
5 30 percent. Am I right that of 1.3 billion cubic
6 meters--I may have my numbers wrong--300,000 were
7 subject to being sold domestically that we heard
8 earlier. Is that the same sort of proportion? If
9 not--

10 THE WITNESS: I'm not sure of that
11 particular analogy.

12 ARBITRATOR ROWLEY: Tell me why 30 percent.
13 Is it 30 percent because they would be held back for
14 ransom? Is that it?

15 THE WITNESS: There is a combination.
16 They're either were prevented from being exported,
17 or there is a significant portion of volume where
18 the delay issue has caused damage or the sort issue
19 has caused not to be able to realize the quantum.
20 The amount that is actually not exported is smaller.
21 The damage piece in volume is bigger. The
22 denigrated piece.

11:38:57 1 One last comment, the retrospective past
2 harvest has two components to it, one being the
3 Georgia Basin lands and the other being the--the
4 balance of the properties are owned by Merrill &
5 Ring, and Mr. Bowie's Report comments on this. If
6 it were determined that the retrospective past
7 harvest on the owned lands wasn't going to occur in
8 the past, if that was your determination, then all
9 of that flows forward into the future period. It's
10 not like it would disappear. The trees are still
11 intended to be harvested by 2016. The Georgia Basin
12 is a slightly different issue because Merrill & Ring
13 doesn't have the right to harvest there anymore.

14 ARBITRATOR ROWLEY: Thank you.

15 THE WITNESS: Thank you, sir.

16 PRESIDENT ORREGO VICUÑA: Thank you.

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

22 Is it technically different to say, look,

11:40:44 1 I'm going to look at the aggregate and come up with
2 a conclusion of whether as a result of all these
3 elements there has been a loss or not? Does it
4 matter technically, financially from where that loss
5 or difference arises, does it matter whether it's
6 Line 1, 2, 3, 4 or 5, or at the end it comes out to
7 a loss that otherwise would not have been there?
8 How do you see that?

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

22 PRESIDENT ORREGO VICUÑA: But that's

11:42:29 1 precisely the point I'm interested in.

2 If you can identify a line or two, it's
3 perfect, ideal; but to the extent that you cannot do
4 that with all the specifics, is it technically fair
5 to come up at the end and said look, all of this,
6 however, it arises from Line 1 through 5 ends up
7 here, and that is the figure one would have to take
8 into account, how do you see that?

9 Or put it another way, does the final
10 figure only emerge from the individual lines,
11 because to the extent that there are specifics,
12 that's fine, but to the extent that there are areas
13 where it's difficult to establish which is the
14 precise impact, but still, if you look at the end,
15 there is an impact.

16 THE WITNESS: Yes.

17 PRESIDENT ORREGO VICUÑA: Do you follow my
18 question?

19 THE WITNESS: I do. Let me try to cite an
20 example.

21 Some of the breaches have very direct
22 consequences, so you could say if I like this one,

11:43:50 1 then I get this amount. Others, for instance, the
2 requirement, the cut and sort, have cost
3 consequences and they have Lost Export Premium
4 consequences, but I'm not able to identify which
5 rafts suffered because of that. I can't say,
6 well--we just don't have the background information
7 to say, well, the Asian customer didn't take this
8 raft because the logs were too short--I'm just using
9 examples--and therefore it got sold domestically,
10 and therefore the--it became a lost premium. Or
11 they were too short, so they only paid something
12 less. So, I'm not able to really segregate into,
13 you know, is it a complete loss or a portion of a
14 loss from that, for instance, where I went--it's the
15 wrong market versus--the wrong market or it's the
16 right market with damages with denigration of the
17 price, and that's where I had difficulty segregating
18 it out, and then some of them kind of trickled
19 through a lot of the cost and the Lost Export
20 Premium in addition.

21 PRESIDENT ORREGO VICUÑA: Okay. Now one
22 last question. In your discussion with Mr. Little

11:45:40 1 and Mr. Watchmaker, you came to the conclusion that
2 there were a few items that were about what would
3 have been your intention because the way they were
4 presented or so.

5 THE WITNESS: Yes, sir.

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

15 THE WITNESS: The margin of error that you
16 referred to, I think, exists in almost any damage
17 quantification or a valuation analysis, and would
18 vary depending on the circumstances.

19 Let me break down the claim as it's here.

20 With respect to the costs attributable to
21 the Regime, I think that the margin of error there,
22 it is very small. Perhaps--I'm getting ahead of

11:47:32 1 myself. Let's say in a technical sense plus or
2 minus 1 percent. What you have to determine, for
3 instance, since some of their questions were about
4 the nature of, for instance, the Progressive fee and
5 whether the 25 cents is correct or the dollar is
6 correct, once the determination is made that the 25
7 cents is correct or the dollar is correct, then I
8 think the margin of error is de minimis, so that's
9 on the expense side. I think those simply are what
10 they are. They're easier to calculate. They're
11 more definitive.

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

21 PRESIDENT ORREGO VICUÑA: Right. Well, the
22 5 percent sounds very familiar at this stage.

11:49:09 1 THE WITNESS: That's why I was hesitant to
2 talk about it actually, but no, I could say it's
3 less than that, but I'd have no basis for saying
4 that, and that's a test that we did, and that was
5 the confidence level that it had.

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

8 You have some?

9 MR. APPLETON: Yes, I do.

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

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

15 PRESIDENT ORREGO VICUÑA: Just because of
16 the--

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

19 REDIRECT EXAMINATION

20 BY MR. APPLETON:

21 Q. Mr. Low, do you recall Mr. Ringma's
22 evidence regarding the use of low value wood for

11:50:01 1 which he had an export permit to liberate higher
2 value wood? We have an exhibit on that. At the
3 request of Mr. Rowley, we reduced it. I believe
4 it's been given to the Members of the Tribunal, and
5 it's called Exhibit 1.

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

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

11 So, this is Exhibit 1 as everyone can see.

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

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

18 A. Yes, it was, where it's a trade-off issue
19 of if the process allows a forcing into the domestic
20 market where you're not going to have a choice
21 because an offer at the Domestic Market Price
22 absolutely results in a domestic offer, lack of a

11:51:21 1 Surplus Letter or non-Surplus Letter being
2 delivered, then what you would try to do is to trade
3 off the low margin product as against the high
4 margin in order to maximize your return.

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

9 A. That's correct.

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

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

18 THE WITNESS: As to what I said?

19 ARBITRATOR ROWLEY: Yes.

20 THE WITNESS: In answer to your question?

21 MR. APPLETON: You mean what Mr. Ringma
22 said, sir.

11:52:19 1 ARBITRATOR ROWLEY: I thought you were
2 mischaracterizing what the witness said.

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

5 ARBITRATOR ROWLEY: Mr. Low.

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

8 BY MR. APPLETON:

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

11 A. Yes.

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

19 A. The Export Permit isn't the right test
20 here. It's the Surplus Letter. Once you have an
21 Export Permit, I can virtually guarantee you are
22 going to export because nobody can do anything at

11:53:23 1 that point. It's the question of when a Surplus
2 Letter is issued, there is a bunch of things that
3 have happened up to that point. And to the degree
4 that a buyer can suggest to you that we are going to
5 block this one unless you give us this one, and it
6 may have a Surplus Letter on it, but they still want
7 it, and this has lower margin than this one, then
8 the trade-off would be done, and you would get the
9 higher margin one out, and you wouldn't get the low
10 margin one out.

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

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

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

21 PRESIDENT ORREGO VICUÑA: Okay. Thank you
22 very much, Mr. Low, for having attended this long

11:54:46 1 examination.

2 THE WITNESS: You're very welcome, sir.

3 (Witness steps down.)

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

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

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

12 SECRETARY OBADIA: Give me two minutes.

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

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

21 MR. APPLETON: I thought I should give you
22 a good indication, yes.

11:56:10 1 (Brief recess.)

2 DOUGLAS A. RUFFLE, INVESTOR'S WITNESS, CALLED
3 PRESIDENT ORREGO VICUÑA: Good afternoon,
4 Mr. Ruffle. Could you please read your Witness
5 Statement.

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

9 PRESIDENT ORREGO VICUÑA: Thank you.
10 Mr. Appleton will direct the examination
11 now.

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

14 DIRECT EXAMINATION

15 BY MR. APPLETON:

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

20 A. That's correct.

21 Q. Your Report has several appendices that are
22 attached to it. Appendix 6 has your curriculum

12:15:48 1 vitae. I put a slide of it up on the screen and the
2 monitor before you.

3 A. Right.

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

7 A. That's correct.

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

10 A. Yes, I do.

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

14 A. That is correct.

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

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

19 Q. Mr. Ruffle, can you just speak more loudly
20 or closer to the microphone so that we can all get a
21 good recording, and I think they might ask you to
22 speak a little more slowly?

12:17:45 1 stop right now. Are we in open session? No? Okay,
2 good. I just want to confirm that we have to stay
3 in restricted session. I didn't see it in the
4 transcript, so, okay. Fine. So, we are in the
5 right session, in the right place.

6 BY MR. APPLETON:

7 Q. So, Mr. Ruffle, you're here the we are
8 here, the party is going to go on.

9 Could you look now, sir, at Figure 6.5.
10 And could you explain to the Tribunal what this
11 summary means. And I'm going to--do you want a
12 laser pointer, or do you want to describe? What
13 would you like?

14 A. Laser pointer, if you have one.

15 Q. We have all the toys.

16 A. Figure 6.5 is a graphical, graphical
17 representation and summary of the Harvest Plan, and
18 along the horizontal axis is the plan showing the
19 years from 2004 through 2016. And by the year 2016
20 the forest inventory on the Merrill & Ring
21 properties will have been depleted as the inventory
22 is drawn down.

12:18:53 1 The vertical axis shows the volumes, and we
2 measure volumes in cubic meters. And just to give
3 you an idea what a cubic meter is, these columns
4 behind us here, they're approximately about three
5 cubic meters. And if you see a logging truck, in
6 British Columbia a logging truck carries about 35 to
7 45 cubic meters. And in terms of the inventory on
8 the Merrill & Ring property, there is approximately
9 1.4 million cubic meters, and as it grew over time
10 and through the Harvest Plan, the Harvest Plan
11 includes a volume of about 1.5 million cubic meters.

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

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

17 Can you explain to the Tribunal how you
18 went about your analysis for making this Report,
19 sir.

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

12:20:10 1 going to do going forward. I then reviewed that
2 plan, taking a look at what I thought was
3 operationally possible on the properties, made some
4 adjustments taking into account that I felt the
5 growth rates that they were using within the Harvest
6 Plan were slightly too high.

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

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

12 A. Yes, I did. I went out onto the field,
13 took a look at the properties, and that was in a
14 two-stage process. The first was to fly out and do
15 an aerial overview, and that is to get a sense of
16 what's on the property and it's a fly by, and what
17 we're looking at or what I'm looking at is the areas
18 looking at the timber stands, checking to see if
19 they look reasonable based on the information that
20 was provided to me by Merrill & Ring as a visual
21 check, areas, timber species, volumes per hectare,
22 an overall check of what they're providing me, and

12:21:29 1 then we follow that up with a ground inspection, and
2 the purpose of the ground inspection was to get out,
3 get into the timber stands, and confirm the volumes,
4 the stocking levels, species distribution, the age,
5 more or less a smell test to see if what they
6 provided me was reasonable.

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

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

18 I would like to draw your attention to the
19 Table 6.3 that's at the bottom of this projection.
20 This is the past projected harvest volumes from your
21 Report, and you said these are the volumes that
22 Merrill & Ring could have realized if the Export

12:22:46 1 Control Regime was not in effect. I'm going to
2 point it out here so we know what we are looking at.
3 It's the bottom of the slide.

4 Would you please summarize for the Tribunal
5 your results.

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

14 Q. Now, you also prepared an Executive Summary
15 of your Report in the binder that starts at the
16 beginning around Page 1. I'm going to ask you to
17 actually turn to Page 2 of the Report, and you will
18 see in the Executive Summary on this page, Page 2,
19 there are two tables that compare your past harvest
20 projections, both past and future, with Mr. Schaaf's
21 harvest projections both past and future. I have
22 set these out here on the slide for you.

12:23:59 1 The comparison between your Harvest Plan
2 and Mr. Schaaf's Harvest Plan projections are shown
3 in Paragraph 1.4 which I've put on the side, and
4 this shows a difference of some 37,000 cubic meters
5 out of 1.5 million cubic meters of wood. Could you
6 please explain to the Tribunal the significance of
7 this difference.

8 A. Overall, the significance is immaterial.

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

12 A. The Harvest Plan is developed based on the
13 Merrill & Ring November 19, 2008, Harvest Plan. I
14 take that as the assumption that Merrill & Ring
15 knows what they do in their business, and I'm
16 looking at examining that from the harvest
17 perspective whether or not they could operationally
18 take that volume from their woodlands, looking at
19 their inventory to see that it could support those
20 projections, taking a look at their growth to see if
21 that adds to the inventory, looking at the rates of
22 harvest from the perspective of can they accomplish

12:25:24 1 these.

2 Q. Based on your knowledge, how would you
3 describe the quality of Merrill & Ring's timber?

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

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

18 A. Yes, there's two properties that have minor
19 corrections in terms of the operable timber, the
20 timber that would have been harvested, and that's at
21 East Thurlow, which is one of their properties, and
22 it's approximately 3,400 cubic meters should come

12:26:34 1 out of the Harvest Plan, and additional property at
2 Rock Bay where approximately 3,200 cubic meters
3 order come out of the plan, so total I think it's
4 6,600 cubic meters.

