

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 1

HEARING ON JURISDICTION AND THE MERITS

Monday, May 18, 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 9:08 a.m. before:

PROF. FRANCISCO ORREGO VICUÑA, President

MR. J. WILLIAM ROWLEY, QC, Arbitrator

PROF. KENNETH W. DAM, Arbitrator

Also Present:

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

Court Reporter:

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

APPEARANCES:

On behalf of the Investor:

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

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

On behalf of Merrill & Ring:

MR. NORM P. SCHAAF

MR. PAUL STUTESMAN

APPEARANCES: (Continued)

On behalf of the Respondent:

MS. SYLVIE TABET

MS. LORI DI PIERDOMENICO

MR. RAAHOOL WATCHMAKER

MR. PATRICK DUMBERRY

MR. SCOTT LITTLE

MS. CÉLINE LÉVESQUE

MR. ERIK LABELLE EASTAUGH

Departments of Justice and Foreign Affairs  
and International Trade, Canada

125 Sussex Drive

Ottawa, Ontario K1A 0G2

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

2                   PRESIDENT ORREGO VICUÑA: Good morning. We  
3 are pleased to begin the hearing in this case, and I  
4 welcome in particular the Members of the Tribunal,  
5 Professor Dam, Mr. Rowley, and the parties and their  
6 representatives and experts and other accompanying  
7 staff.

8                   So that I will be looking forward to the  
9 discussions we are about to begin, and request in  
10 particular that we keep to our time schedules, which  
11 are very dense and lengthy, but that's the best way  
12 for us to get to know the very detailed issues about  
13 which this case is concerned.

14                  I would like to invite now the opening  
15 statements from the parties, beginning with that for  
16 the Claimant, so I invite Mr. Appleton to make his  
17 opening, please.

18                   OPENING STATEMENT BY COUNSEL FOR INVESTOR

19                   MR. APPLETON: Good morning, Mr. President,  
20 Members of the Tribunal.

21                   This is a very simple case because Merrill  
22 & Ring's story is a very simple story. Merrill &

09:09:34 1 Ring Forestry L.P., the Investor in this case, is a  
2 member of the Merrill & Ring family of companies  
3 located in Washington State, in the United States of  
4 America. The principals of Merrill & Ring are  
5 comprised of the third, fourth, and fifth  
6 generations of direct descendants of its original  
7 founders, who came to Canada to purchase timberlands  
8 in British Columbia in 1884.

9           The business of Merrill & Ring is tree  
10 farming, which is the growing, harvesting, marketing  
11 of trees. Merrill & Ring has been growing,  
12 harvesting, and marketing trees in British Columbia  
13 for over 120 years.

14           Merrill & Ring began buying land in British  
15 Columbia in the 1880s, and it owns approximately  
16 10,200 acres of private lands in the Province of  
17 British Columbia.

18           This, on the big screen, is a map of the  
19 Province of British Columbia. This is a map of the  
20 Province of British Columbia. Let's see if I can  
21 find something that will--it's a very large  
22 room...okay, much better. So, this is a map of the

09:11:04 1 Province of British Columbia.

2           The Province of British Columbia is  
3 approximately five times the size of the United  
4 Kingdom. Approximately 95 percent of British  
5 Columbia is publicly owned lands known as Crown  
6 lands. British Columbia has one of the largest  
7 public forests on earth. Two-thirds of British  
8 Columbia, or approximately 235 million acres, is  
9 completely covered by forests. Of that 235 million  
10 acres, 130 million acres are considered to be  
11 commercially viable. And of that, approximately  
12 121 million acres, or 96 percent, is publicly owned  
13 Crown land. Only the remaining 4 percent,  
14 approximately five million acres, are privately  
15 owned lands in British Columbia.

16           So, the 10,200 acres owned by Merrill &  
17 Ring make up only 0.008 percent--that's less than  
18 1/100th of 1 percent--of all the private forest  
19 lands in British Columbia. And Merrill & Ring owns  
20 such a small percentage of all the forest land in  
21 British Columbia that I can't even do the math.  
22 It's just that small. Merrill & Ring is, indeed,



09:12:53 1 just a tiny part of the British Columbia forest  
2 industry.

3           And as we look at this map on the large  
4 screen, for the purposes of forest management  
5 British Columbia is divided into Administrative  
6 Regions. They're generally referred to as the  
7 Coast--I will point that out to you here on the  
8 map--and the Interior, really in through here. And  
9 the Coast is divided into two Administrative  
10 Regions. There is the North Coast and the South  
11 Coast.

12           All of Merrill & Ring's lands are located  
13 in the South Coast; and of the 10,200 acres of land  
14 owned by Merrill & Ring on the South Coast, 700  
15 acres are referred to as being provincially  
16 regulated, and 9,500 acres are referred to as being  
17 federally regulated.

18           The distinction between federally regulated  
19 land and provincially regulated land refers simply  
20 to an arbitrary distinction between land first  
21 acquired before May 12, 1906, and land that was  
22 acquired after that date. So, of the 9,500 acres

09:14:14 1 that Merrill & Ring bought before 1906, they're  
2 called federally regulated, and the 700 acres that  
3 Merrill & Ring bought after that date are called  
4 provincially regulated. There are no functional or  
5 practical differences of any significance between  
6 trees or forests that are federally regulated and  
7 those that are provincially regulated.

8           Throughout British Columbia, private land  
9 sits next to public land, and federally regulated  
10 land sits next to provincially regulated lands with  
11 stands of trees of exactly the same species, the  
12 same size, the same quality, the same age, growing  
13 next to each other side by side. In other words,  
14 they are indistinguishable and interchangeable.

15           A hemlock tree is a hemlock tree, wherever  
16 it grows; and the logs that could be manufactured by  
17 cutting that hemlock tree are the same, regardless  
18 of whether the tree grows on federally regulated  
19 land or on provincially regulated land, or  
20 regardless of whether it's on private land or on  
21 public lands. The tree is just a tree. That  
22 hemlock tree is still the hemlock tree, and the

09:15:42 1 hemlock log is the same hemlock log regardless of  
2 what the designation was of the land upon which it  
3 was grown.

4           This is just as true when the same species  
5 of tree is grown in the Interior or on the North  
6 Coast or on the South Coast where Merrill & Ring  
7 happens to be located. And in any case, it takes  
8 approximately 50 years to grow a tree to maturity  
9 for harvesting. The usual harvesting age is in the  
10 range of 50 to 60 years. Merrill & Ring has grown  
11 most of its trees that it harvests for at least 60  
12 years, which tends to make them generally of a  
13 higher quality. And this, like in any business, is  
14 a very important factor in the sustainability of its  
15 business model. In the tree farming business, this  
16 is particularly an important factor in both the  
17 harvesting and the marketing phases of the business  
18 as the very nature of the business requires a  
19 commitment to sustainability for long-term success.

20           Now, the harvesting of trees requires  
21 careful planning and prudent management of  
22 inventory, growth cycles, species selection,

09:17:05 1 quality, prevailing market prices, and competition  
2 in the marketplace. Harvesting requires a large  
3 investment in the mobilization of extensive  
4 resources required and the high costs of  
5 implementing a Harvest Plan for cutting the right  
6 trees in the right place at the right time so they  
7 can be converted into logs of the right size, the  
8 right quality, and for the particular purpose they  
9 will be used for, and to have all that happen at the  
10 right time so logs can be delivered to market at the  
11 right place and for the right buyer.

12           On both the North Coast and the South Coast  
13 of British Columbia, there are actually three  
14 essential phases in the tree farming business. The  
15 first is the harvesting of trees and cutting them  
16 into logs. The second is the sorting, scaling, and  
17 grading of the logs. This confirms their species,  
18 their size, and their quality.

19           The third is the rafting of a bundle of  
20 logs. Sometimes this is called booming, which is  
21 how the logs are moved from place to place across  
22 Coastal waters for delivery to customers.