5 Q. And do these changes affect your
6 conclusions in any way?

7 A. Not overall. It's a very minor volume.

8 Q. And that's based out of 1.5 million cubic
9 meters?

10 A. That's right.

11 Q. Okay, just to make sure I get it all in the
12 right perspective.

13 A. Okay.

14 Q. Now. Mr. Ruffle, you also reviewed the
15 Report of Mr. Jendro that has been filed in these
16 proceedings. This is set out in Tab 4 of the binder
17 that's before you.

18 A. Yeah, correct.

19 Q. Just get that organized for you. Give you
20 a minute. It's a big binder, sir. Sorry.

21 Do you have any general observations about
22 Mr. Jendro's Report as it relates specifically to

12:27:31 1 your conclusions, Mr. Ruffle?

2 A. Looking at the Jendro Report, it was a very
3 lengthy Report, very thorough Report. In general, I
4 would say I felt that there was some criticism in
5 regards to my Report that I felt that was a little
6 bit effective issues that were either immaterial or
7 irrelevant, and giving you an example of it,

8 Mr. Jendro prepared his Harvest Plan, compared it to
9 my Harvest Plan, and calculated the differences, and
10 he cited in one case--pardon me. In the case of six
11 properties of the nine properties held by Merrill &
12 Ring that Merrill & Ring and Ruffle inventory
13 errors, excessive harvest rates, and other factors
14 were significant. But if I look in the Report of
15 his, the differences only added up to about 10,000
16 cubic meters on a total harvest plan of about
17 1.5 million. However, there are significant
18 differences in regards to other properties. And
19 those differences relate to the Georgia Bay (sic.)
20 Holdings properties where Merrill & Ring has the
21 harvesting rights. Mr. Jendro deducted
22 approximately 150,000 cubic meters out of my harvest

12:29:06 1 plan.

2 There was also issues regarding the
3 properties at Waiatt Bay and Unwin Lake. Mr. Jendro
4 deducted approximately 25,000 cubic meters at Waiatt
5 Bay because he looked back at a 2005 Report that
6 Merrill & Ring had done, and at that time Merrill &
7 Ring thought they could sell the Waiatt Bay property
8 to the Provincial Government with
9 approximate--having to retain, though, 25 percent of
10 the timber on the property because the property was
11 going to be included in a park.

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

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

12:30:24 1 sits in the middle of a park, and there is no road
2 access to it, so the only way to remove the timber
3 is by helicopter.

4 And Mr. Jendro felt the distance was
5 somewhere--the flying distance was 2.9 to three
6 kilometers. I measured 2.3 to 2.4. His longer
7 distance, I believe, is a result of flying to too
8 far a distance. He overflies the property where I
9 believe the logs could be landed.

10 There is also an issue in regards to the
11 harvest rates at Theodosia. It's not a volume
12 deduction. I think it's important to consider that
13 Mr. Jendro believes the harvest rates at Theodosia
14 would be much lower, citing the concerns that
15 Merrill & Ring had back in 2005 regarding issues
16 related to public perceptions regarding harvesting
17 at rapid rate, First Nations issues, and possible
18 Government regulatory problems.

19 My feeling from the site visit was that
20 these issues were not there, that Merrill & Ring
21 really does do a good forestry job. They understand
22 what's involved. They take environmental protection

12:31:51 1 seriously. They provide riparian areas to protect
2 fish habitat. Their Harvest Plan is over a 13-year
3 period at Theodosia. And I just get a sense that
4 Merrill & Ring people realize what's involved there.
5 I think they can deal with the First Nations issues
6 by offering employment to them.

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

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

20 A. That's correct.

21 Q. Now, just coming back to the answer that
22 you just gave, I just want to clarify the transcript

12:33:14 1 on two points.

2 The first is you referred to a company
3 called Georgia Bay Holdings. Did you possibly mean
4 Georgia Basins?

5 A. Yes, Georgia Basins.

6 Q. And you said that the period of the harvest
7 would be 13 years. Was that what you intended to
8 say is 13 years? Because my understanding of your
9 Report was that it was 16 years. I just want to
10 make sure that--I might be wrong. I just want--

11 A. I'll check.

12 Q. In any event, it's fair to say--

13 A. 13 to 16 years, yeah.

14 Q. All right. It's a long time?

15 A. Yes.

16 Q. Or at least in my perspective. All right.

17 Now, Mr. Ruffle, you said in your Report at
18 Page 5 that Merrill & Ring was a price taker.

19 What do you say about Mr. Jendro's
20 suggestion that Merrill & Ring is a price taker--I'm
21 sorry, price setter. Mr. Jendro said they are price
22 setter. You say they're a price taker. What do you

12:34:29 1 have to say about Mr. Jendro's suggestion?

2 A. No, I don't believe Merrill & Ring has the
3 market volume, the presence, the power to either
4 affect their prices or change the Market Prices of
5 other participants in the market. They're a very
6 small company, and these harvest volumes are very
7 small, given the size of the log markets in British
8 Columbia and the Pacific Rim.

9 I think other day Norm Schaaf was here and
10 looking up at the map of British Columbia, and he
11 mentioned that their properties wouldn't even show
12 up. And in terms of a participant in the log
13 market, they're very small.

14 Q. Now, Mr. Jendro suggests that the inventory
15 adjustment for Charles Bay calls into question the
16 inventory numbers for all of the Merrill & Ring
17 lands. What do you have to say about that, sir?

18 A. No, I would disagree with that. That was a
19 onetime inventory adjustment that Norm Schaaf
20 explained the other day, and it has no effect on the
21 Harvest Plan.

22 Q. Mr. Ruffle, I would now ask you to please

12:35:38 1 refer again to your own Report, and turn
2 specifically to Page 9. I would like to look at
3 Paragraph 4.6.4. You see that we have it on up on
4 the screen. I'm going to go to the last sentence of
5 the paragraph at the top of Page 9 where you say
6 that, "The logs harvested in the Wet Belt in terms
7 of species and size are very similar and could be
8 interchanged with those produced by Merrill & Ring
9 and other producers of second-growth logs on the
10 Coast."

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

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

17 And there is a distinct difference between
18 the Coast of B.C. and the Interior of B.C. in
19 general. However, there is a location in the
20 Interior B.C. called the Wet Belt or the Interior
21 rain forest, and the tree species in that Interior
22 Wet Belt, include western red cedar, western

12:36:56 1 hemlock, and Douglas-fir, and the logs produced from
2 these species would be the same as the logs produced
3 from Merrill & Ring.

4 Q. Now, could I ask you to look down the page
5 at Paragraph 4.6.6 of your Report. It's also here
6 on Page 9. The last sentence in the third paragraph
7 which begins with "This is because," and I'm going
8 to read it. "This is because the log export
9 regulations create a wall across the border that
10 prohibits the north to south flow of logs. These
11 regulations apply across all of British Columbia,
12 affecting exports from both the Interior and Coast.
13 Occasionally, minor volumes of logs have moved north
14 from the U.S. Coast to B.C. Coastal mills (mostly
15 pulp logs for pulpmills), but the reason why most
16 logs would flow from the north to the south is
17 because U.S. sawmills pay higher prices for logs
18 than B.C. mills. The log export regulations thereby
19 benefit sawmills and other log consumers in British
20 Columbia by limiting cross-border competition. Log
21 prices in B.C. are lower than they would otherwise
22 be, creating a loss for B.C. log producers."

12:38:25 1 Would you please explain to the Tribunal
2 the significance of that statement, Mr. Ruffle.

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

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

15 PRESIDENT ORREGO VICUÑA: Thank you.

16 Who is going to cross-examine?

17 MS. TABET: Mr. Watchmaker will.

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

21 MR. WATCHMAKER: I'm hopeful that I could
22 finish cross-examination by 1:00.

12:39:39 1 PRESIDENT ORREGO VICUÑA: Okay. Thank you.

2 CROSS-EXAMINATION

3 BY MR. WATCHMAKER:

4 Q. Good afternoon, Mr. Ruffle.

5 A. Good afternoon.

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

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

12 A. That's correct.

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

18 A. That's correct.

19 Q. Now, Mr. Ruffle, I see at Paragraph 3.1 of
20 your statement that you say that Mr. Jendro and
21 Mason, Bruce & Gerard both state that M&R is a price
22 taker in the export market. You go on to say that,

12:40:59 1 "Both experts have independently concluded that log
2 export sales from Merrill & Ring cannot have a
3 material effect on the price of logs," and then you
4 adopt their conclusions.

5 Is that right?

6 A. That's correct.

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

10 A. No, I don't.

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

21 (Witness reviews document.)

22 A. I would have to go through his Report again

12:42:39 1 because I got the general feeling from it that
2 Merrill & Ring's production was so small that it
3 didn't have an effect on the Market Price for logs.

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

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

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

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

22 A. Sorry, I must have the wrong page.

12:44:15 1 Q. It's Paragraph 7.1.5.

2 A. Oh, sorry. Wrong page.

3 Yes, that would be fairly accurate.

4 Q. So, just to repeat my question, is that a

5 reasonable definition of a price taker?

6 A. That would be a reasonable definition.

7 Q. Okay. Is the market in which Merrill &

8 Ring operates perfectly competitive, sir?

9 A. Yes, it is.

10 Q. It's perfectly competitive?

11 A. I would think it is.

12 Q. Could you please explain how.

13 A. There is quite a few buyers and sellers

14 that would fall into this definition. It's a large

15 number of buyers and sellers, none of which are

16 large relative to the total output.

17 Q. Okay. Well, Mr. Webster, in "Managerial

18 Economics," as Mr. Jendro goes on a little further,

19 cites some conditions of a perfect market. They

20 include the presence of a homogeneous or

21 commodity-type product, purchase decisions are based

22 entirely on selling price, and that market entry and

12:45:47 1 exist is easy. So let's take them one by one, sir.

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

4 A. No, logs wouldn't be homogeneous.

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

8 A. Yes, they are a differentiated product.

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

12 A. They consider other factors, yes.

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

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

19 Q. What about ease of entry and exit,
20 Mr. Ruffle? It seems to me that there are
21 considerable investments that need to be made to
22 enter the market. You did the nature of the good,

12:46:47 1 isn't there? You can't really grow trees overnight,
2 can you, sir?

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

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

22 And I mean the log market.

12:48:05 1 Q. Nevertheless, sir, you did agree that logs
2 are not a homogeneous commodity-type product;
3 correct?

4 A. Yes.

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

7 A. No, that's right.

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

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

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

17 A. No, no.

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

22 A. I think given the small volumes of timber

12:49:00 1 that Merrill & Ring have, they could find a home for
2 that wood, yes.

3 Q. Okay. Now, I would like to discuss with
4 you briefly your conclusions on what you call
5 interregional log flows.

6 Now, as I understand it, it's your general
7 opinion that the timber grown on the B.C. Coast and
8 the B.C. Interior is different; is that right?

9 A. That's correct.

10 Q. The question was it's general opinion that
11 the timber grown on the B.C. Coast and the B.C.
12 Interior are different?

13 A. General opinion, looking at the Coast in
14 general and the Interior in general, yes.

15 Q. And that again in general the B.C. Interior
16 mills do not normally compete with B.C. Coastal
17 mills because the regions "produce lumber from
18 different species"?

19 A. That's correct.

20 Q. For different lumber markets; correct?

21 A. That's right.

22 Q. And I take from this, then, again generally

12:49:50 1 the mills in the Interior and the mills on the Coast
2 are built to consume different types of logs; is
3 that right?

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

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

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

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

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

19 Q. Right due to proximity of mills?

20 A. That's right. The Coast industry benefits
21 from a very low cost transportation system using
22 water, such as barge and rafting.

12:50:51 1 Q. Okay. And in the normal course of a
2 Coastal logging company, you would have to absorb
3 the costs of water transportation plus more
4 expensive Inland truck or rail transportation if the
5 Coastal producer was to trying to sell into the
6 Interior; is that right?

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

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

11 A. Go ahead.

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

19 Is that right?

20 A. That is correct.

21 Q. And yet also in your discussion with
22 Mr. Appleton, it's your contention that the Interior

12:52:00 1 Wet Belt is an exception to this general rule; is
2 that right?

3 A. That is correct.

4 Q. And in particular to Merrill & Ring's
5 properties have similar timber to the Interior Wet
6 Belt?

7 A. They do.

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

12 A. That is correct.

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

19 A. That is correct.

20 Q. And particularly this would certainly be
21 the case for the type of Douglas-fir and hemlock
22 that Merrill & Ring produces?

12:52:54 1 A. That is correct, yeah.

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

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

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

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

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

20 A. No, I didn't.

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

12:53:47 1 lower timber supplies throughout--they'll be
2 significantly lower timber supplies throughout the
3 Interior; is that right?

4 A. That's correct.

5 Q. But if I understand, the mountain pine
6 beetle, it would only affect pine trees; is that
7 right?

8 A. And pine trees are a substantial inventory
9 within the Interior industry.

10 Q. And the Interior Wet Belt, though, there
11 isn't much pine there, is there?

12 A. No, there is a component of pine in the
13 Interior Wet Belt.

14 Q. Do you know what proportion, sir?

15 A. I'm going to--approximately 40 percent.

16 Q. Okay. You mentioned in questions from
17 Mr. Appleton that the difference between your
18 Harvest Plan and Mr. Schaaf's Harvest Plan that was
19 given to you was immaterial?

20 A. That is correct, yeah.

21 Q. Okay. And you also said that you took this
22 plan as your client's assumption that they know what

12:54:41 1 they do in their business; is that right?

2 A. That is correct, yeah.

3 Q. Okay. Now, there was also some discussion
4 of the retrospective harvest, I believe. And by my
5 count, the retrospective harvest makes up some
6 426,000 cubic meters of your Harvest Plan?

7 A. That's right.

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

11 A. I will just have to check.

12 That sounds about right.

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

15 A. That's right. It's quite a substantial
16 increase in terms of Merrill & Ring. However, in
17 the overall picture of the Coastal industry, it's
18 not a large figure. And what I was looking at was
19 whether or not they could operationally increase the
20 cut, their volumes, which to Merrill & Ring is a
21 significant amount. However, they have the ability
22 to do that.

12:56:05 1 Q. Okay. Now, you did say that--in fact,
2 Mr. Appleton said that the Harvest Plan gave you was
3 prepared for this litigation; is that correct?

4 A. That's correct.

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

8 A. No, I did not.

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

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

15 Q. So, it's based on Merrill & Ring's
16 assumptions?

17 A. It's based on Merrill & Ring's assumptions,
18 with my observations in terms of what could be
19 operationally possible and adjustments made--and
20 adjustments made because of my feelings on terms of
21 the operable inventory and the timber growth
22 factors.

12:57:10 1 Q. Okay. Thank you, Mr. Ruffle.

2 MR. WATCHMAKER: Mr. President, those are
3 my questions. Thank you.

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

6 Mr. Appleton, no redirect?

7 MR. APPLETON: I have nothing further.

8 ARBITRATOR DAM: I have one question.

9 QUESTIONS FROM THE TRIBUNAL

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

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

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

20 THE WITNESS: No. Well, in terms of the
21 logs, yes. They pay a higher price for logs in the
22 U.S.

12:58:07 1 ARBITRATOR DAM: I'm just trying to get why
2 that is so. Is that in the nature of consuming
3 industry?

4 THE WITNESS: Well, the U.S. sawmilling is
5 at a competitive advantage to the Canadian one,
6 particularly on the coast of B.C. They have lower
7 labor costs. They don't have the 15 percent lumber
8 tariff. They're closer to their end markets, they
9 have lower transportation costs, and I think most
10 importantly is that they've retooled their sawmills.
11 They went through a significant timber supply
12 shortage in the early 1990s when the Spotted Owl
13 environmental restrictions on Federal harvests came
14 in, and it was a substantial reduction in timber
15 supply primarily from old growth forests, and many
16 mills were shut down in the U.S. Pacific Northwest.

17 Since that time, second-growth forests have
18 come on stream, and the industry rapidly developed
19 down there to build super mills, very efficient
20 sawmills, particularly along Puget Sound. They had
21 water access, and they had water access also to
22 Canadian logs. So, if you manage the B.C. Coast, I

12:59:25 1 mean, the logs can sort of keep coming down, and if
2 it wasn't for the 49th parallel, they would just
3 keep going, and those mills were quite a competitive
4 advantage compared to our mills up here. On the
5 Coast of B.C., I can't recall any mill being
6 retooled or rebuilt to the extent they have done
7 down in the U.S. In fact, the B.C. Coast is
8 almost--you almost hate to say it, but a basket case
9 in terms of milling technology.

10 ARBITRATOR DAM: Thank you very much.

11 That's very interesting.

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

14 (Witness steps down.)

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

18 (Discussion off the record.)

19 PRESIDENT ORREGO VICUÑA: Okay. Thank you.

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

22

14:24:51 1 don't have any problem, then we could leave it
2 public. Is that all right?

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

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

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

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

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

14:25:45 1 or substance.

2 MR. APPLETON: We will see how it goes.

3 PRESIDENT ORREGO VICUÑA: Okay. Thank you.

4 (End of confidential session.)

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OPEN SESSION

2

DIRECT EXAMINATION

3

BY MR. LITTLE:

4

Q. Again, good afternoon, Dr. Reishus.

5

A. Good afternoon.

6

Q. Dr. Reishus, could you briefly describe

7

your background for the Tribunal.

8

A. Sure. I have a Ph.D. in economics from

9

Harvard University.

10

Since 1990, I have been a consultant, work

11

specializing in the operation and organization of

12

markets typically in the context of some government

13

policy intervention in a number of different

14

industries. In practice, this consists of market

15

analysis, market design, and valuation.

16

Q. And have you ever worked on the economics

17

of log or lumber markets before this proceeding,

18

Dr. Reishus?

19

A. Yes, quite a lot. I started working on the

20

economics of B.C. log and lumber markets back in

21

1992, and since then I have spent thousands of hours

22

studying log and lumber markets in B.C., North

14:26:46 1 America, and the Pacific Rim.

2 I've submitted testimony in the
3 long-running softwood lumber dispute between United
4 States and Canada on behalf of the Governments of
5 Canada, British Columbia, and on behalf of private
6 timber interests and processing interests in British
7 Columbia.

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

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

13 Q. Thanks for the overview.

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

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

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

14:27:50 1 A. The raft analysis, as I understand it, is
2 their attempt to determine the price and premium
3 that would be received for their B.C. logs absent a
4 log, an economically relevant log export controls on
5 Merrill & Ring. The way they do this is by
6 comparing actual sales transaction prices on actual
7 rafts sold in the past, which have been referred to
8 as "subject rafts," to purportedly comparable prices
9 in transactions that are not subject to log export
10 controls.

11 It's fundamentally an attempt to value the
12 subject rafts through a use of comparable
13 transactions.

14 Q. And can you please summarize--

15 MR. APPLETON: I just want to make sure
16 that my friend knows that the minute we get into the
17 rafts themselves, we are going to close; correct?

18 MR. LITTLE: Sure.

19 MR. APPLETON: I want to make sure that you
20 and witness know and don't wonder into there
21 accidentally.

22 MR. LITTLE: Are you comfortable with where

14:28:52 1 we are now?

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

4 MR. LITTLE: Then we will stay.

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

8 MR. LITTLE: Okay.

9 BY MR. LITTLE:

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

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

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

18 What's the basis for this opinion?

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

22 Second, the Merrill & Ring and Mr. Low zero

14:29:50 1 out transactions for which the purported Best Market
2 Price is less than the actual price.

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

8 Q. Okay. Let's go through those in order.
9 The first of your three points involves
10 overvaluation as a result of the method by which
11 comparables were chosen. Can you explain how that
12 works.

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

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

14:31:10 1 characteristics of those transactions such as the
2 quality of the raft of logs and the preferences of
3 buyers and sellers. These transactions occur in an
4 environment in which there is no log exchange.
5 There is nothing like a Stock Exchange. And as a
6 result, there is not a single price for similar or
7 even identical logs transacted in this market.
8 Instead, you get a substantial variation in prices
9 actually struck.

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

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

21 Q. And does the sort identifier alone capture
22 all the relevant information about logs?

14:32:32 1 A. No, it does not. There is substantial
2 physical variation in the logs that make up a raft,
3 even with the same sort code.

4 You observe on the B.C. Coast that buyers
5 typically take the time and expense to inspect rafts
6 of logs prior to making an offer or purchasing these
7 logs. If the sort identifier was sufficient to
8 identify the relevant economic value of the raft,
9 then you wouldn't have to go through the trouble of
10 inspecting them.

11 Q. Is the economics of markets for B.C.
12 Coastal logs unusual, Dr. Reishus?

13 A. No, not really. There are a number of
14 markets in which goods of different qualities are
15 traded through a network of buyers, sellers, and
16 brokers. This is particularly true for commodities
17 and what I referred to as "natural goods." Unlike
18 manufactured goods which, you know, come off
19 identical off an assembly line, logs--one log is not
20 like the one next to it.

21 Q. Okay.

22 A. Actually, as a result of that process and

14:33:55 1 the complex quality nature of Coastal logs, it's
2 very difficult for someone who is not a participant
3 in that market to directly observe the price and
4 value of those logs in a timely manner.

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

8 A. Well, in my opinion, the raft analysis does
9 not properly account for the quality of the rafts.
10 In general, high-quality, high-priced rafts will
11 tend to get a higher price; and low-quality,
12 low-priced rafts will tend to get a low price, and
13 that's going to be true even within a sort code.

14 So, on average, you would expect an average
15 quality raft to get a price that looks like an
16 average for similar rafts in the marketplace.
17 That's not what the raft analysis does.

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

20 A. Well, as you've heard, Mr. Low didn't.
21 Mr. Low was provided the Best Market Prices and
22 subject to minor verification by Merrill & Ring

14:35:17 1 management.

2 Q. Okay. How were the comparable prices used
3 on the raft analysis then determined?

4 A. Well, they appeared to have been drawn from
5 the top or the top part of the range, excluding what
6 had been referred to as "aberrational
7 circumstances," of transactions involving logs of
8 the same sort identifier as those in the raft and of
9 the actual subject rafts.

10 Q. Okay. You said earlier that the premium
11 was overvalued and overstated. What would a valid
12 method have been to avoid that result?

13 A. Well, let me give an example using houses,
14 which may be more familiar to us than logs.

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

14:36:24 1 of the lot, age of the house.

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

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

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

20 What I wouldn't want to do is take some
21 extreme value from the adjusted prices because if I
22 consistently took the high price, I would tend to

14:37:27 1 overvalue my house. And if I took the high
2 unadjusted price, I would tend to even more
3 significantly overvalue my house.

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

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

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

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

22 A. Well, zeroing is the process in the raft

14:38:45 1 analysis when if the Best Market Price assigned to a
2 subject raft by Merrill & Ring management is below
3 the actual price for that raft, then that price
4 difference is set to zero.

5 Q. And what's the implication of zeroing for
6 the raft analysis?

7 A. Well, the implication is that you are going
8 to, for significant sections of the rafts in the
9 raft analysis, that they're going to be overvalued.

10 Q. Could you use an analogy or an example to
11 show how it results in the overvaluation.

12 A. Sure. I will talk about houses again.

13 The--suppose I have sold a bunch of houses
14 and I want to figure out if I'd sold them for fair
15 market value or not, and I develop some fair
16 comparable method for evaluating whether these
17 transaction prices are fair or not. So that, on
18 average, the comparable valuation is equal to the
19 Fair Market Price.

20 But for any given house, my comparable
21 valuation is going to be tend to be either above or
22 below. So, if I throw out those cases in which my

14:40:00 1 comparable valuation is less than my transaction
2 price, I will discover that on average for these
3 group of houses that the comparable value is above
4 the price at which they actually sold at, and I
5 would come to the erroneous conclusion that I had
6 sold these houses below the fair market value
7 determined by the comparables.

8 The same process works in the raft
9 analysis.

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

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

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

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

14:41:07 1 time which we can quantify the effect of the
2 zeroing.

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

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

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

14:42:34 1 And this is true in other jurisdictions.

2 Q. And what's your other reason?

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

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

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

21 So, in some sense they're not the same
22 good.

14:43:41 1 And, therefore, even if the markets--the
2 same pricing system, you would expect to see an
3 apparent Export Premium in which the price for the
4 exports exceeded that for the--that in the domestic
5 market.

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

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

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

20 A. I have a few, but there is one I would like
21 to mention. Mr. Low and Merrill & Ring, as part of
22 their damage analysis, have used an additional

14:44:58 1 hypothetical harvest known as a retrospective past
2 harvest. And I look to see if that retrospective
3 past harvest was consistent with what's known about
4 log supply.

5 Q. Okay. And what did you find?

6 A. Well, I basically asked what would be the
7 effect of the removal of the log export
8 restrictions, and I looked at Mr. Low's claims on
9 the price and revenue effects from the Export
10 Premium, which as I've argued has overstated that,
11 and then compared that to the quantity change
12 claimed by Merrill & Ring management. And that
13 quantity change as you saw was large, more than
14 70 percent of the actual harvest.

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

22 A. No, not at all. I think it's important to

14:46:12 1 understand what that statistical sampling actually
2 consists of. As I reviewed his sampling
3 methodology, he stated he looked at 131 invoices,
4 which I now come to believe probably corresponds to
5 131 lines in the raft analysis and actually looked
6 at Log Sale Agreements.

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

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

22 Could I come back to a question you had

14:47:34 1 asked before?

2 Q. Sure.

3 A. You were talking about the retrospective
4 past harvest, and I wanted to say what I had also
5 done was compared the response assumed by Ring
6 management to what was seen in the economics
7 literature that has looked at the economics of log
8 supply. And what I discovered was that the assumed
9 response to the price change by Merrill & Ring's
10 management is grossly disproportionate to that which
11 has been observed in North American log supply.
12 It's somewhere between seven to a hundred times
13 larger in response to prices than what has otherwise
14 been observed.

15 Q. Okay. Thank you very much, Dr. Reishus.

16 A. You're welcome.

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

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

20 CROSS-EXAMINATION

21 BY MR. NASH:

22 Q. Dr. Reishus, did you write your Report

14:48:34 1 yourself?

2 A. Yes.

3 Q. From beginning to end?

4 A. I had some help drafting some of the
5 background section, but I then rewrote it.

6 Q. And who helped you write the background
7 section?

8 A. Members of my staff.

9 Q. Okay. In-house?

10 A. Yes.

11 Q. Is it fair to say that a B.C. log supplier
12 would have an incentive to export higher quality
13 logs? Do you agree with that?

14 A. I believe if they could achieve a--they
15 would have the incentive to sell their log into
16 whatever market they could achieve the best net back
17 given all the costs and other considerations they
18 may have.

19 Q. I didn't understand that. Maybe I will
20 just repeat the question.

21 Is it fair to say that it would be the B.C.
22 log suppliers would have an incentive to export

14:49:38 1 their high quality logs?