09:18:35 1           For example, a typical bundle of Merrill &  
2 Ring export logs is comprised of about 40 logs.  
3 These logs are--let's say they're hemlock--they  
4 could be between 36 and 40 feet in length, and they  
5 will be between 12 and 16 inches in diameter. Just  
6 to give you an idea of what we're talking about.

7           Now, each of these three phases of tree  
8 farming also involve storage and transportation.  
9 These add important factors of time and costs, which  
10 are also central to productivity and profit; and,  
11 like in any business, time is money.

12           Now, without governmental intervention, the  
13 time involved in the basic phases of this business  
14 typically takes in the range of about five weeks,  
15 but in the case of Merrill & Ring, there is  
16 governmental interference, and that governmental  
17 interference fundamentally affects Merrill & Ring's  
18 ability to compete on a level playing field because  
19 the Government's interference distorts the  
20 marketplace and artificially reduces revenue in ways  
21 that disadvantage Merrill & Ring and favor its  
22 domestic competitors.

09:19:58 1           This happens every day to Merrill & Ring.  
2 As a result, the administration and implementation  
3 of a Regulatory Regime developed by the Government  
4 of British Columbia in conjunction with the  
5 Government of Canada for the purpose of  
6 administratively controlling the export from British  
7 Columbia of an administratively selected category of  
8 logs.

9           Now, as a matter of Canadian constitutional  
10 law, the Canadian Federal Government has exclusive  
11 jurisdiction to regulate exports and imports. Every  
12 export from Canada is issued solely by the Canadian  
13 Federal Government.

14           Now, a central problem of the Regime is  
15 that this selective administrative action is only  
16 applied to logs growing on land in British Columbia.  
17 It is not applied in any other part of Canada  
18 outside of British Columbia. Any other part of  
19 Canada is different. British Columbia has its own  
20 set of rules imposed by the Federal Government of  
21 Canada. In all other parts of Canada, a private  
22 landowner automatically receives an Export Permit to

09:21:13 1 export their logs on mere application.

2           Within British Columbia, the selective  
3 administrative control of log exports is only  
4 applied to lands and trees to which British Columbia  
5 has not given an administrative exemption, but  
6 British Columbia does not give administrative  
7 exemptions to the so-called "federally regulated  
8 lands," and British Columbia does not give  
9 exemptions to land on the South Coast. It only  
10 gives exemptions to lands on the North Coast and to  
11 the Interior.

12           Since almost all of Merrill & Ring's lands  
13 are deemed to be in the category of federally  
14 regulated lands, and all of Merrill & Ring's lands  
15 are in the South Coast of British Columbia, Merrill  
16 & Ring is denied these administrative exemptions.

17           The profound effect of this different  
18 administrative treatment is that export restrictions  
19 are not administratively applied to Merrill & Ring's  
20 competitors who operate in the North Coast of  
21 British Columbia or in the Interior of British  
22 Columbia or who operate anywhere else in Canada

09:22:35 1 outside of British Columbia.

2           And it's not applied in the same way to  
3 Merrill & Ring's competitors on the South Coast,  
4 those who operate on provincially regulated lands,  
5 which comprises the majority of forest land on the  
6 South Coast and sit directly beside Merrill & Ring.

7           These policies, procedures, and practices  
8 which embody the administration of the Export  
9 Control Regime and which are at the very heart of  
10 this case purport to emanate from a Federal  
11 Government policy described in what is commonly  
12 known as Notice 102, and a companion British  
13 Columbia Government policy contained in a Government  
14 handout describing procedures for the export of  
15 Coastal lumber. Excuse me. Coastal timber. There  
16 is a difference, as my clients always points out to  
17 me.

18           There are several devastating business  
19 effects that flow directly from the administration  
20 of the resulting Regime which these Government  
21 policies purport to justify.

22           One is that the main form of administrative



09:23:52 1 exemption, which is denied to Merrill & Ring only  
2 because it owns federally regulated land on the  
3 South Coast of British Columbia--this is what's  
4 called a standing exemption--a standing exemption  
5 allows a tree farm owner to obtain Federal  
6 Government permission to export logs while the trees  
7 are still standing. So, the trees that are going to  
8 be cut do not have to be cut. This allows the owner  
9 of the trees to enter into contracts with buyers for  
10 logs of a particular kind, the kind that that buyer  
11 requires, knowing that an Export Permit for these  
12 logs will be granted without delay and without  
13 uncertainty. So, the owner can engage in the very  
14 costly processes of harvesting these trees,  
15 manufacturing the logs, and delivering them to the  
16 buyer in the most effective, economical, and  
17 predictable way.

18           Now, instead, the administration of the  
19 Export Control Regime compels Merrill & Ring every  
20 time it wants to export logs to apply for a permit  
21 to export them only after they have already been cut  
22 and manufactured into logs. This requires Merrill &

09:25:17 1 Ring to have to always guess what log  
2 specifications' prospective buyers might be  
3 interested in rather than being able to enter into  
4 prior cut-to-suit contracts or long-term supply  
5 contracts that require predictability. The  
6 administration of the Regime also compels Merrill &  
7 Ring to advertise to the domestic market of British  
8 Columbia. It advertises that it has logs for sale  
9 for which it is seeking an Export Permit. The  
10 Regime then allows those domestic buyers, who are  
11 typically log processors like sawmills or pulpmills  
12 that do not need high quality logs to make an offer  
13 to buy the high quality Merrill & Ring logs that  
14 Merrill & Ring wants to export.

15           Now, the export price of logs is  
16 substantially higher than the domestic price of  
17 logs. In addition to the delay caused by the  
18 mandatory advertising period, what causes the  
19 problem is that if a domestic buyer offers to buy  
20 logs that Merrill & Ring has advertised that it has  
21 available for export, that offer immediately stops  
22 Merrill & Ring from being able to obtain an Export

09:26:37 1 Permit. This is why in the forest industry an offer  
2 to buy logs that have been advertised as being  
3 available for export is called a block. It blocks  
4 Merrill & Ring from getting an Export Permit. The  
5 only way Merrill & Ring can get an Export Permit is  
6 to have the blocker remove the block by having the  
7 blocker withdraw the blocking offer. This, of  
8 course, compels Merrill & Ring to negotiate some  
9 arrangement with the blocker to sell some logs to  
10 the blocker for a lower price than what Merrill &  
11 Ring would realize for those logs in the export  
12 market. And in a direct reference to blackmail,  
13 this blocking is referred to as blackmail, because a  
14 block has the effect of holding logs hostage until  
15 the blockers pay a ransom to release them.

16           The practical result is that when Merrill &  
17 Ring wants to export logs, it has to pay a ransom  
18 because the blocker knows that when the Government  
19 Regime can be used to paralyze an export like  
20 Merrill & Ring, it knows every time it does this it  
21 has the effect of using the governmental process to  
22 block Merrill & Ring. This practice is so endemic

09:28:07 1 that it's just as common for a random to be paid to  
2 the blocker in advance just to prevent the block  
3 from occurring.

4           In either case, Merrill & Ring has to pay a  
5 ransom to get a permit to export its logs, and it  
6 has to pay this ransom just because its land is  
7 located on the South Coast of British Columbia and  
8 is deemed by the administration of the Regime to be  
9 federally regulated. All logs that are exported  
10 from Canada require the log Export Permit from the  
11 Federal Government, but only a select category of  
12 logs require the exporter to advertise the logs they  
13 want to export and then pay a ransom before they're  
14 granted an Export Permit.

15           Merrill & Ring's competitors, who have  
16 exemptions because their lands are on the North  
17 Coast of British Columbia or in the Interior of  
18 British Columbia or whose lands are located outside  
19 of British Columbia do not have to advertise the  
20 logs they choose to export, so they are not subject  
21 to blockmail, and they do not have to pay this  
22 ransom.