2 A. In general, the economic forces would tend
3 to encourage, if there were to be exports, that they
4 would be of the higher quality logs.

5 Q. And would it then be economically rational
6 to export higher quality high value logs?

7 A. Well, since I believe value tends to be
8 correlated with quality, I would agree with that.

9 Q. You agree with that.

10 And Japan has no import restrictions on
11 B.C. logs; correct?

12 A. I would have to review. At one point they
13 did have some tariffs, but I believe the tariffs
14 were on lumber, not on logs, so I would agree with
15 you at this point.

16 Q. When did Japan take off tariffs on B.C.
17 logs--not lumber. Logs.

18 A. I don't recall. I don't believe it's
19 relevant during the period under consideration here.

20 Q. So, you're pretty certain that tariffs were
21 taken off B.C. logs in Japan prior to 2004?

22 A. I don't recall. My memory is better with

14:51:19 1 respect to the lumber, so I just don't recall.

2 Q. You can't recall, okay.

3 If you could turn to Page 92 of your
4 Report.

5 A. Which one?

6 Q. The first Report.

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

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

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

12 If you go to Paragraph 158.

13 A. Yes.

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

21 My question is: Did you read Part 6 of the
22 B.C. Forest Act before you wrote that?

14:52:59 1 A. Yes, I did.

2 Q. Did you read Section 94, subsection 5?

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

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

9 And Section 94 is about the scaling.

10 Do you recall reading that?

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

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

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

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

22 A. Well, if that supplier received an

14:54:10 1 exemption, that would be true.

2 Q. Right.

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

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

22 A. Well, if you're doing those things better

14:55:22 1 than the competition, then I would agree with that.
2 If the competition is doing those same things that
3 you're doing, I wouldn't expect to see on average a
4 difference.

5 Q. But if you're doing it better than the
6 competition and because of that you have a good
7 supply of customers and the suppliers--the customers
8 are saying I want more of your houses, give me all
9 the houses you can give me because you deliver them
10 on time, you're a good, reputable supplier, and all
11 those other things, wouldn't that suggest that you
12 would fetch a higher price?

13 A. Well, you may not necessarily fetch a
14 higher price as opposed to be essentially among a
15 set of preferred suppliers, so that it is true that
16 good customer relations means that you're more
17 likely to use a supplier with which you have a good
18 relationship than with one you have a bad
19 relationship with.

20 Q. And if you could become a preferred
21 supplier because of the qualities of your house and
22 the characteristics of them, that would tend to

14:56:29 1 increase the price that you would be able to fetch
2 for your houses because of those relationships;
3 isn't that fair?

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

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

9 A. That's one possibility, yes.

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

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

15 Q. Who are the two major landowners?

16 A. TimberWest and Island Timberlands.

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

22 A. They're clearly producing a greater flow of

14:57:51 1 volume at any given time. I'm not sure that gives
2 them proportionally more flexibility than Merrill &
3 Ring would have.

4 Q. It's a possibility, though, isn't it?

5 A. Yes, it's possible.

6 Q. And if in the current Regime they had
7 Provincial wood that would assist them in being more
8 flexible in their operations to be able to navigate
9 the Regime, would you agree with that? Provincial
10 wood of the same species quality or comparable
11 species quality and price.

12 A. I believe if they have comparable
13 Provincial wood, that gives them some flexibility,
14 yes.

15 Q. A little bit more flexibility? And I'm
16 thinking of the fee-in-lieu, the export fee-in-lieu.
17 They don't have to pay the fee-in-lieu on that
18 Provincial wood; right?

19 A. Yes, it's true. The Provincial Regime
20 imposes a fee-in-lieu that's not paid under the
21 Federal Regime.

22 Q. So, that would give the larger suppliers

14:58:56 1 like Island Timberland, for example, more
2 flexibility in navigating the system? Wouldn't you
3 agree with that?

4 A. Given the way you've posed it, I don't
5 think it's a matter of size, but would be the
6 proportionality of Federal and Provincial wood the
7 way you've set it up.

8 Q. So, if a supplier in your scenario had
9 25 percent Provincial wood, they would have a lot
10 more flexibility than a supplier that had five or
11 10 percent; correct?

12 A. Well, first I would characterize it as your
13 scenario, but I would agree with that.

14 Q. Under my limited scenario?

15 A. Yes, I would agree with that.

16 Q. Fair enough.

17 Do you know in 2007 how many million cubic
18 meters of private federally regulated wood logs were
19 exported from British Columbia?

20 A. My memory--well, I can look it up, but just
21 from memory I think it's somewhere between two and
22 three million cubic meters.

15:00:06 1 Q. Do you know how many million or how many
2 cubic meters Merrill & Ring exported in 2007?

3 A. Again, I could look it up, but it's
4 obviously much less than that, in the tens or low
5 hundreds of thousands.

6 Q. Probably in the tens of thousands in that
7 range?

8 A. In 2007, that's probably true.

9 Q. Out of somewhere between two and
10 three million cubic meters overall?

11 A. I could confirm that, but yes.

12 Q. If you could turn to your Affidavit--is it
13 an Affidavit or is it a Report? You sworn to it or
14 affirmed it, but how would you like to have it
15 referred to? A Report?

16 A. Either one.

17 Q. Let's call it an Affidavit.

18 And go to Page 16, Paragraph 33, and then
19 if you could also look at Ms. Korecky's Affidavit--I
20 may have said Page 15, and if I did I misspoke.
21 It's Page 16.

22 A. Okay. Unfortunately, I see it in my

15:01:16 1 copies.

2 Q. First of all, did you review Ms. Korecky's
3 Affidavit before you wrote your Affidavit?

4 A. No.

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

7 A. Yes, I did.

8 Q. What did you speak about?

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

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

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

19 Q. Okay. If you could turn to Ms. Korecky's
20 Affidavit at Page 6, Paragraph 25 and compare it, if
21 you will, at the same time to your Paragraph 33.

22 I must say that they're strikingly similar

15:02:38 1 language in these two paragraphs, not all identical
2 although some identical.

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

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

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

19 Ms. Korecky says in the last sentence of
20 her Paragraph 25, "The distinctions between the
21 Coast and the Interior derive from differences in
22 geography, the forest ecosystems, timber harvesting

15:03:46 1 methods and costs, and transportation alternatives."

2 Q. Did you write Paragraph 33?

3 A. Yes, I did.

4 Q. So, if those words in Ms. Korecky's
5 Affidavit are written tracking yours, she did not
6 write them; is that right?

7 A. No, I couldn't come to that conclusion.

8 Q. You wouldn't come to that conclusion? The
9 last sentence is identical word for word.

10 A. Actually, I don't believe that's true,
11 but--

12 Q. Other than the bracketed part, second to
13 last sentence.

14 A. Yeah. Her last sentence is similar to my
15 middle sentence in that paragraph except for the
16 line long parenthetical.

17 Q. It's identical to yours, is it not?

18 A. Except for the line long parenthetical,
19 yes.

20 Q. Right.

21 And Paragraph 33 are your words.

22 A. I believe so, yes.

15:04:58 1 Q. Okay. Thank you very much. Those are my
2 questions.

3 A. Thank you.

4 PRESIDENT ORREGO VICUÑA: Thank you.

5 Redirect?

6 MR. LITTLE: We have nothing further.

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

10 THE WITNESS: Okay.

11 (Witness steps down.)

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

15 DAVID JENDRO, RESPONDENT'S WITNESS, CALLED

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

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

21 PRESIDENT ORREGO VICUÑA: Thank you,
22 Mr. Jendro. You will be now examined by Mr. Little.

15:06:23 1 MR. LITTLE: Thank you, Mr. President.

2 DIRECT EXAMINATION

3 BY MR. LITTLE:

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

8 A. That's correct.

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

11 A. I do, yes.

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

15 (End of open session. Confidential
16 business information redacted.)

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15:07:33 1

CONFIDENTIAL SESSION

2 BY MR. LITTLE:

3 Q. My apologies for not noticing that.

4 For the Tribunal's benefit, Mr. Jendro,
5 could you please provide us with a brief summary of
6 your professional background.7 A. Yes. Since 1977, I have worked as a
8 consultant, focusing on the areas of valuation and
9 appraisal of timber and timberlands, development of
10 forest management strategies, market studies, price
11 evaluations, antitrust and trade issues, including
12 disagreements between the United States and Canada
13 over the importation of softwood lumber into the
14 United States, as well as the forest management
15 evaluations and impact analyses all for a variety of
16 clients.

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

18 A. Well, for example, Forest Products
19 companies ranging from large to small, Indian
20 Tribes, native groups, trade associations,
21 Government agencies, as well as individuals.

22 Q. And where have you worked over the course

15:08:36 1 of your career?

2 A. I have worked throughout the United States
3 and throughout Canada as well as Japan, but I often
4 concentrate or focus on the Oregon, Washington,
5 British Columbia, and Alaska.

6 Q. Mr. Jendro, what were you asked by the
7 Government of Canada to do in this litigation?

8 A. I was asked to review and evaluate certain
9 of the Investor's claims as well as the work product
10 of Mr. Low and Mr. Ruffles in order to determine the
11 appropriateness of their methodologies, their data
12 and analyses, and in light of the facts established
13 in this case, whether or not the conclusions they
14 reach were, indeed, correct.

15 Q. Okay. Let's discuss Mr. Low's Report
16 first.

17 Do you agree that Merrill & Ring suffered
18 the Lost Export Premiums as a result of the Log
19 Expert Control Regime in British Columbia?

20 A. No, not in my opinion. I don't believe
21 that the losses that Mr. Low alleges were suffered
22 by Merrill & Ring.

15:09:36 1 Q. Okay. And what are your reasons underlying
2 this conclusion.

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

14 Q. Any other major errors? You mentioned
15 three.

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

20 And the third major error on the price side
21 being attributing 100 percent, virtually all of any
22 observed difference between these overstated

15:10:53 1 benchmark price and the Subject Log Prices to the
2 log Export Procedures when, in fact, there are many,
3 many factors that can and do affect log prices and
4 can explain these conferences.

5 Q. Okay. At the outset you mentioned that on
6 the price side you had certain problems. Is there
7 another side to your concerns?

8 A. Yes, the volume side, and my concern on the
9 volume side is that Mr. low relied on Mr. Ruffle's
10 Harvest Plan, which I believe is overstated.

11 Q. All right. Well, let's start with the
12 price side of the analysis. You mentioned that the
13 Best Market Prices are overstated. Can you explain.

14 A. Yes. But I think it would be helpful for
15 the Tribunal if we went to what I believe is Tab 1
16 to the Core Bundle for this direct examination.

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

19 Okay, at Tab 1 I'm seeing a flow chart.
20 What is this flow chart, Mr. Jendro?

21 A. This is a flow chart from my Affidavit, my
22 second Affidavit in this case. I don't have a

15:12:23 1 pointer.

2 Q. Sir, we will get you the laser pointer. It
3 might help.

4 A. It's Figure 3.2-one from my second
5 Affidavit.

6 And what this does is to illustrate the
7 steps taken in the Merrill & Ring raft analysis for
8 the period November 2003 to December 2005. The
9 methodology changed somewhat for 2006, 2007, and
10 2008, but I believe for purposes of illustration
11 this will suffice.

12 And I might suggest it might make it easier
13 if this were to be kept handy during the course of
14 the questions, that would just be easier.

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

17 A. Yes.

18 What this flow chart does again is take
19 steps that were taken in the raft analysis. It
20 starts with a selection of a Best Market Price for a
21 particular sort and month. Often, not always, as we
22 heard this morning from Mr. Low, the Best Market

15:13:39 1 Price is expressed in U.S. dollars per thousand
2 board feet Scribner. That being it was taken from a
3 market not subject to the log export restrictions,
4 and ostensibly from Merrill & Ring's sales in the
5 neighboring Washington State.

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

16 Next, an adjustment is made or is attempted
17 to be made by Mr. Low, Merrill & Ring, in the event
18 that the Best Market Price selected was at a
19 location that required some additional
20 transportation for the subject logs, so they attempt
21 to make a transportation adjustment here resulting
22 in Line 7 is an adjusted Best Market Price in

15:14:54 1 Canadian dollars per cubic meter.

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

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

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

22 Q. All right. Thank you for the overview.

15:16:01 1 Now, back to where we started. Can you
2 explain why Best Market Prices are overstated.

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

10 Q. Can you provide an illustration for the
11 Tribunal.

12 A. Yes. I think if we went to Tab 2.
13 What Tab 2 relates to--and this is again
14 from this my second Affidavit, Figure 1.2-2, this
15 has to do with the selection of the Best Market
16 Price used for Douglas-fir FC sort for the month of
17 September 2004. I believe that Merrill & Ring
18 produced nine Log Sale Agreements for the month of
19 September 2004 that had FC sort Douglas-fir in it.
20 That's summarized in my Appendix D to my Affidavit
21 with the individual Log Sale Agreements very much
22 posted in Appendix J, should you wish to look at

15:17:23 1 them.

2 But what I have done here on Figure 1.2-2
3 is to array the FC sort prices from those nine Log
4 Sales Agreements from highest to lowest, and I know
5 from my review that the Best Market Price selected
6 for this month for FC sort Douglas-fir was \$850.
7 Now, you can see here the very top price, in Log
8 Sale Agreement 1675 sold from Merrill & Ring to
9 Sumitomo was sold at \$850.

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

12 A. Hit you in the eye, sir.

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

20 And, you know, the 850 is no more
21 representative of the valuation of the subject logs
22 than the 505. It's simply the highest price.

15:18:48 1 Q. Okay. And the 850 or the 505 all of these
2 agreements Merrill & Ring Log Sale Agreements?

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

5 Q. Sorry, that example was in the same Log
6 Sale Agreement?

7 A. Yes.

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

10 A. All-excuse me. All for Douglas-fir FC sort
11 for the month of September 2004.

12 Q. And they are Merrill & Ring agreements?

13 A. I'm sorry, yes.

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

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

22 Q. What should Merrill & Ring have done in

15:19:48 1 selecting the Best Market Price in this instance?

2 A. Well, again, they should have selected a
3 benchmark that's reflective of the log, physical
4 log, attributes of the subject timber, subject rafts
5 or at least adjusted to the subject.

6 Q. All right. In your Affidavit, Mr. Jendro,
7 you also spent a considerable amount of time on the
8 errors that were committed in volumetric conversion;
9 that is the conversion from Scribner to metric;
10 correct?

11 A. That's correct, yes. In the state of
12 Washington or when a sale is sold out of British
13 Columbia to an Asian buyer, say, the scale, the most
14 predominant scale is thousand board feet Scribner
15 log scale, whereas a domestic sale in British
16 Columbia is scaled in what's known as British
17 Columbia metric scale.

18 Q. All right. And how does the conversion
19 factor impact the comparison in the raft analysis?

20 A. Well, since the comparator, the export sale
21 is often in a different scale, Scribner, as opposed
22 to the subject raft sale in metric, they have to be

15:21:01 1 converted. And converting between Scribner and
2 metric is not at all like converting between quarts
3 and liters or miles and kilometers. There's no
4 direct correlation between the scales, so every log
5 or every assemblage of logs, rafts, would have its
6 own unique conversion factor, and these conversion
7 factors differ by species, differ by log size, by
8 length, taper, quality, and they can vary
9 substantially.

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

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

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

21 A. That's correct, yes.

22 Now, what Tab 3 does here is it shows here

15:22:08 1 to the immediate left of the shaded gray the
2 conversion factors used for certain sorts of
3 Douglas-fir and hemlock by Merrill & Ring over the
4 period. For example, for FC sort they would have
5 use the 5.43 for every raft over that period of
6 time. To the immediate right--to the right, excuse
7 me, of the shaded gray line, you see low to high.
8 These are the conversion factors, actual conversion
9 factors, not just estimated or the ones they used,
10 for dual scaled rafts, Merrill & Ring rafts that
11 were dual scaled. That means that they were scaled
12 in both MBF Scribner and in B.C. metric.

13 Now, any time Merrill & Ring or Mr. Low
14 would have used a conversion factor that was lower
15 than the actual conversion for the raft, say 5.43
16 instead of 6.34, it would have resulted in an
17 overstated Best Market Price in Canadian dollars per
18 cubic meter and would have exaggerated any shortfall
19 in the difference between the benchmark and subject.

20 Q. Can you provide an illustration of the
21 sensitivity, then, of Best Market Prices which were
22 the comparators to variations and conversion

15:23:25 1 factors.

2 A. Yes. Mr. Low calculated a shortfall of
3 some 4.2 million dollars as he put up earlier today
4 or yesterday for the period November 2003 through
5 December 2008. That's based on the actual harvest,
6 not any retrospective harvest.

7 If he had used or Merrill & Ring had used
8 conversion factors that were just 10 percent higher,
9 just 10 percent higher instead of 5.43 for that sort
10 it would be something like six, he would have
11 resulted--or it would have resulted in a shortfall
12 half, 48 percent of what he calculated half of the
13 4.2. So, it's very sensitive to change in
14 conversion factor.

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

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

22 Q. Okay.

15:25:58 1 volume of the rafts and results in damages
2 calculated in the amount of about \$8,000. This is
3 what was actually done.

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

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

20 Why is this incorrect?

21 A. Well, again, there are many, many factors
22 that affect log prices, and Mr. Low adjusted for

15:27:17 1 about one of them, in some cases that being
2 transportation.

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

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

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

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

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

15:28:38 1 damages claim on red cedar. Can you expand a little
2 bit on that.

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

5 THE WITNESS: That's correct.

6 MR. LITTLE: Okay.

7 THE WITNESS: I believe this was an exhibit
8 that was shown to Mr. Low this morning. This has to
9 do with the red cedar sort prices from Sale
10 Agreement 258 to TMI Forest Products, March 28,
11 2007. And what this shows is that this sale was
12 selected as a benchmark or a Best Market Price for
13 cedar of this sort, although it ended up comparing
14 to another sort, to CX, for the second quarter of
15 2007. The Best Market Price selected was \$1,500 per
16 thousand board feet Scribner. And, of course, as
17 talked about in Mr. Low's examination, that reflects
18 the highest quality within that sale of that sort at
19 that time, logs that were 36 to 40 feet in length.
20 They commanded a significantly higher price than
21 logs of shorter length.

22 My examination showed that the subject red

15:30:39 1 cedar CX sort logs for which they're being valued
2 here or compared averaged but 29 feet in length. I
3 believe Mr. Low testified that he thought that the
4 \$1,500 was an error and it should have been
5 something less. I concur.

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

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

19 Q. Mr. Jendro, in your opinion, what
20 proportion of the alleged shortfall damages alleged
21 by Mr. Low did you find were attributable to causes
22 other than the Log Export Control Regime?

15:31:51 1 A. My analysis resulted in an estimate of at
2 least 79 percent. I believe this is in Tab 9 to the
3 Core Bundle.

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

6 A. Right. Again, this is out of my second
7 Affidavit at Table 3.15-1. And what this is is
8 essentially a summary of what I found from examining
9 the seven sorts that that accounted for some
10 87 percent of the alleged claims shortfall by
11 Mr. Low.

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

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

21 A. Well, without more data, data regarding
22 such things as the log scale information for the

15:33:12 1 Best Market Prices selected by Merrill & Ring,
2 information they likely have but did not produce,
3 I'm unable to attribute the remaining difference,
4 the unexplained difference, to any specific factor,
5 but it could be well due to factors other than the
6 log Export Procedures themselves.

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

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

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

21 A. Well, to begin with, as late as January of
22 2008, Merrill & Ring was of the opinion, as stated

15:34:23 1 in Affidavit or a witness statement of Mr. Schaaf,
2 that absent the log Export Procedures that Merrill &
3 Ring would have harvested another 32, another 3,300
4 cubic meters of wood, of logs. However, what's
5 being claimed now is an extra 447,000 cubic meters
6 of logs absent the Regime or an increase of 70,
7 80 percent, 77 percent, I think is what was said.

8 And I might point you to Tab 10 of the Core
9 Bundle at Paragraph 41--this is from Mr. Schaaf's
10 February 2008 Witness Statement. The numbers in
11 Paragraph 41 and Paragraph 41 can--derives the extra
12 32 or 3,300 cubic meters to which I refer.

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

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

21 Let's take Theodosia. This is the largest
22 single property of Merrill & Ring's on the B.C.

15:35:50 1 Coast. I believe at 2005 it probably held some
2 50 percent or more of Merrill & Ring's merchantable
3 timber inventory. Merrill & Ring in that 2005
4 Report expressed concerns about the rate of harvests
5 that they were proposing at that time for Theodosia,
6 indicating that they might attract the unwanted
7 attention of local Tribes, native groups, bands,
8 Government officials, or individuals such that they
9 could be even shut down in the worst case scenario.
10 They even talked in that Report about selling and
11 parceling out this merch timber there so as to avoid
12 this problem.

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

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

20 A. Well, it has several impacts. First, it
21 said it moves 447,000 cubic meters of logs that were
22 still standing out there in 2008 and may still be

15:37:04 1 standing there today into the past period. It moves
2 149,000 cubic meters of Georgia Basin wood, which
3 Merrill & Ring lost the harvest rights to or they
4 expired on December 31, 2006, into the past period.

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

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

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

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

14 PRESIDENT ORREGO VICUÑA: Thank you,
15 Mr. Little.

16 Mr. Appleton.

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

18 CROSS-EXAMINATION

19 BY MR. APPLETON:

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

22 A. I do.

15:38:47 1 Q. And you also agree that quality
2 characteristics includes various factors like
3 diameter, length, ring count, taper, and other
4 factors?

5 A. Yes.

6 Q. Mr. Jendro, may I refer you, please, to
7 Appendix A of your Supplemental Affidavit. It's in
8 the binders before you.

9 I'm also going to put it up--actually, what
10 I'm going to do is I'm going to put up a picture
11 from your Report, but just to situate things, you
12 mentioned Theodosia, and I would like to talk about
13 Theodosia and Unwin Lake, and just to show you where
14 they're located on the map. They're located here.
15 Theodosia, as you mentioned, is one of the larger
16 properties, on the Merrill & Ring you believe it's
17 the largest of the Merrill & Ring properties, and
18 Unwin Lake is located very nearby, so if we could
19 turn then, sir, to your figure--look at Section 6.4
20 of your Supplemental Affidavit, and let's turn to
21 Figure 6.4-1 which I put up here on the screen so
22 you could look at your monitor.

15:39:52 1 A. Just one clarification, sir. The earlier
2 map you had out there was not from my Report.

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

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

12 A. I'm following you, sir.

13 Q. No problem. And you've set out the

14 distance over from that property over to Merrill &
15 Ring's Theodosia property, which is located here in
16 the bottom section of the map. Do you see how it's
17 outlined?

18 A. I do.

19 Q. Very good.

20 Now, you conclude in your Report that the
21 most economical way to harvesting Unwin Lake is by
22 helicopter logging; is that correct?

15:40:53 1 A. I concluded in my Report that if the Unwin
2 Lake property were to be logged, in my opinion, it
3 would logged via helicopter.

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

6 A. Yes.

7 Q. You showed the distance between Unwin Lake
8 and Theodosia for the purpose of helicopter logging
9 to be an average of 2.9 to 3 kilometers; correct?

10 A. I'm just checking, sir. I don't believe
11 2.9 or 3 is correct. 3.1 to 2.64.

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

16 A. Yes.

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

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

21 BY MR. APPLETON:

22 Q. Yes, I'm sorry. I'm going to look at the

15:42:12 1 top dotted line. Thank you, that's my fault this
2 time. I'm looking at the top dotted line you have
3 drawn.

4 Is that your handwriting on this exhibit,
5 sir?

6 A. I believe it is, yes.

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

10 A. That number there is 1.64.

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

15 A. I am now.

16 Q. Very good.

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

19 A. 2.12 KM, kilometers.

20 Q. Very good, excellent.

21 Now--and that goes to a point?

22 A. It does.

15:42:59 1 Q. Yes. And then from that point south shall
2 we call it below, you see there is another distance
3 towards the Merrill & Ring Theodosia property;
4 correct?

5 A. Correct.

6 Q. And what is that number, sir?

7 A. 1.64 kilometers.

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

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

16 Q. I believe that is correct.

17 A. Okay.

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

20 A. It does.

21 Q. Yes. Now, could you please add those two
22 numbers together, sir.

15:43:52 1 A. 3.22 would be the sum of those two numbers.
2 Q. Mr. Jendro--3.22 kilometers?
3 A. Kilometers.
4 Q. Very good, yes. So, that is the distance
5 you have calculated here?
6 A. Yes.
7 Q. All right. Now, let us look at the other
8 number, okay?
9 A. Yes.
10 Q. The other route that you have calculated.
11 So, now we are going to do the more southerly route
12 from Unwin Lake.
13 A. Yes.
14 Q. What number is handwritten there, sir?
15 A. 1.64 kilometers.
16 Q. And then you've added it to another
17 distance; correct?
18 A. Correct.
19 Q. And then what is the total, then, of those
20 two distances?
21 A. 2.74.
22 Q. Kilometers?

15:44:34 1 A. Kilometers.

2 Q. Excellent, all right.

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

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

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

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

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

19 A. Without studying it, I don't think I could
20 offer you an opinion right now, but my examination
21 or investigation into this appeared that at the
22 prices that we were looking at for the species,

15:45:47 1 grades, et cetera, that were out there, and given
2 the cost of helicoptering at the time, it would not
3 be economic at the present or foreseeable future.

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

7 A. Even at that, it would be--I would be
8 suspect, I would be doubtful that it would be
9 economic at that distance.

10 Q. I see.

11 Now, first of all, let's look at Figure
12 6.4-1 again. You will see the square property
13 outlined in the upper edge of the Theodosia property
14 around where you have written 1.10 kilometers above
15 the dotted line?

16 A. Yes.

17 Q. You see that property?

18 A. Yes.

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

20 A. I believe that's correct.

21 Q. Yes. If Lot 2314 was owned by Merrill &
22 Ring--I'm not finished--if it was owned by Merrill &

15:46:42 1 Ring and it had been forested already so it was
2 clear and if it had a network of logging roads, then
3 Merrill & Ring might be able to helilog Unwin Lake
4 logs over to Lot 2314?

5 A. I would still have concerns. I did not
6 know that at the time--

7 Q. Mr. Jendro, just answer my question.

8 A. I would still have concerns, sir.

9 Q. I see.

10 And the basis of your concerns would be
11 because of the--of which characteristics?

12 A. It would be again the distance, the
13 species, quality mix out there, the costs of
14 helicopter logging, the log prices, spot markets in
15 place at the time.

16 Q. I see.

17 And have you been to Unwin Lake, sir?

18 A. I have not.

19 Q. And are you aware of any of the
20 characteristics of the forest inventory over Unwin
21 Lake?

22 A. Sitting here right now, I cannot recite

15:47:35 1 them to you, but I have looked at the inventory data
2 that was produced by Mr. Ruffle.