09:29:23 1           In addition, to having to sell some of its  
2 high quality export logs to a domestic blocker at a  
3 reduced price in order to remove the block or to  
4 prevent the block, the administration of the Regime  
5 also compels Merrill & Ring to incur long delays in  
6 time and very large additional costs before it can  
7 obtain an Export Permit. Instead of the ordinary  
8 five weeks it takes from the time the tree is cut to  
9 the time its logs can be delivered to a buyer, the  
10 administration of the regime compels Merrill & Ring  
11 each time to incur many more additional steps and to  
12 take many more additional costs. These typically  
13 add a minimum of eight to nine weeks to the time it  
14 takes for Merrill & Ring before it can deliver its  
15 logs to a buyer.

16           So, every Merrill & Ring applies for an  
17 Export Permit to sell its logs for their optimum  
18 value in the export market, the arbitrary  
19 administration of the Regime causes Merrill & Ring  
20 to lose revenue and to incur extra costs.

21           Now, this Regime causes Merrill & Ring to  
22 lose revenue because Merrill & Ring is forced to

09:30:49 1 sell some of its logs to a domestic blocker at a  
2 lower price than it could realize for those logs in  
3 the export market and because it's unable to enter  
4 into specific precut contracts with buyers, or  
5 because long-term supply contracts with buyers can't  
6 be entered into because those kinds of contracts  
7 require certainty, stability, and predictability.

8           Merrill & Ring has to incur extra costs  
9 because it has to incur extra brokerage fees, extra  
10 towing and storage charges, and extra transportation  
11 risks, like losses from sinking logs, water damage,  
12 and damages from toredoes, a type of water worm that  
13 drill holes into floating logs and destroy their  
14 value, as well as extra sorting and scaling costs,  
15 and extra staffing and overhead costs.

16           Scaling, for example, which is the  
17 measurement of logs by volume, is required by the  
18 Regime to be done metrically. When the United  
19 States and Asia use a different scale, so the  
20 application of the Regime compels Merrill & Ring to  
21 incur the extra expense of double scaling to export  
22 its logs. The administration of the Regime also

09:32:22 1 forces Merrill & Ring to prepare suboptimal harvest  
2 plants because Merrill & Ring cannot sell its logs  
3 to a buyer before it harvests them, and it does not  
4 know if it will be allowed to export logs that are  
5 cut to the actual specifications that the buyers  
6 actually want.

7           Nonetheless, in the ordinary course of its  
8 daily business, Merrill & Ring also sells logs  
9 directly into the domestic Canadian market in  
10 British Columbia. Those logs, however, are  
11 typically of a lower grade. They're sold on  
12 different terms and naturally command a lower price.

13           The effect of blockmail is that Merrill &  
14 Ring is forced to sell higher grade logs at a lower  
15 price in the domestic market than those logs would  
16 realize in the export market. Now that difference  
17 in that price is the ransom paid by Merrill & Ring  
18 for every Export Permit, and Merrill & Ring has no  
19 effective recourse to do anything about it. Even  
20 though the administration of the Regime--that  
21 includes two Government committees that purport to  
22 review and settle the market value of logs that are

09:33:49 1 advertised for export--those committees only make  
2 the problem worse. These committees are the Timber  
3 Export Advisory Committee, called TEAC, the members  
4 of which are industry representatives appointed by  
5 the British Columbia Government, and the Federal  
6 Timber Export Advisory Committee called FTEAC.  
7 FTEAC is comprised of exactly the same industry  
8 representatives as TEAC, except it also includes one  
9 representative of the Federal Government. FTEAC is  
10 housed in TEAC's Secretariat in the B.C. Ministry of  
11 Forests. FTEAC is administrated by the B.C.  
12 Ministry of Forests, and B.C. provides  
13 administrative and analytical support to FTEAC. If  
14 Merrill & Ring is not satisfied with an offer made  
15 to block export, it can refer the offer to FTEAC for  
16 review. FTEAC then sets the market value of the  
17 logs that are being blocked.

18           But the industry representatives who  
19 comprise TEAC are mainly domestic British Columbia  
20 log buyers as well as log exporting competitors of  
21 Merrill & Ring. Individually and collectively the  
22 members of TEAC and FTEAC have a direct financial



09:35:24 1 interest in the price they set and a direct  
2 financial interest in suppressing the market value  
3 of logs in British Columbia to keep the price low  
4 for themselves and their fellow British Columbia log  
5 buyers and log processors.

6           So, instead of these Government committees  
7 providing a safety net, the reality is that the  
8 administration of the Regime puts the fox in charge  
9 of the hen house. And the result, the purported  
10 objective, the determination of market value, is  
11 actually done by a Government appointed group of  
12 industry insiders who have a direct financial  
13 interest in their very own decisions, and to truly  
14 add arrogance to injury, their decisions and their  
15 deliberations are kept secret. There is no  
16 opportunity for transparency, verification,  
17 accountability, or any meaningful opportunity for  
18 input or review. The Government committee process  
19 simply gives Government sanction to what by any  
20 standard is extortion or an expropriation.

21           And the rationale for this administrative  
22 Regime was set to ensure that an adequate supply of

09:36:55 1 logs for the B.C. domestic sawmill and pulpmill  
2 industry would be established before logs would be  
3 permitted for export. That rationale may make some  
4 sense if there is a shortage of supply, but for  
5 decades now there has been no shortage of supply of  
6 logs in British Columbia. To the contrary, there is  
7 nothing but a huge surplus of logs in British  
8 Columbia.

9           So, there is no longer any rational  
10 connection between the stated purpose of the Regime,  
11 its actual design, and its implementation. And  
12 since there is no rationale for what's being done to  
13 Merrill & Ring, the very use of that rationale of  
14 log shortage to justify the ongoing administrative  
15 action is completely disingenuous.

16           In effect, Merrill & Ring is forced to  
17 subsidize British Columbia's log processors, and  
18 Merrill & Ring is simply too small to resist the  
19 manipulation and the distortion of the market  
20 caused by the administration of this Regime. And it  
21 leaves Merrill & Ring with just one choice each and  
22 every day, which is to pay the ransom and to do

09:38:25 1 whatever it can to minimize its losses.

2           So, the success of Merrill & Ring's  
3 business becomes defined not by its ability to  
4 maximize profits in a free and open market, or its  
5 level of competitiveness, or the ability for it to  
6 organize and optimize its Harvest Plan, its growing,  
7 and those things that should make a business work.  
8 Merrill & Ring's success, its hallmark for success,  
9 has to be the ability to cut its losses. And it  
10 will be self-evident to the Tribunal that these  
11 governmental policies and practices and actions are  
12 simply wrong, that they are an abuse of governmental  
13 discretion and a patent violation of the NAFTA.

14           As the members of this Tribunal know very  
15 well at this point, one of the foundational  
16 principles of the NAFTA is the principle of national  
17 treatment. NAFTA treatment Article 1102 enshrines  
18 the Golden Rule of the NAFTA: The Investor is  
19 entitled to treatment that is no less favorable than  
20 the best treatment accorded in that jurisdiction to  
21 competing investments in like circumstances. And  
22 when I mean that jurisdiction, I mean the regulating

09:39:48 1 jurisdiction. NAFTA is very clear, so we know  
2 exactly what we are talking about.

3           National treatment protects the equality of  
4 competitive opportunity between investments  
5 operating in like circumstances and between  
6 investors operating in like circumstances. And if a  
7 Government measure impairs the competitive  
8 relationship, the competitive opportunity, it  
9 violates NAFTA Article 1102.

10           Now, in this case, Merrill & Ring and all  
11 of its competitors are in a defined product market.  
12 It's a market that identifies products by certain  
13 defined characteristics like sort, species, and  
14 quality, in the same markets, to the same customers  
15 and the same users. And in this defined product  
16 market, cost is relevant. In this market, the  
17 defining characteristic is price, which is at the  
18 heart of this competitive relationship.

19           Now, just as fundamental to the NAFTA is  
20 the guarantee of fair and equitable treatment  
21 contained in the international law standard of  
22 treatment in NAFTA Article 1105. The essence of

09:41:16 1 this obligation is good faith. NAFTA Article 1105  
2 prohibits arbitrariness, and it prohibits  
3 discrimination. It requires natural justice.  
4 Article 1105 also requires Canada to provide full  
5 protection and security. This means that Canada  
6 must observe the rule of law to protect the  
7 legitimate expectations of a foreign Investor in a  
8 modern business environment.

9           Blackmail is blackmail, and a shakedown is  
10 a shakedown no matter what you call it. Whether  
11 it's done with a gun or a knife or a letter or a  
12 phone call, it's all the same. And despite Merrill  
13 & Ring's repeated pleas for help, the administration  
14 of the Log Export Control Regime has turned a blind  
15 eye and has failed to protect Merrill & Ring.

16           Natural justice requires any decision that  
17 affects the rights, status, or interests of a party  
18 to be made by independent and impartial decision  
19 makers who have no personal interest in the result,  
20 who make their decisions openly and transparently,  
21 and on the basis of known standards and principles  
22 that are supported by verifiable information, and

09:42:53 1 only after a full, real, and meaningful opportunity  
2 for those who may be affected by the decision to  
3 have some input into it.

4           The secret, biased, and self-serving  
5 processes of TEAC and FTEAC make a mockery of these  
6 fundamental principles, and that is especially so in  
7 the absence of any shortage of supply of logs in  
8 British Columbia and in the presence of an abundant  
9 and well-known surplus of logs.

10           The administrative policies and practices  
11 involved in the administration of the Log Export  
12 Control Regime stresses prices, distorts the market,  
13 and turns basic economic principles upside down.  
14 The Regime allows some to take unfair advantage of  
15 others, and that destroys the level playing field of  
16 a free market and of fair competition, and this is  
17 the essence for which the NAFTA was designed to  
18 protect.

19           Now, contrary to Article 1106 of the NAFTA,  
20 the administration of the Log Export Control Regime  
21 also requires Merrill & Ring to assemble a given  
22 amount of logs of a given type and given locations

09:44:26 1 based on arbitrary and undefined standards such as  
2 the remoteness of where they are harvested, before  
3 Merrill & Ring can even apply for an Export Permit,  
4 and it gives a clear preference to Merrill & Ring's  
5 competitors who could harvest trees and manufacture  
6 logs without these restrictions. Merrill & Ring is  
7 required to manufacture these logs before they can  
8 obtain an Export Permit, while others do not need to  
9 meet this requirement.

10           Now, the Export Control Regime is an  
11 industrial policy devised by the Government of  
12 British Columbia and supported and enacted by the  
13 Government of Canada. And any industrial policy  
14 that contains these types of requirements and  
15 resulting preferences that interferes with the  
16 orderly market are prohibited by NAFTA and are a  
17 patent violation of it.

18           And contrary to NAFTA Article 1110, the  
19 administration of the Log Export Control Regime  
20 deprives Merrill & Ring from one of its most  
21 precious Canadian business assets: The right to use  
22 its property as it sees fit and to receive a fair

09:45:48 1 market value for its property that it wishes to sell  
2 or that has been taken from it by governmental  
3 action.

4           Neither in law nor in logic can there be  
5 any justification for the policies and procedures  
6 that are imposed on Merrill & Ring by the  
7 administration of the Log Expert Control Regime.

8           Now, over the next few days, Mr. President,  
9 Members of the Tribunal, the Tribunal will hear  
10 directly from Mr. Norm Schaaf. Mr. Schaaf is a Vice  
11 President of Merrill & Ring and General Manager of  
12 Timberlands and Administration, and he's going to  
13 explain the log harvesting process.

14           And you will hear from Paul Stutesman, also  
15 a Vice President of Merrill & Ring, who is  
16 responsible for supervising its log marketing  
17 processes.

18           And you will hear from Tony Kurucz, an  
19 independent log broker who sells Merrill & Ring logs  
20 domestically and deals with the logistics of its  
21 harvests.

22           And then you will hear from Richard Ringma,



09:47:10 1 who is not here yet, who is employed by the second  
2 largest private forest landowner in British Columbia  
3 located on the Coast of British Columbia, and he  
4 will speak to his own extensive experience with the  
5 administration of the Log Expert Control Regime.

6           You'll also hear from several experts.  
7 These include Doug Ruffle, who I think is here with  
8 us, who is an expert timber appraiser who has  
9 reviewed and assessed the Merrill & Ring Harvest  
10 Plan.

11           Professor Robert Howse, who we all know is  
12 out of the country right now, on certain  
13 international law questions.

14           And Mr. Robert Low, a chartered business  
15 Valuator, who has quantified the damage caused to  
16 Merrill & Ring by the administration of the Log  
17 Expert Control Regime.

18           Mr. President, Members of the Tribunal,  
19 this case is about the trees that Merrill & Ring has  
20 been growing in British Columbia for over 120 years.  
21 This Tribunal will be familiar with the common  
22 expression that people can sometimes lose sight of

09:48:21 1 the forest because they get lost in the trees. Now,  
2 what that expression means is that we sometimes lose  
3 sight of what's really happening because we get  
4 immersed in small distractions. So, as we wander  
5 through the trees of this case, we need to be ever  
6 mindful of the patent unfairness and  
7 unreasonableness of the Log Expert Control Regime  
8 and its real effect on Merrill & Ring.

9 In other words, Mr. President, while there  
10 are many times that we cannot see the forests for  
11 the trees, this time we really can.

12 With that, we thank you for the opportunity  
13 of presenting our oral submissions this morning, and  
14 we look forward to a very productive and fruitful  
15 hearing over the next few days. Thank you very  
16 much.

17 PRESIDENT ORREGO VICUÑA: Thank you,  
18 Mr. Appleton, for your opening statement. And now  
19 we will proceed straight on to the opening statement  
20 by the Respondent.

21 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

22 MS. TABET: Mr. President and Members of

09:50:48 1 the Tribunal, as a preliminary matter let me  
2 introduce the legal team that will address you this  
3 week. You will hear from--

4 MR. APPLETON: Excuse me, Mr. Chairman,  
5 before we begin, I really need to get the material.

6 MS. TABET: Please. Apologies.

7 MR. APPLETON: Just to make sure we're all  
8 in place. Sorry, Ms. Tabet. Perhaps you might  
9 start again.

10 MS. TABET: All right. You will hear this  
11 week from Ms. Di Pierdomenico. She will address you  
12 on the Article 1106 issues. You will hear as well  
13 from my colleagues, Mr. Watchmaker and Mr. Little,  
14 as well as Mr. Dumberry, who will address you on the  
15 minimum standard of treatment, and Ms. Lévesque,  
16 who will address you on expropriation.

17 As an organizational matter, I've just  
18 provided you with a Core Bundle of my presentation  
19 as well as a copy of the PowerPoint presentation,  
20 and I will be referring to these documents.

21 So, this case is about a challenge to  
22 Canadian's Log Expert Control Regime. More

09:51:57 1 specifically, it's about an Investor who, after  
2 having operated under the Regime for over a decade,  
3 as you heard Mr. Appleton say, they now want to  
4 challenge the Regime as a whole under NAFTA Chapter  
5 Eleven.

6           The challenge should be dismissed for two  
7 reasons. First, because Chapter Eleven bars an  
8 Investor bringing a claim given that more than three  
9 years have elapsed since they became aware of the  
10 Regime and damages resulting from it. And, second,  
11 because none of what you've heard this morning or  
12 throughout the submissions of the Investor, none of  
13 these allegations are capable of constituting nor do  
14 they constitute breaches by Canada of NAFTA Chapter  
15 Eleven obligations.