3 Q. Yes, and you heard Mr. Ruffle give
4 testimony about the very high quality of the timber
5 on Merrill & Ring lands.

6 A. I did hear that.

7 Q. Yes, but you didn't go there to investigate
8 that, sir?

9 A. I did not go there to investigate it, no,
10 sir.

11 Q. But you can make a comment based on whether
12 it would be economical or not to be able to helilog
13 that property?

14 A. My concern is several-fold in addition to
15 what I have already told you.

16 Q. Just answer my question.

17 ARBITRATOR ROWLEY: Let him finish his
18 answer.

19 MR. APPLETON: I'm sorry, I thought he was
20 giving me a nonresponsive question.

21 ARBITRATOR ROWLEY: He was answering your
22 question.

15:48:16 1 THE WITNESS: Could I have the question
2 again, sir.

3 BY MR. APPLETON:

4 Q. Sure. I will read it back off the
5 transcript.

6 But you did not go there to investigate
7 that, sir?

8 A. No, I did not.

9 Q. Okay. Now, may I refer you now to Tab 2 of
10 the binder before you. This contains Mr. Ruffle's
11 Report. I'm going to ask you to look at Tab 9 of
12 his Report, which I reproduced on a slide. I have
13 also set it out here on the monitor.

14 This shows the Theodosia property. It
15 shows a network of logging roads through the
16 Theodosia property that continue until Lot 2314. As
17 you will see noted on the Lot 2314, the forest cover
18 label, which is a numbering format Merrill & Ring
19 uses for the Theodosia property.

20 Now, I'm going--you see that?

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

22 Q. Okay. Do you not have the Report in front

15:49:23 1 of you? I'm sorry, I asked you to please turn to
2 Tab 2 and look specifically at Tab 9, sir.

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

7 A. I will be glad to do so.

8 Q. Good. Please look at it.

9 Are you having a problem seeing it now,
10 sir?

11 A. No.

12 Q. Okay, good.

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

18 A. I do.

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

22 A. I see that, yes.

15:50:14 1 Q. Now, would you please turn to Tab 18 of
2 Mr. Ruffle's Report. I'm going to ask you to turn
3 to the third page of this tab. We are going to look
4 at an aerial photograph. This is numbered 011096.
5 You will recognize this as an aerial photograph of
6 the same area of the Theodosia property, and you
7 will see that Lot 2314 is adjacent to it. It's also
8 reproduced on the slide here, sir, but if you could
9 look in the book--

10 A. What tab is it?

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

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

15 Q. That's why I gave you the number,
16 Mr. Jendro.

17 I'm sorry, please follow. It's number
18 011096.

19 A. Yes.

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

22 A. 011096.

15:51:08 1 Q. Excellent. We are on the same page.

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

4 A. It appears to be, yes.

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

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

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

12 BY MR. APPLETON:

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

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

20 A. The road network, to the best of my
21 recollection, just looking at the earlier exhibit,
22 appears similar, I would agree, and it has been

15:52:07 1 clear-cut, yes.

2 Q. Would you like us to put the other map--

3 A. No, I will accept your word.

4 Q. Okay. And you just confirmed to me that
5 you did not do a site visit to Unwin Lake. Did you
6 do a site visit, sir, to Theodosia?

7 A. No, sir.

8 Q. Did you do a helicopter tour of the
9 properties before you prepared your Report?

10 A. No.

11 Q. Did you do a title search of the properties
12 or any of the properties in the area before you
13 prepared your Report?

14 A. No, sir.

15 Q. Did you look at the logging map at Tab 9 or
16 this aerial photograph of Tab 18 of Mr. Ruffle's
17 Report before completing your Supplemental Report?

18 A. I believe I did.

19 Q. Well--but yet you assumed that Lot 2314 was
20 not Merrill & Ring property?

21 A. No, I didn't necessarily assume that. I
22 will agree with you that I did not know that it was

15:52:55 1 another property owned by the family of companies of
2 Merrill & Ring, but I didn't know that, no.

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

10 A. I did.

11 MR. APPLETON: I have nothing further.

12 PRESIDENT ORREGO VICUÑA: Thank you,
13 Mr. Appleton.

14 Questions?

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

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

19 (Witness steps down.)

20 PRESIDENT ORREGO VICUÑA: So, we shall
21 perhaps take a break for 10 minutes. Okay. We are
22 doing very well. Just one to go.

15:54:09 1 (Brief recess.)

2 MIKE BOWIE, RESPONDENT'S WITNESS, CALLED

3 PRESIDENT ORREGO VICUÑA: Good afternoon,
4 Mr. Bowie.

5 THE WITNESS: Good afternoon.

6 PRESIDENT ORREGO VICUÑA: Would you please
7 read your Witness Statement in front of you.

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

11 PRESIDENT ORREGO VICUÑA: Thank you.
12 Mr. Bowie.

13 You will be examined by Mr. Watchmaker.

14 MR. WATCHMAKER: Thank you, Mr. President.

15 Mr. President, Members, I believe

16 Mr. Bowie's Core Bundle is being distributed. I
17 would ask you to have Mr. Bowie's Core Bundle and
18 also his Supplemental Report with you.

19 DIRECT EXAMINATION

20 BY MR. WATCHMAKER:

21 Q. Now, Mr. Bowie, I understand you're with
22 the firm of KPMG. What's your position with this

16:14:32 1 firm?

2 A. I'm a partner with the firm, and also the
3 partner in charge of our advisory practice in--I'm a
4 partner with the firm, and I'm also the--in charge
5 of our transaction advisory services practice in
6 Western Canada.

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

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

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

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

19 I'm also retained in connection with
20 commercial disputes where the issue is business
21 values or business losses, and I served as an expert
22 witness on a number of occasions in that regard.

16:15:32 1 And I have acted as an arbitrator in a
2 number of situations where the situation is business
3 losses.

4 Q. Okay.

5 MR. WATCHMAKER: I would just like to
6 confirm, Mr. President, are we in closed session?
7 Because I would like to be?

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

11 MR. WATCHMAKER: So, we are closed?

12 SECRETARY OBADIA: Yes, we are closed.

13 MR. WATCHMAKER: All right.

14 BY MR. WATCHMAKER:

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

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

21 Q. Now, do you agree with Mr. Low's
22 conclusions?

16:16:21 1 A. No, I do not. I found Mr. Low's estimates
2 of financial losses to be generally unsupported and
3 overstated.

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

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

17 Now, in addition, what the tables set out
18 are the estimated losses under each of the Articles
19 allegedly violated and as well summaries the losses
20 in a two-part component, one being the alleged Loss
21 Export Premiums and the second being the incremental
22 costs.

16:17:40 1 Q. Okay. Let's take the claims one by one,
2 sir. Let's start with the claims under Articles
3 1102 and 1105. I understand that they are
4 identical. Could you state your conclusions with
5 respect to the alleged Export Premium aspect of
6 these claims.

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

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

22 Q. And what about the alleged incremental

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

2 A. We estimated those to be approximately
3 \$1.1 million compared with Mr. Low's estimate of
4 approximately \$4.7 million.

5 Q. Okay. And were you able to conclude as to
6 how much of that \$1.1 million is attributable to the
7 Procedures?

8 A. Well, not completely. The \$1.1 million is
9 comprised or represents eight different cost
10 categories, and we were not able to in many cases
11 apportion what portion actually would relate to
12 incremental costs directly attributable to the
13 Regime as compared to other factors that may have
14 caused the costs to be different.

15 Q. Okay. Now, what about the allegations
16 under Article 1106?

17 A. The allegations under--Mr. Low's
18 calculations under Article 1106 are essentially the
19 same as those calculated for Articles 1105 and 1102,
20 with the exception that the fees-in-lieu are not
21 included.

22 Q. And what were your conclusions with respect

16:19:53 1 to this particular allegation?

2 A. Our conclusion here as well was that the
3 losses under this particular Article were not
4 determinable based on the information provided to
5 us. The allegations under Article 1106 are
6 fundamentally different than those under Articles
7 1102 and 1105, and we would assume that there would
8 be different losses arising from that, as well.

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

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

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

21 So, the underlying assumptions and
22 components that give rise to those calculations are

16:21:04 1 the same as those used for 1102 and 1105, so any of
2 the issues and problems associated with those
3 calculations would apply to those under
4 Article 1110, as well.

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

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

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

18 A. Yes. Mr. Low's inability to come up with a
19 specific figure for Article 1106 would be about
20 that. Mr. Low acknowledges or indicates that some
21 of the loss components in the conclusion, the
22 numbered conclusion, do not relate to Article 1106.

16:22:28 1 Q. What would be advisable for the Tribunal to
2 take into consideration with respect to this problem
3 of causation, sir?

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

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

14 A. It would depend on the violation, but
15 unfortunately the way the information has been
16 presented and the lack of certain information, I
17 don't believe there is sufficient information to
18 actually go down and hone into specific allegations.

19 For some you may be able to do it, but for others
20 the information has not been provided by the
21 Investor.

22 Q. Okay. Why do you believe Mr. Low ended up

16:23:39 1 presenting a loss estimate that's overstated,

2 Mr. Bowie?

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

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

11 A. Well, again, Mr. Low relies on Merrill &
12 Ring's raft analysis for his Lost Export Premium
13 calculations; and again, based on information from
14 Mr. Jendro and Mr. Reishus, there are problems with
15 that analysis--

16 Q. Okay.

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

19 Q. Sorry.

20 And what about incremental costs?

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

16:24:45 1 provided to him with respect to the incremental
2 costs without undertaking a full analysis of those
3 assumptions or those costs.

4 Q. Okay. You said several times now that
5 Mr. Low relied on Merrill & Ring management. Why do
6 you say this?

7 A. Well, he indicates that throughout his
8 Report.

9 Q. Okay. Can you give us an example of how
10 Mr. Low's reliance on management's assumptions has
11 the impact of increasing the Investor's claim.

12 A. Yes. The retrospective past harvest would
13 be an example of that. The impact of the assumption
14 of the retrospective past harvest is to increase the
15 loss calculations by approximately two-and-a-half
16 million dollars.

17 Q. Okay. And what causes that increase?

18 A. There are three broad components to that,
19 contributory things. The first is the inclusion of
20 approximately 149,000 cubic meters of timber that
21 otherwise would not be included in the loss
22 calculations, and this relates to the Georgia Basin

16:25:51 1 timberlands that I understand Merrill & Ring did not
2 have the cutting rights for after December 2006.

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

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

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

16 A. I would have sought from my client all of
17 the information and documentation that I felt was
18 needed to determine or assess what level of price
19 shortfalls were rising on logs sold in the Past Loss
20 Period, and I would have done the same thing to
21 identify and quantify what incremental costs were
22 incurred to be able to come up with those two

16:27:07 1 categories.

2 And to the extent that I did not have the
3 expertise to deal with some of that information, I
4 would have indicated that we needed an independent
5 expert to assist in that quantification.

6 In addition, I would have attempted to
7 undertake the analysis in such a way that we would
8 be able to, as best possible, identify what the
9 losses were associated with the various allegations
10 that are being made, so if you could--if you--should
11 you find that there was one or two or whatever
12 number might be that you could put some sort of
13 reasonable number to that.

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

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

21 Now, what this sets out or summarizes are
22 the eight different incremental cost categories and

16:28:08 1 the amounts estimated or calculated by KPMG, by even
2 Mr. Low for the past and future period, and as well
3 as a total.

4 Q. Okay. Now, generally speaking, what caused
5 the differences in your incremental loss estimates
6 for contrast with that of Mr. Low?

7 A. The differences would relate to some of the
8 information on the record not being supportive of
9 the incremental costs being calculated or claimed,
10 some the inclusion of costs related to the domestic
11 inventory or sales that would not have been affected
12 by the Regime, and the third other additional
13 information that was not supportive but was
14 inconsistent with the incremental cost claimed.

15 Q. Okay. I would like to ask you about a few
16 of these incremental cost claims. However, is it
17 correct to say that you have concerns with almost
18 all of these eight claims made by Mr. Low?

19 A. Yes, with the exception of the
20 fees-in-lieu.

21 Q. Okay. Could you just state your
22 conclusions with respect to sales commissions.

16:29:21 1 A. The sales commissions, Mr. Low's, if you
2 look on the schedule, the sales commissions referred
3 to as sales commissions annual dollar impacts the
4 third cost from the bottom-up, and Mr. Low's
5 estimate was approximately \$1,030,000.

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

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

16 Q. Okay.

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

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

21 A. Well, I think Mr. Low's conclusions were
22 based on \$1 per cubic meter charge, I believe, for

16:30:43 1 the exported timber. We--and I think there had been
2 various discussions around the inconsistencies in
3 what was described in Mr. Low's Report what actually
4 shows up in the Timber Management Agreement, and
5 then what Mr. Schaaf indicated was to be included in
6 that charge. Our estimate was approximately
7 \$77,000, and we referenced the indicated premium
8 differences or fee differences between the export
9 logs and domestic logs, and that was how we
10 estimated those incremental costs.

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

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

18 A. My understanding of Mr. Low's but-for
19 assumption is that Merrill & Ring would not be
20 subject to the Regime or to export controls, but
21 everybody else who is would be.

22 Q. Okay. There was a suggestion earlier this

16:32:08 1 week in examination that because of the Tribunal
2 doesn't have the authority to strike down the
3 Regime, the but-for should be assumed by Mr. Low.
4 Do you agree with that?

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

17 But generally, we would take instructions
18 as to what the but-for would be. You would test the
19 reasonableness of that, but that is usually a legal
20 determination.

21 Q. Okay. Mr. Rowley, I believe, asked Mr. Low
22 about the value of booms denied surplus status. Do

16:33:20 1 you have any comment on this topic?

2 A. Well, in our Report, we do have, based on
3 Mr. Low's and Merrill & Ring's analysis with their
4 Export Premiums, but we do have what the losses
5 would be using those assumptions as relates to the
6 logs that were deemed not surplus.

7 Q. Okay.

8 A. Now, that is, I believe, also included in
9 my Core Bundle, and it's included in my Report.
10 It's referred to as Schedule C-1.

11 ARBITRATOR ROWLEY: Just refer to where it
12 is in the Core Bundle, for the transcript.

13 THE WITNESS: Sorry. It's under Tab 9.

14 This is just a summary that sort of groups
15 the various information from Mr. Low's Exhibit 2,
16 and you will see we have a column, third column
17 over, and it says "denied surplus question?", and
18 wherever there is a yes would indicate where
19 the--where the logs were deemed not surplus, and
20 there were approximately 1,800 cubic meters in the
21 category that--where the actual market was domestic
22 and the ideal market was domestic. Those ones were

16:34:45 1 actually sold in the domestic market, so there are
2 no losses attributed to those.

3 And then if we go down to the I guess it's
4 the third category down, it says "domestic export,"
5 and what that indicates is there was 16,448 cubic
6 meters of the booms that were deemed not surplus,
7 and the calculated losses in Mr. Low's analysis
8 attributable to those was approximately \$460,000.

9 Q. And that was based on their numbers;
10 correct?

11 A. Yes. That's based on, again, on the
12 assumptions, the Export Premium assumptions, in
13 Mr. Low's analysis.

14 Q. Okay. Thank you very much, Mr. Bowie.

15 MR. WATCHMAKER: That concludes my
16 examination, Mr. President.

17 PRESIDENT ORREGO VICUÑA: Thank you,
18 Mr. Watchmaker.

19 Mr. Appleton, please.

20 CROSS-EXAMINATION

21 BY MR. APPLETON:

22 Q. Good afternoon, Mr. Bowie.

16:35:59 1 A. Good afternoon.

2 Q. May I refer you, please, to Page 5 of your
3 Supplemental Affidavit. You should find it in the
4 binder in front of you, sir. There you have a chart
5 of Past Losses. I believe it's up on the board.

6 A. Yes.

7 MR. APPLETON: Could we just go off the
8 record for a moment?

9 (Discussion off the record.)

10 MR. APPLETON: We are back on.

11 BY MR. APPLETON:

12 Q. Sorry, Mr. Bowie, I think we have taken
13 care of these technical problems.

14 I would like to look at the chart of Past
15 Losses. I believe that was up recently before when
16 you were taken through your direct evidence.

17 A. Yeah. The one I have on the screen is the
18 same as that because I can't read that one.

19 Q. We will work on the monitor in front of
20 you. It's the same as in your materials there.

21 A. Okay.

22 Q. Now, if we can look at this chart, the

16:37:12 1 first column shows your calculation of Merrill &
2 Ring Past Losses. At the bottom of this first
3 column you show Merrill & Ring's total losses of
4 \$681,664, and then you compare that to Merrill &
5 Ring's total losses as assessed by Deloitte's of
6 \$13,984,228. Is that correct?

7 A. Yes, that's for Article 1110.

8 Q. And that large discrepancy because, in your
9 column, you show most of the categories as ones for
10 which you were not able to calculate the loss.

11 A. Yes.

12 Q. Now, I have set out the next slide, Page 6
13 of your Report--you might want to turn to that--and
14 there you have the other chart which we recently
15 saw, that was the chart of estimates of Future
16 Losses.

17 A. Yes.

18 Q. And at the bottom of your first column
19 showing your calculation of Merrill & Ring's Future
20 Losses, there you show a total of \$1,122,054 as
21 compared to Deloitte's assessment of Merrill &
22 Ring's total losses of \$18,682,368.

16:38:31 1 A. This is for Article 1110, as well?

2 Q. Yes. I'm just going to pick one to try to
3 keep apples to apples and oranges to oranges.

4 A. Okay.

5 Q. So, again, the large discrepancy is because
6 in your first column you show that you were unable
7 to make the calculations for most of the categories
8 of loss; is that correct?

9 A. Yes.

10 Q. So, with all the information needed to fill
11 in the blanks on these charts, you actually can't
12 come to any conclusion at all, can you?

13 A. That we are indicating that it is--based on
14 the information provided, it was not determinable
15 what the Lost Export Premiums are, and the same for
16 Article 1106. It's not determinable based on the
17 information we had to be able to attribute a dollar
18 value to those particular alleged violations.

19 Q. So, that's the same answer for each of the
20 headings; correct?

21 A. Yes.

22 Q. Okay. Before you completed your

16:39:27 1 Supplemental Affidavit, you have a copy of the
2 Deloitte Report?

3 A. Yes, we did.

4 Q. And you had a copy of all the exhibits of
5 the Deloitte Report?

6 A. Yes, we did.

7 Q. Exhibit 5 to the Deloitte's Report sets out
8 an Annual Report for TimberWest for the year 2004.
9 I bring that to your attention.

10 A. Yes.

11 Q. And Exhibit 8 to the Deloitte Report is an
12 Annual Report for TimberWest for the year 2007.

13 A. Okay.

14 Q. You might--well, you might want to turn to
15 Exhibit 8, actually.

16 You know TimberWest is a large integrated
17 forest products company in British Columbia?

18 A. Yes.

19 Q. You know that KPMG are the auditors for
20 TimberWest?

21 A. Yes.

22 Q. You're a partner of KPMG?

16:40:15 1 A. Yes, I am.

2 Q. So, then, let's look at Exhibit 8. I
3 believe the Secretary is getting that available for
4 the Members of the Tribunal.

5 Now, on Page 53, you see the KPMG Auditor's
6 Report.

7 A. Yes.

8 Q. Now, let's make sure everyone is there.

9 Very good.

10 Now, you know that TimberWest recognizes an
11 Export Premium for exporting logs out of British
12 Columbia as a material source of revenue in their
13 Financial Statements which were prepared by KPMG?

14 A. Would you like to show me that?

15 Q. Sure.

16 Well, actually, let's turn to Page 48, sir.
17 And I have set it out on the screen as well and may
18 assist you where I'm going--we could look.

19 If you look at Page 48 and you look on the
20 right-hand column Page 48 and the management
21 discussion, I will just read out to you and also put
22 the text up on the slide. There is the paragraph

16:41:49 1 that starts:

2 "In 2007, TimberWest sold 1.2 million
3 cubic meters of logs into markets in Asia
4 and the U.S. West Coast at an average sales
5 realization premium of \$18 per cubic meter
6 over what would be realized in the domestic
7 markets. The premium earned by selling
8 private land logs into the export market
9 represents 25 percent of the 2007
10 distributable cash and has represented more
11 than half the distributable cash generated
12 by the company in the past. The ability to
13 export private land logs has also played a
14 key role in keeping employees working.
15 Selling logs at higher international prices
16 allows owners of private land to harvest
17 stands that would otherwise be uneconomic.

18 "Forcing private forest landowners to
19 sell logs to domestic sawmills at prices
20 lower than international prices transfers
21 the value from the tree grower to the
22 processors, impairs the value of private

16:43:05 1 timberlands in Coastal British Columbia,
2 and reduces pricing of Crown logs sold on
3 the Coast of British Columbia."

4 Does that refresh area memory?

5 A. Yes.

6 KPMG--these are management notes. This
7 wouldn't be an KPMG audit comment.

8 Q. Yes, but KPMG does prepare their Financial
9 Statements, and KPMG has prepared their Finaicial
10 Statements, and KPMG does attribute a large amount
11 of their distributable cash with respect to the
12 Export Premium that's involved there; is that not
13 correct, sir?

14 A. KPMG doesn't make that attribution. That
15 would be TimberWest management. What KPMG would be
16 reviewing are revenues and expenses, and what would
17 be left would be distributable cash, and it would be
18 management commenting on how they are characterizing
19 how their net cash is.

20 Q. And my question, sir, is whether you were
21 aware of what was in the TimberWest Annual Report.

22 A. Yes.

16:44:07 1 Q. So--and you can confirm that KPMG is the
2 auditor on page 53.

3 A. Yes.

4 Q. Okay, fine. So--excuse me for one moment.
5 Let's just turn over. Let's go back to
6 your Report for a moment.

7 Actually, you know what--well, let's turn
8 to your Report. Let's go to Page 13, and I would
9 say it must be your Supplemental Report
10 Paragraph 38. It's on Page 12.

11 A. Yes.

12 Q. You see the paragraph says, "We spoke with
13 Mr. Gazeley of Dakota Creek Resources Limited"?

14 A. Yes.

15 Q. You don't need to look at some of these
16 other paragraphs but at Paragraph 124 you again
17 refer to discussions with Mr. Gazeley with respect
18 to the export cost of sorting.

19 And again in Paragraph 155 you refer to
20 "our interview with Mr. Gazeley" in reference to
21 export log preparation.

22 And then again in Paragraph 170 you refer

16:45:24 1 to "our interview with Mr. Gazeley" in reference to
2 log storage.

3 And then in Paragraph 192 you refer to
4 Mr. Gazeley in reference to scribner scaling.

5 And then in Paragraph 196 you refer to
6 Mr. Gazeley in reference to scaling technology and
7 cost.

8 And then yet again in Paragraph 249 you
9 refer to Mr. Gazeley in reference to the storage
10 holding of logs.

11 Do you recall these references to
12 Mr. Gazeley?

13 A. Yes, I believe he is referenced a number of
14 times.

15 Q. Could you just repeat that. I couldn't
16 hear you.

17 A. Yes, I believe he is referenced a number of
18 times.

19 Q. Oh, yes.

20 Nowhere in your Supplemental Affidavit,
21 Mr. Bowie, do you identify what Mr. Gazeley does,
22 nor do you reference any verifying documentation

16:46:16 1 that you may have received from him. Would you
2 please tell the Tribunal who Mr. Gazeley is.

3 A. He is a consultant. He used to work for
4 Canfor, I believe it is, and we met with Mr. Gazeley
5 just to get an understanding of sort of how the
6 movement of logs worked and the storage, the towing,
7 just to get a flavor for what sort of went on in the
8 industry.

9 Q. Now, in respect of all these areas that you
10 spoke to Mr. Gazeley about, I take it that you don't
11 have personal expertise in these areas and that's
12 why you spoke to Mr. Gazeley?

13 A. Yes, it was to get an understanding of what
14 these issues were.

15 Q. And are there specific facts either
16 discussed with Mr. Gazeley--well, are the specific
17 facts you discussed with him, are they set out
18 anywhere in your Report?

19 A. There are a number of references to
20 Mr. Gazeley, and I believe a lot of times the
21 references are to be Mr. Gazeley, so the references
22 would be there, yes.

16:47:15 1 Q. But there's nothing else?

2 A. Nothing else like what?

3 Q. Well, like interview notes?

4 A. No.

5 Q. How about there is no Witness Statement
6 from Mr. Gazeley?

7 A. No, there is not.

8 Q. But the specific facts you discussed with
9 Mr. Gazeley were important enough in coming to your
10 conclusions that you had to specify them as you
11 reached your conclusions and considerations in this
12 case; yes?

13 A. Sorry, could you repeat that?

14 Q. I will try that again.

15 The specific facts you discussed with
16 Mr. Gazeley were important to coming to the
17 conclusions you reached.

18 A. To a certain extent. We were largely
19 talking to Mr. Gazeley to get an understanding of
20 what was going on, and when we talk about various
21 things in our Report, to the extent that would be
22 referenced to information we discussed with

16:48:02 1 Mr. Gazeley, then that is noted.

2 Q. Well, then, these were important
3 considerations for you, weren't they?

4 A. It was important for me to understand how
5 these things worked, yes.

6 Q. Okay. That's why you specified them;
7 right?

8 A. I specified them showing my source of
9 information, yes.

10 Q. Thank you, Mr. Bowie.

11 PRESIDENT ORREGO VICUÑA: Thank you,
12 Mr. Appleton.

13 Mr. Watchmaker.

14 MR. WATCHMAKER: Just one question on
15 redirect.

16 REDIRECT EXAMINATION

17 BY MR. WATCHMAKER:

18 Q. Mr. Bowie, why did you contact Mr. Gazeley
19 instead of relying on Mr. Cook or Ms. Korecky, sir?

20 A. We just wanted an independent outside
21 person to talk to about what some of the issues are
22 in terms of towing, storage, just to get a flavor

16:48:55 1 for what was going on in the industry on the Coast,
2 and that's where Mr. Gazeley works and has worked
3 for a number of years.

4 MR. WATCHMAKER: Thank you. Those are my
5 questions.

6 ARBITRATOR DAM: Yes, I had just one
7 question.

8 QUESTIONS FROM THE TRIBUNAL

9 ARBITRATOR DAM: I wanted to understand
10 your statement about the Timberlake--

11 (Pause.)

12 ARBITRATOR DAM: My question had to do with
13 your comments on the Timberlake.

14 THE WITNESS: TimberWest, sir.

15 ARBITRATOR DAM: TimberWest, sorry.

16 Are you saying that KPMG never comments on
17 the management comments, other than to verify the
18 numbers that might be used there?

19 THE WITNESS: Those would be management
20 comments.

21 ARBITRATOR DAM: They are management
22 comments; I understand that. That's what I'm asking

16:49:57 1 about.