16           Now, although there are some  
17 mischaracterizations by the Investor that will need  
18 to be corrected this week, the case is really a  
19 systemic challenge against the Regime as a whole,  
20 and therefore the fundamental issues that you will  
21 need to decide this week are mainly legal and not  
22 factual. Indeed, the Investor does not complain of

09:53:10 1 specific instances of misapplication of the Regime.  
2 What the Investor complains of is the Regime itself,  
3 and more generally of log export controls. This is  
4 clear from the Investor's damages case.

5           The Investor complains that the Regime, and  
6 more specifically the surplus test, imposes a burden  
7 and delays to log producers wishing to export. It's  
8 clear--you've heard it this morning--that Merrill &  
9 Ring would prefer not to be subject to log export  
10 controls. You heard them say that the Regime causes  
11 price suppression and that it's trade-distortive.  
12 But that's not the issue, and the only issue before  
13 you is whether this is a breach of NAFTA Chapter  
14 Eleven.

15           There is no doubt that the Investor  
16 disagrees with Canada's policy rationale for  
17 imposing log export controls, but this Tribunal is  
18 not here to decide whether log export controls are  
19 desirable or if they're good public policy. That's  
20 the role of the Government, so instead of pleading  
21 to NAFTA Chapter Eleven obligations, the Investor  
22 has made vague references to the fact that the

09:54:32 1 regime is unfair, unreasonable, and discriminatory,  
2 but this is not supported by the evidence on the  
3 record. The evidence shows that the Regime is  
4 administered in a fair, uniform, and  
5 nondiscriminatory way.

6 More to the point, the evidence does not  
7 support any finding that Chapter Eleven obligations  
8 have been breached. In fact, the Investor's  
9 allegations have very little to do with Chapter  
10 Eleven obligations.

11 Now, let me bring your attention to some of  
12 these fundamental problems right away, and I will  
13 come back to these, but I want you to have them in  
14 mind from the outset. The Investor's  
15 national-treatment claim raises eight aspects of the  
16 Regime that it alleges results in less favorable  
17 treatment of his investment. Yet the Investor has  
18 not put forward any evidence that there is  
19 nationality-based discrimination. They have not  
20 even asserted that the Regime treats differently  
21 American log producers from Canadian log producers.  
22 In fact, it doesn't. The Regime treats all the

09:55:43 1 investors the same.

2 Under Article 1105, the Investor raised a  
3 number of minor issues regarding the process set out  
4 in the Regime, for example, the composition and the  
5 Advisory Committee and how it makes its  
6 recommendations. But none of the issues it raises,  
7 notwithstanding the colorful language used, have  
8 anything to do with the type of serious breaches of  
9 international law such as denial of justice that the  
10 minimum standard of treatment was meant to address.

11 With respect to the Investor's Article 1106  
12 allegations, the Investor has raised issues such as  
13 extra towing costs and minimum volumes for  
14 advertising in remote regions, but these have  
15 nothing to do with the type of performance  
16 requirements that are covered by that article.  
17 Article 1106 deals with requirements that are  
18 imposed on foreign investments as a condition of  
19 their operation, such as local content rules and  
20 requirements to export.

21 As for the Article 1110 claim, there is  
22 simply no substantial deprivation of Merrill & Ring

09:57:11 1 at issue or even alleged. The Investor claims that  
2 Canada has expropriated what they referred to in  
3 their submission as an interest in realizing export  
4 sales at a fair market value on international  
5 markets.

6 Now, notwithstanding how the Investor tries  
7 to characterize this interest, what they're talking  
8 about is a potential price difference, and that's  
9 not an investment that's protected by the NAFTA, so  
10 there can be no expropriation.

11 And this should be enough for you to  
12 dismiss the claim, but I will come back to each of  
13 the NAFTA obligations at issue in the legal test.

14 Now, before doing so I would like to go  
15 over some of the factual elements and the aspects of  
16 Notice 102 and the Provincial Regime that are being  
17 challenged because this will be important to clarify  
18 some of the terminology and understand some of the  
19 comparisons that are being made.

20 Log export controls have been in place in  
21 British Columbia for many decades. Now, local use  
22 and manufacture requirements have been in place in



09:58:33 1 British Columbia, in fact, for over a century. The  
2 current procedures under the B.C. Forest Act have  
3 been substantially unchanged since the mid-eighties.  
4 The most recent policy document describing the B.C.  
5 export procedures dates from 1999.

6           At the Federal level, the procedures for  
7 obtaining an Export Permit for Federal land in  
8 British Columbia have been substantially unchanged  
9 since 1986. That's when Notice 23 was issued to  
10 harmonize the Federal process with the Provincial  
11 one. And the current Notice 102 that's at issue  
12 dates from 1998. Those dates will be important in  
13 the context of the time bar argument.

14           The legal basis for log export controls in  
15 Canada is set out in the Export Import Permit Act  
16 which I will refer to as the EIPA. It requires that  
17 all log exports from Canada obtain an Export Permit.  
18 This applies in addition to the requirements of the  
19 Provincial Regime.

20           Now, notwithstanding the Provincial local  
21 use and manufacturing requirement and the Federal  
22 log export controls, a large portion of Canada's log

10:00:10 1 exports come from British Columbia. Depending on  
2 the years, we're talking about between 80 and  
3 90 percent of the Canadian log exports that will  
4 come from British Columbia. Almost 90 percent of  
5 these exports come from the Coastal region because  
6 of its easy access to water and noncostly  
7 transportation.

8           Now, in comparison, Alberta's export  
9 represents less than 1 percent of Canada's exports.

10           The Federal and Provincial log export  
11 controls respond to the particular situation in  
12 British Columbia. This will be important to keep in  
13 mind in considering the Investor's argument that the  
14 treatment of log producers in British Columbia  
15 should be compared to that of other Provinces and  
16 also to the--it will be important to keep this in  
17 mind when hearing the Investor's argument that the  
18 Federal Regime only applies to British Columbia but  
19 not to other Provinces.

20           Now, for historical and constitutional  
21 reasons, there are two Regimes that apply in British  
22 Columbia. This is what we referred to in this

10:01:25 1 arbitration as the Federal and the Provincial  
2 Regime. The Federal Regime is set out under Notice  
3 102, and this was issued by the Department of  
4 Foreign Affairs and International Trade to provide  
5 some guidance to exporters on the process to obtain  
6 an Export Permit for logs.

7 Most of the Investor's allegations seem to  
8 relate to Notice 102. The Provincial Regime,  
9 including the local use and manufacture  
10 requirements, are set out in part 10 of the B.C.  
11 Forest Act. The Export Procedures are detailed in a  
12 policy document that's referred to as the B.C.  
13 Export Procedures.

14 In its latest submission, the Investor  
15 responding to the amicus submission, the Investor  
16 has stated that it's not challenging the B.C. Forest  
17 Act but that it's challenging the 1999 B.C. export  
18 procedures.

19 Some of the differences that you heard this  
20 morning the difference between those two Regimes are  
21 at issue, so I want to take a few moments just to  
22 explain, set out the basic components of the two

10:02:40 1 Regimes and the process. I will first start with  
2 the Provincial Regime.

3           Now, the Provincial Regime applies to Crown  
4 lands and to private lands granted after 1906. Now,  
5 the Investor has referred to this, to the 1906 date,  
6 as an arbitrary date, an arbitrary date between that  
7 sets the difference between what's Federal and  
8 Provincial. 1906 is the date at which the Timber  
9 Manufacture Act was passed by British Columbia, and  
10 as Ms. Korecky says in her Affidavit, the idea was  
11 that over time the Province of British Columbia  
12 wanted to--sought to retain higher value for the  
13 lands before granting them to private individuals,  
14 and so it introduced in 1906 with the Timber Act a  
15 local use and manufacture requirement. And there  
16 are conditions and fees associated with any  
17 exemption that is made from the local use and  
18 manufacture. Lands that were granted before 1906  
19 are not subject to this.

20           Now, there are three types of exemptions to  
21 the local use and manufacture requirements set in  
22 the Provincial Regime. There is the utilization, an

10:04:22 1 economic and a surplus exemption. All of these  
2 exemptions may be granted on an individual or a  
3 blanket basis; and when I say a blanket basis, I  
4 refer to the fact that the exemption may be granted  
5 for a whole region or area. And these exemptions  
6 may be granted for standing or for harvested trees.

7           Again, when an exception is granted, a  
8 fee-in-lieu of manufacture will have to be paid for  
9 the logs that are exported. Mr. Cook--you will hear  
10 later this week Mr. Cook explain some of these  
11 exemptions in his testimony, but I will provide just  
12 a brief overview just so we understand what we're  
13 talking about.

14           The utilization exemption is granted only  
15 in cases where timber would otherwise go to waste.  
16 For example, it has been granted in land areas that  
17 have been cleared by the oil and gas industry and  
18 pipeline development projects.

19           The economic exemption is granted when  
20 harvesting is economically viable only if the  
21 portion of timber can be exported.

22           And the surplus exemption is granted to

10:05:47 1 timber that is surplused to local demand. Now, in  
2 order to receive the surplus exemption, the logs  
3 must go through the surplus test. The surplus test  
4 is an important part of the Investor's challenge.

5           So, how does the Minister of Forests  
6 determine that, whether logs are surplused to  
7 domestic needs? The Minister will do so with the  
8 help of an Advisory Committee, and Mr. Appleton has  
9 referred to the TEAC. This is the name of this  
10 advisory, the Provincial Advisory Committee, and it  
11 is, indeed, comprised of industry experts, both  
12 private and public sector representatives, and the  
13 experts, the industry participants, are drawn from  
14 both log processors and log producers.

15           Now, why are there industry experts?  
16 That's so that the committee can advise the Minister  
17 on what's happening in the market and the fair  
18 market value. I'll come back to this in a moment.

19           The composition of this committee has been  
20 challenged by the Investor, including its operation  
21 in the context of its 1105 allegations.

22           Now, let me just explain the process to put

10:07:17 1 in context Mr. Appleton's allegations of  
2 blockmailing and blackmailing. Essentially a  
3 company that wishes to export logs must advertise  
4 them on a Bi-Weekly List. This, the advertisement,  
5 gives the domestic mills an opportunity to make an  
6 offer to purchase the logs. If no offer is  
7 received, then the logs will be deemed surplus. If an  
8 offer is received, then the committee has to  
9 consider whether the offer represents fair market  
10 value. So, contrarily to what Mr. Appleton said, an  
11 offer does not immediately stop the export.

12           Now, if an offer is made at a fair market  
13 price, then the logs are not considered surplus to  
14 local needs. If the offer is not made at fair  
15 market value, then the committee will recommend to  
16 the Minister that the logs be deemed surplus.

17           In assessing whether the offers received  
18 are at a fair market price, the committee reviews  
19 the prevailing Domestic Market Price and various  
20 factors relating to the logs being advertised, such  
21 as the species, sort, and grade, the size of the  
22 booms, the average length and diameter of the logs,

10:08:51 1 and the age and location of the logs. And they also  
2 consider transactional sales price for equivalent  
3 booms in the market. And that's why it's important  
4 to have industry participants in this Advisory  
5 Committee.

6           Now, for this the purpose of this  
7 advertising process for the surplus test, there are  
8 some differences between the Coast and the Interior  
9 as to whether standing timber can be advertised.

10           On the Coast, the timber must be harvested  
11 before it's advertised. In the Interior of B.C.,  
12 the timber can be advertised while it is standing.  
13 Those advertisement requirements and these  
14 differences are at issue in this arbitration, so I  
15 will come back to this in the context of the  
16 national treatment, the performance requirements,  
17 and the minimum standard of treatment allegations.

18           There are also some minimum volume  
19 requirements for advertising that apply, depending  
20 on whether a log is--producer is in a remote versus  
21 a nonremote area. This also has been at issue.

22           Now, for the surplus test to function



10:10:23 1 properly, it is important that the logs be  
2 sorted--by that you heard Mr. Appleton--that means  
3 grouped according to recognized industry categories.  
4 On the Coast these categories are described in the  
5 Coast market domestic end use--sorry, the Coast  
6 Domestic Market End Use Sort Descriptions.

7           It's also important that the logs be scaled  
8 according to the B.C. metric system, and the  
9 historical elements are important because they allow  
10 potential buyers to assess whether the advertised  
11 logs are of interest and to give them a proper fair  
12 market price.

13           Now, let me talk about the Federal Regime,  
14 and I will be much briefer, given that there are  
15 some things that have already been covered with  
16 respect to the Provincial Regime. The Federal  
17 Regime--that's Notice 102--applies to private lands  
18 that are granted before 1906 and to aboriginal  
19 lands. I have already explained why this divided  
20 date of 1906. Under the Federal Regime, the logs  
21 can be exported only if they are surplus to domestic  
22 needs, and the test to determine whether they are

10:11:55 1 surplus is very similar to the test under the  
2 Provincial Regime.

3           The surplus test is administered by the  
4 Export Control Division of the Department of Foreign  
5 Affairs and International Trade in Ottawa; and it is  
6 the Minister of Foreign Affairs that makes the  
7 determination as to whether the logs are surplus to  
8 domestic needs, and they do that through the Federal  
9 surplus testing procedure. Very much like the  
10 Provincial Regime, there is also a Federal Advisory  
11 Committee that was established to make  
12 recommendations to the Minister. The Federal  
13 Government and the Province of British Columbia have  
14 agreed to cooperate with respect to the  
15 administration and the advertising of the surplus  
16 test process.

17           Therefore, the meetings of the TEAC, the  
18 Provincial Advisory Committee, and the FTEAC, the  
19 Federal counterpart are held jointly. And, in fact,  
20 a lot of the members of the Provincial Advisory  
21 Committee are the very same members that form the  
22 Federal Committee.

10:13:05 1           Now, there are two main differences as you  
2 can see between the Federal and the Provincial  
3 Regime. Unlike the Provincial Regime, there is no  
4 economic or utilization exemption granted under the  
5 Federal Regime. And also, unlike the Provincial  
6 Regime, there is no fee-in-lieu of manufacture, no  
7 fee that the Investor that exports its logs has to  
8 pay when it does so.

9           The Investor has made much of the  
10 differences between these two Regimes, so I will  
11 come back to this in the context of the national  
12 treatment argument.

13           The key point is that difference between  
14 the Federal Regime and the Provincial Regime are not  
15 violations of NAFTA Chapter Eleven. They're not a  
16 violation of national treatment. The differences  
17 result, in part, from the different mandates between  
18 the two pieces of legislation: The Federal IEPA and  
19 the B.C. Forest Act. The Province has a much  
20 broader forest management mandate, whereas the  
21 Federal Government's focus is on log exports to  
22 ensure that there is adequate domestic supply of

10:14:14 1 logs.

2           Now, let me turn to the legal issues that  
3 the Tribunal will have to decide in this  
4 arbitration.

5           The starting point to be--to consider what  
6 are the measures at issue, and this should be a  
7 considerable question, but there is a bit of  
8 confusion. In its legal argument with respect to  
9 the specific breaches of NAFTA, the Investor has put  
10 forward a case with respect to various aspects of  
11 Notice 102 and the B.C. Export Procedures. They're  
12 challenging these aspects of the procedures  
13 themselves. In its time-bar argument, the Investor  
14 argues that its case is also about particular  
15 applications of the Regime.

16           Now, in the expropriation and damages  
17 claim, the Investor has sought compensation for the  
18 effects of the Regime as a whole, but also more  
19 generally from any effects of log export controls  
20 themselves.

21           So, in effect, Canada is faced with three  
22 different and inconsistent cases. The Tribunal has

10:15:33 1 to keep in mind that the case cannot be about the  
2 existence of log export controls.