2 THE WITNESS: We would read them. I'm not
3 sure exactly what all the audit procedures are. I'm
4 not an audit partner, but usually we are involved in
5 reading the notes of the Financial Statements, and
6 I'm not sure to what extent we were involved in
7 reading the management discussion.

8 ARBITRATOR DAM: So, you're not actually
9 knowledgeable about whether or not KPMG reviewed
10 those--the management comments or verified the
11 theories that were expressed in them or not; right?

12 THE WITNESS: No.

13 ARBITRATOR DAM: Okay. Thank you.

14 ARBITRATOR ROWLEY: Please turn to Tab 9 of
15 your Core Bundle. You described this earlier in
16 your testimony. But do I understand that the
17 \$459,613 figure found under about the seventh column
18 which is Deloitte's damages claimed--it's described
19 as Deloitte's damages claimed, under that
20 column--that that 460-odd thousand-dollar figure
21 reflects the loss calculation called "Lost Premiums"
22 on those rafts for which Merrill & Ring applied for

16:52:01 1 but was denied surplus status--

2 THE WITNESS: Yes.

3 ARBITRATOR ROWLEY: --by Mr. Low.

4 THE WITNESS: Yes. If you were to go
5 through and look at each of the individual rafts
6 that were deemed not surplus, then these would be
7 the amounts that in aggregate would add up to what
8 the Export Premium was.

9 ARBITRATOR ROWLEY: And the 460,000-dollar
10 Export Premium would be subject--I'm not saying that
11 the criticism is right, but it would be subject to
12 the criticism that you and the other expert
13 witnesses from Canada have made of the Low Report?

14 THE WITNESS: Yes. That calculation is
15 based on the Export Premiums that were calculated by
16 Merrill & Ring, yes.

17 ARBITRATOR ROWLEY: And reverting to the
18 first tab of your Core Bundle Page 6, under Articles
19 1102 and 1105--I think I've got the wrong place.
20 It's the previous page, sorry, Page 5. Under 1102
21 and 1105, the third item down, "Subtotal-Alleged
22 Lost Export Premiums Incremental Costs," that's your

16:54:21 1 calculation of incremental costs of 340,000-odd
2 dollars.

3 THE WITNESS: I'm sorry, where are you?

4 ARBITRATOR ROWLEY: I started by taking you
5 to the wrong page. I'm at Page 5.

6 THE WITNESS: Okay.

7 ARBITRATOR ROWLEY: Under the heading
8 Articles 1102 and 1105.

9 THE WITNESS: Okay.

10 ARBITRATOR ROWLEY: I'm going down three
11 lines to "Subtotal-Alleged Lost Export Premiums
12 Incremental Costs."

13 THE WITNESS: Yes.

14 ARBITRATOR ROWLEY: As I understand your
15 testimony, based on the information you had, you
16 couldn't come up with a lost premiums figure, but
17 you were able to do an assessment of incremental
18 costs.

19 THE WITNESS: We were able to make a better
20 estimate of the incremental costs by making some
21 adjustments to those presented by Mr. Low, and that
22 was--I think in our Report we caution that it's

16:55:37 1 still based on a number of assumptions and that it
2 still in many cases assumes that 100 percent of the
3 costs we identified are, in fact, incremental when
4 they perhaps could relate to other factors. So,
5 it's a very rough estimate adjusting Mr. Low's
6 calculations, but we were not able to do that at all
7 with respect to the Export Premiums.

8 ARBITRATOR ROWLEY: Thank you.

9 PRESIDENT ORREGO VICUÑA: Thank you.

10 I'm always a bit hesitant to ask questions
11 to very distinguished experts and loss adjustors
12 because it will certainly reflect my ignorance, but
13 still I will put it in any event.

14 The question is this: You mentioned that
15 it's indeterminable for various reasons. Let us
16 assume that it's not possible to determine on the
17 specifics how much for such-and-such boom or export
18 or operation or whatever it is. Fine. Let's start
19 from that assumption.

20 Now, is it in any way feasible to say in
21 the absence of the specific information about item
22 by item or some other feature, is it feasible to

16:57:17 1 say, "Look, what I sold in the domestic market not
2 intended for the domestic market," because if you
3 were intending it there is no problem--not intended,
4 but you were asked to sell it through the mechanisms
5 we have considered in terms of offers and blockings
6 and whatever one calls it. Well, one would have
7 that information on precise terms, say so many booms
8 in so many years were subject to sales at these
9 prices because of the offer, et cetera.

10 Now, can you actually establish, say, an
11 average to say, in accordance to these sales, the
12 average price in the domestic market, domestic fair
13 market price is X; right? Is that understandable
14 what I'm saying?

15 THE WITNESS: I think I understand what
16 you're saying, yes.

17 PRESIDENT ORREGO VICUÑA: Okay. Now, you
18 go the other side and say, how much would I have
19 realized obtained for these same booms or amounts or
20 cubic meters or whatever measurement you are using
21 in the international market, understanding by
22 "international market" probably a basket of things.

16:59:13 1 It could be U.S., Korea, Japan or other or one or
2 two, I don't know, and say this same volume of
3 exports that I sold domestically would have meant or
4 resulted in an average sale price of Y. Do you
5 follow that side of the equation?

6 THE WITNESS: Yes, I believe I do.

7 PRESIDENT ORREGO VICUÑA: Okay. And
8 then--this is absolutely genial, I suppose--you
9 deduct X from Y and say this average, which was X if
10 you draw the difference with Y, you would have,
11 which is on average, the difference between the
12 domestic market and the foreign. Would that be
13 feasible? You might say that technically it's
14 madness, and maybe it is.

15 THE WITNESS: Would it be feasible?

16 PRESIDENT ORREGO VICUÑA: But in the
17 absence of the specifics that you say here it's
18 indeterminable.

19 THE WITNESS: Are you saying would it be
20 feasible with the information we have right now?

21 PRESIDENT ORREGO VICUÑA: Well, you would
22 have to add the information, I suppose. Well, it is

17:00:38 1 right now available from the point of view of how
2 much it was sold in the domestic market and probably
3 figure out what was the average price and how much
4 would those same booms have produced in the
5 international market on an average price. But that
6 information is generally available except for the
7 averages, of course.

8 THE WITNESS: I don't believe you could do
9 that with the information we have. You could
10 perhaps seek to get all sorts of information of
11 prices received in the export market for the
12 different species, same time frame. It would be a
13 significant analysis to actually go through that. I
14 don't think it's--I don't think there is anything
15 I'm aware of that would lend itself to just saying,
16 "Oh, that would be approximately 10 percent" or
17 "that will be approximately"--because there will be
18 so many variables. It really comes down to what
19 you're comparing it to and whether it's a fair
20 comparison.

21 And even just assembling that information I
22 do not believe it would be that easy, but you could

17:01:51 1 try to do something like that, but that would be a
2 significant analysis to do that.

3 PRESIDENT ORREGO VICUÑA: But isn't it true
4 that most of these financial estimates are done on
5 assumptions? For example, when you do a discounted
6 cash flow analysis which all your firms do
7 regularly, is it not based on assumptions, say,
8 well, according to the record of profits or so, what
9 I will have expected for the future is so much. And
10 if inflation were this or that, then that would have
11 meant something else and so on, and you simply
12 assume. You don't have the certainty because it's
13 the future. And then once you apply that, well,
14 it's an estimate, fair as much as it is feasible to
15 forecast, but then in reality it might be totally
16 different. It doesn't work at all in the same
17 terms.

18 THE WITNESS: I agree. That's sort of
19 future-looking. This is actually looking back at
20 what actually happened on the discount.

21 People do make assumptions all the time,
22 but what you want to be here would be looking at

17:03:17 1 what was actually suffered in the past, and you
2 might use that as a benchmark as to what the loss
3 might be in the future. But again to have it be
4 much more than just a guess, you would have to go
5 through quite a bit of effort to make sure you're
6 gathering appropriate information so you are--that
7 you are making a meaningful comparison as opposed to
8 just--you could guess at numbers, but I think that
9 was pretty much what it would end up being, but you
10 could with more--you could use that as another
11 reference point, but again I think that would
12 require quite a bit of analysis to have a meaningful
13 comparison.

14 PRESIDENT ORREGO VICUÑA: Yes, I agree from
15 the point of view of the scientific estimate, but
16 cannot you make an educated guess as to one you
17 would do for the future? There is no scientific
18 certainty, but still there is an educated guess this
19 is the most reasonable and likely thing we can think
20 about. Cannot that be done also in this example I
21 mentioned to you?

22 THE WITNESS: It could be done. Again,

17:04:40 1 that probably would be an educated guess. There
2 would be a lot of variables to look into the future,
3 but you could always make assumptions or estimates
4 of anything. It's just a question of how strong or
5 how solid they might be.

6 PRESIDENT ORREGO VICUÑA: Right.

7 Mr. Bowie, thank you so much.

8 THE WITNESS: Thank you.

9 PRESIDENT ORREGO VICUÑA: Sorry,
10 Mr. Watchmaker.

11 MR. WATCHMAKER: Yes, just one matter
12 arising that came to me that's more of a
13 clarification for the record than anything else.
14 You just tweaked my memory when you mentioned the
15 word "income."

16 FURTHER REDIRECT EXAMINATION

17 BY MR. WATCHMAKER:

18 Q. Mr. Bowie, we heard testimony earlier today
19 I think from Mr. Low in response to a question from
20 Member Rowley about profits of Merrill & Ring's and
21 some numbers were quoted. Do you have any comment
22 on that?

17:05:33 1 A. Yes. I believe, if my memory was correct,
2 that what you asked for was Mr. Low to read you out
3 the net income profit numbers just for the record,
4 and what the numbers that were read out were the
5 gross profit numbers, which is the profit before
6 operating expenses. So, if that was the number you
7 were looking for, then that's what Mr. Low read you.
8 If you're looking for what the net profit number
9 was, that's not what Mr. Low read you.

10 ARBITRATOR ROWLEY: Do you have both of
11 them here?

12 THE WITNESS: Yes.

13 ARBITRATOR ROWLEY: Why don't you read them
14 to us.

15 THE WITNESS: Okay. I will start with 2004
16 and then go through to 2007.

17 So, the gross profit for 2004 was
18 approximately 4,100,000. The net income for 2004
19 was approximately 3,100,000.

20 For 2005, the gross profit was
21 approximately \$6.3 million. The net profit was
22 approximately \$5.6 million.

17:06:53 1 For 2006, the gross profit is approximately
2 \$5.1 million; and the net profit was approximately
3 \$4.2 million.

4 And for 2007, the gross profit was
5 approximately \$4.4 million; and the net profits was
6 approximately \$2.7 million.

7 The total for the four-year period gross
8 profit for those four years 19,873,000; net income
9 15,633,000.

10 BY MR. WATCHMAKER:

11 Q. One additional matter arising out of
12 Professor Vicuña's questions to you with regards to
13 being able to do comparison. What are the reasons
14 that would make it difficult? I think we heard
15 them, but...

16 A. I'm sorry? Could you repeat that?

17 Q. Sure.

18 What would be the reasons that would make
19 that type of comparison difficult to do? You
20 mentioned that they would be difficult.

21 A. This is trying to go to get averages? Is
22 that what you're referring to?

17:08:02 1 Q. In the actual comparisons.

2 A. Accessing the information would be an
3 issue, but in particular down to the--so that you
4 are actually of the same grades, the species, the
5 timing. There would be a number just as we heard
6 there was a number of issues in terms of the
7 comparability of logs. Again, you're going to be
8 sort of in the broad categories. And I'm not sure
9 how readily available that sort of information would
10 be on that sort of level of detail.

11 PRESIDENT ORREGO VICUÑA: Just one thing in
12 respect to that thought.

13 Is there no, say, world market information
14 available? I asked you because in some other case,
15 for example, in which it was also very difficult to
16 estimate the price of important gas in a certain
17 European country because the sources were different,
18 there were all sorts of difficulty. Well, finally,
19 the statistics of the International Energy Agency
20 were used. Of course, they might reflect reality or
21 not for that specific case, but they're an educated
22 guess. If the price is 10 for a given year, well,

17:09:31 1 maybe it's slightly lower of all, but it's very
2 difficult, and it would have been 30. There is no
3 such thing in forestry?

4 THE WITNESS: There may be not that I'm
5 aware of. I'm not saying there isn't, but not that
6 I'm aware of.

7 PRESIDENT ORREGO VICUÑA: Okay. Great.
8 Thank you very much.

9 Well, Mr. Bowie, thank you. You are
10 excused now.

11 THE WITNESS: Thank you.

12 (Witness steps down.)

13 PRESIDENT ORREGO VICUÑA: You have done
14 extremely well. I'm surprised.

15 So, tomorrow we meet at 9:00 to hear from
16 Professor Howse. Just to remind you, we have, of
17 course, the opinions of Professor Reisman, so we
18 will have them all in mind, and surely they will
19 show up as we discuss with him, with Professor
20 Howse, as we discuss with him ideas of the sort.
21 So, just for all of you to keep that in mind and be
22 able to make the most of tomorrow's meeting.

17:10:42 1 Great. So, if there is no--oh, yes,
2 please, Eloïse.

3 SECRETARY OBADIA: We have 11 hours and 5
4 minutes for the Claimant used; 7 hours and 7 minutes
5 for Canada used.

6 PRESIDENT ORREGO VICUÑA: Okay. Thanks
7 very much.

8 (Whereupon, at 5:12 p.m., the hearing was
9 adjourned until 9:00 a.m. the following day.)

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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