3           As the amicus have discussed in their  
4 submissions, log export controls were anticipated by  
5 the NAFTA parties, and Canada's log export controls  
6 were specifically allowed under Chapter Three. And  
7 this is why the Investor has chosen instead to  
8 challenge specific aspects of Notice 102 and the  
9 B.C. Export Procedures. Yet again, when it comes to  
10 the damages claim, the Investor did not limit its  
11 quantification of damages to damages resulting from  
12 the procedure it challenges. Rather, what it has  
13 done is submit a wholesale measure of its damages  
14 that results from the existence of the Regime and  
15 more generally from the log export controls as a  
16 whole. For the purpose of my legal arguments, I  
17 will focus only on the specific allegations of the  
18 NAFTA that the Investor has challenged.

19           But the first key legal issue that the  
20 Tribunal must address is whether it has jurisdiction  
21 over this claim in light of the time bar set out in  
22 Article 1116(2) of NAFTA. This is a threshold

10:16:51 1 question. The Investor can only bring a claim--

2 ARBITRATOR ROWLEY: Could I interrupt you  
3 for one moment.

4 MS. TABET: Sorry. Please.

5 ARBITRATOR ROWLEY: Is this a  
6 jurisdictional issue or is it a matter of defense?

7 MS. TABET: We submit it's a jurisdictional  
8 issue, that Article 1116(2) is a jurisdictional  
9 issue.

10 ARBITRATOR ROWLEY: If at some stage you  
11 will develop that further--

12 MS. TABET: I will.

13 ARBITRATOR ROWLEY: If not convenient this  
14 morning, in your closing, and I'm particularly  
15 interested because of the opening words of 1116  
16 which speak about the Investor's right to bring a  
17 claim as opposed to the right of a tribunal to hear  
18 a matter which may--may--be dealt with in 1101.

19 Don't feel you need to deal with it now,  
20 but at some stage I do want to hear from the parties  
21 on this point.

22 MS. TABET: No. Thank you. I think I

10:18:04 1 will.

2           Mr. Rowley, as you said, the Investor--the  
3 words of Article 1116(2) point you to the fact that  
4 the Investor can only bring a claim within three  
5 years of the knowledge of the breach and resulting  
6 damage. And let me just go through the dates here  
7 that are important.

8           First, the Notice of Arbitration that was  
9 filed December 27, 2006. So, the three year cutoff  
10 date is therefore December 27, 2003.

11           Simply put, in Canada's view, the Tribunal  
12 has only jurisdiction to consider the Investor's  
13 claim if the breaches happened after that date.

14           Canada has raised this objection at the  
15 outset of the case as a jurisdictional matter, but  
16 at the first procedural meeting, Canada argued that  
17 the case was really about a measure that had been in  
18 place for over three years prior to the submission  
19 of the Notice of Arbitration and, therefore, that it  
20 was out of time. The fact is that the Investor has  
21 been aware of the Regime before Notice--since before  
22 Notice 102, in fact, since before it was issued in

10:19:20 1 1998. It's also been aware of the Provincial B.C.  
2 Export Procedures since at least 1999.

3 In fact, both the Federal and the  
4 Provincial Regime are substantially unchanged since  
5 the mid-eighties.

6 The Investor had not contested that it knew  
7 and operated under the Regime for over three years  
8 before bringing the claim to arbitration. You won't  
9 hear any of their witnesses say differently.

10 Now, at the first meeting we had with the  
11 Tribunal, you decided that the Investor's case had  
12 not been sufficiently fleshed out, and that in  
13 theory there could have been some issues that are  
14 related to the application of the Regime that fell  
15 within the three years cutoff date. But now that  
16 we've heard the Investor's case, it's clear that the  
17 allegations that are before you are not about  
18 individual applications. They're about the Regime  
19 itself, and the compensation that the Investor seeks  
20 makes that very evident.

21 There are numerous letters on the record by  
22 Mr. Schaaf, Mr. Stutesman, and their lawyers that



10:20:38 1 show that Merrill & Ring has been complaining of the  
2 Regime at the very least since 1997, when they were  
3 consulted about the proposed procedures under Notice  
4 102. I have included those at Tabs 7, 8, and 9 of  
5 your Core Bundle, and you will see that the letters  
6 voice the very same complaints that are now before  
7 this Arbitral Tribunal. They include complaints  
8 about the composition of the Advisory Committee and  
9 what they now refer to as blockmailing. And they  
10 also include complaints about the fact that certain  
11 exemptions are not available for Federal land. This  
12 is very clear from all those letters.

13           But the very fact that the Investor has  
14 repeatedly complained about the process since 1997  
15 and 1998 doesn't suggest that the complaints are  
16 meritorious. There is simply evidence that the  
17 Investor has never accepted to be subject to log  
18 export controls and has continuously lobbied the  
19 Federal Government to have them removed. In fact,  
20 the Investor again does not deny that it knew of the  
21 Regime since before 2003, and there is no question  
22 that it knew of any resulting damages prior to that

10:21:54 1 date. It's simply not credible that a company  
2 operating under the Regime and making regular  
3 applications for export did not know of the effect  
4 of these procedures.

5           Now, also consider the fact that in their  
6 damage claim the Investor has asserted that it knows  
7 its future loss resulting from the procedures with  
8 certainty. In any event, the Article does not  
9 require that the exact extent of the damages be  
10 known for the limitation period to start. The  
11 Investor has tried to get around the time bar by  
12 arguing that the Regime is a continuous measure, and  
13 that, therefore, it renews the limitation period  
14 every time it is applied.

15           It has also argued that the case is about  
16 distinct applications of the Regime. I will give  
17 you three reasons why you should reject this. The  
18 first reason is that the Investor's argument simply  
19 ignores the terms of Article 1116(2) and reads out  
20 the term "first acquired."

21           Secondly, this argument is inconsistent  
22 with what the NAFTA Parties agree is the proper

10:23:19 1 interpretation to give to the Article. The three  
2 NAFTA Parties have agreed that a continuing course  
3 of conduct does not renew the limitation, the  
4 three-year period for an Investor to bring a claim.  
5 And this agreement of the three NAFTA Parties, the  
6 parties to the agreement, should be given  
7 significant weight.

8           And the third reason you have to reject the  
9 Investor's argument is that their case is not about  
10 individual applications of the Regime. Again, this  
11 is not what you've heard today, and this is not what  
12 their damage claim suggests.

13           Let me turn to the specific NAFTA  
14 obligations at issue before you. This will be  
15 useful to keep in mind in hearing the various  
16 witnesses this week.

17           There is disagreement--with respect to  
18 Article 1102, there is disagreement on the proper  
19 legal test to apply. The Investor--you've heard the  
20 Investor say that the issue is whether two  
21 businesses are in competition; and, if they are,  
22 that's the end of the matter. Any difference of

10:24:45 1 treatment they receive is a violation of national  
2 treatment. This stems from a fundamental  
3 misunderstanding by the Investor of the purpose of  
4 the article. What Article 1102 provides is a  
5 protection against nationality-based discrimination,  
6 and it's not the broad protection the Investor would  
7 like it to be.

8           The implication of the Investor's argument  
9 is that all jurisdictions, all Governments in Canada  
10 should have perfectly identical Regimes, and it  
11 amounts to arguing that the fact that corporate laws  
12 in Delaware are not the same as corporate laws in  
13 California are a breach of national treatment.

14           And in its written submissions, the  
15 Investor has gone so far as to say that the Tribunal  
16 cannot take into account any policy consideration  
17 that could explain the different regulatory  
18 requirements in the two Regimes.

19           The same types of arguments have been made  
20 in previous NAFTA Chapter Eleven cases and have been  
21 rejected. In fact, the implication of the  
22 Investor's test are such that they would make it

10:26:13 1 impossible for a Government to regulate. Let me  
2 just take a moment to provide you an example to  
3 illustrate this.

4           Take the example of two paint factories.  
5 One is situated in an industrial zone and the other  
6 one in an environmental sensitive area. According  
7 to the Investor's theory, because the two paint  
8 factories have the same product and compete, that's  
9 the end of the matter. Any different regulatory  
10 treatment is a violation of national treatment. As  
11 you can see, that makes it effectively impossible  
12 for a Government to regulate.

13           Now, instead of comparing the two paint  
14 factories, what would be more relevant for the  
15 purpose of national treatment is to compare the  
16 treatment received by other Canadian enterprises  
17 located in similarly sensitive areas. I won't go  
18 into the detail of this today, but let me just  
19 recall the allegations that are before you with  
20 respect to 1102.

21           Now, in considering these allegations and  
22 the testimony of witnesses this week, you have to

10:27:38 1 ask yourself the following questions:

2           Are the differences that the Investor is  
3 alleging, are they based on treatment of different  
4 Governments? And in fact, as you heard this  
5 morning, that's the essence of the Investor's case  
6 under 1102. The Investor is complaining that log  
7 producers in British Columbia, those in Alberta  
8 don't receive the same treatment, and they're  
9 complaining that the treatment under the Provincial  
10 Regime and the Federal Regime is not the same.

11           While it is true, it is not a violation of  
12 national treatment. And both the Federal and the  
13 Provincial Regime that apply to British Columbia are  
14 a response to the particular conditions in that  
15 Province. I have described those conditions at the  
16 beginning of my presentation.

17           But really what the Investor is seeking is  
18 an à la carte Regime where it gets exemptions under  
19 the Provincial Regime but does not have to pay the  
20 fee-in-lieu of manufacture.

21           The real test for you--the real question  
22 you have to ask yourself is: Are there any American

10:28:48 1 companies being treated differently--I'm sorry, is  
2 the Investor being treated differently than any  
3 Canadian company in like circumstance? And they're  
4 not. The B.C. Export Procedures and Notice 102 make  
5 absolutely no distinction based on the nationality  
6 of log producers. In fact, the Investor does not  
7 even allege this nationality-based discrimination.

8           Let me now turn to the allegations of  
9 breach of minimum standard of treatment. I have  
10 three points to make. The first one will be that  
11 the legal test is the one set out in the Binding  
12 Note of Interpretation. The second one is that none  
13 of the Investor's allegations meet the threshold to  
14 find a violation of minimum standard of  
15 treatment--and that notwithstanding the colorful  
16 language used by Mr. Appleton. And the third point  
17 will be that the Investor relies on inaccurate facts  
18 and mischaracterizations.

19           So, turning to the legal test, and here the  
20 parties disagree again on what is required to  
21 establish a breach of minimum standard of treatment.  
22 The Investor's position seems to be that anything

10:30:14 1 that it feels is unfair or unreasonable as a policy  
2 will constitute a breach of Article 1105. This is  
3 simply inconsistent with the Free Trade Commission  
4 Note of Interpretation that is binding upon this  
5 Tribunal, and the Note confirmed that Article 1105  
6 protects Investors against a breach of a rule of  
7 customary international law with respect to  
8 treatment of aliens.

9           Now, the Investor in his written submission  
10 has tried to put forward various arguments as to why  
11 the Tribunal should disregard the Binding Note, but  
12 at the end of the day that's part of the governing  
13 law of this Tribunal as provided in Article 1131.

14           My second point is that really what is at  
15 issue here are minor administrative irritants that  
16 don't rise to the level of a breach of minimum  
17 standard of treatment. And beyond the use of the  
18 adjectives like unfair, unreasonable, and arbitrary,  
19 the Tribunal needs to look behind those and look  
20 carefully at what the Investor is really talking  
21 about. These allegations are described at Page 132  
22 and following of the Investor's Reply. The specific



10:31:44 1 allegations are for the most part relatively minor  
2 administrative issues. I won't go into this today,  
3 but my colleague, Mr. Dumberry, will address this in  
4 more detail in the concluding arguments. The point  
5 here is simply that none of these allegations,  
6 either individually or collectively, fall below the  
7 minimum floor established by Article 1105.

8           Now, my final point on Article 1105 is that  
9 there are significant factual inaccuracies and  
10 mischaracterizations with respect to these  
11 allegations, and we have addressed those in our  
12 submissions. I just want to talk about the  
13 blockmailing allegation because Mr. Appleton has  
14 spent a lot of time this morning raising this issue.

15           Now, there's three things you need to keep  
16 in mind about these allegations: First, the action  
17 they're complaining of relate to conduct of the  
18 private parties, and in some cases what the Investor  
19 is complaining of is simply the fact that a domestic  
20 mill can make an offer on logs advertised for sale.  
21 In other cases, the Investor seems to suggest that  
22 there is wrongdoing or an abuse of the process, but

10:33:04 1 in both cases the conduct at issue is that of the  
2 private parties. And we have already explained that  
3 at international law we cannot be held  
4 responsible--the Government of Canada cannot be held  
5 responsible for any conduct--for every conduct of  
6 private parties.

7 Now, the second point is that they have not  
8 established a pattern of abuse of the process.  
9 Mr. Kurucz, Mr. Schaaf, and Mr. Stutesman have made  
10 in their Witness Statements a lot of general  
11 allegations regarding the existence of unfair abuses  
12 by buyers. No doubt you will hear more about this  
13 this week, but where is the evidence of any of this  
14 wrongdoing? There is nothing on the record.

15 The witnesses do not provide references to  
16 specific facts and provide no evidence in support.  
17 And the Tribunal has to be particularly cautious  
18 about the use of the term "blockmail" and what it  
19 qualifies as abuses of the process, and the Investor  
20 has referred to ransoms having to be paid and to  
21 being subject to conduct akin to having a knife put  
22 to your throat.

10:34:26 1           But what are we talking about here? The  
2 Investor is talking about the fact that when an  
3 offer is made, the offer still has to be at a  
4 domestic fair market price for it to be considered  
5 valid, and for surplus that is not to be granted.

6           So, even if the Investor's logs are blocked  
7 from exportation, the Investor will receive the fair  
8 market value for the logs. In fact, a lot of what  
9 they're talking about are simply business dealings  
10 between log buyers and log sellers. You will hear  
11 from Mr. Bustard, a former industry participant,  
12 about these business negotiations, and in his view,  
13 there are simply mutually advantaged--advantageous  
14 dealings by private parties. And it's important to  
15 keep in mind that the Governments are not aware of  
16 these negotiations because they take place before  
17 any offer is made or considered by the advisory  
18 committee.

19           And this brings me to the third point with  
20 respect to blockmailing, and that's Governments do  
21 not condone abuses of the process. Now, there is no  
22 question that in all regulated markets, there is a

10:35:54 1 potential for gaming or for abuses by market  
2 participants, but what the Tribunal has to consider  
3 is what the Government does about true abuses of the  
4 system. And we have provided evidence on the record  
5 that shows that when the Governments become aware  
6 that there have been abuses with respect to the  
7 surplus test and that the offers that are made by  
8 participants are not indicative of a domestic needs,  
9 in those cases the Government has reacted and  
10 rejected those offers. And if warranted, the  
11 Government will take disciplinary measures.

12           The only allegation of abuse that relates  
13 to the administration of the surplus test that  
14 Merrill & Ring has articulated is that their logs  
15 have been targeted; and Ms. Korecky and Mr. Cook,  
16 who have reviewed many offers on advertised logs  
17 through their participation in the Advisory  
18 Committee, have stated that in their view, that's  
19 not the case. On the one occasion that there is no  
20 pattern of abuse or targeting, but on the one  
21 occasion where Ms. Korecky has--where it has been  
22 brought to her attention and she has investigated

10:37:15 1 the issue, and she took action to remedy the  
2 situation. And that's the relevant fact that the  
3 Tribunal needs to consider for the purpose of  
4 Article 1105.

5           Turning to the Article 1106 allegations,  
6 and I won't spend too much time on this this  
7 morning, but there are three aspects of the Regime  
8 that the Investor challenges under Article 1106.  
9 The first is the requirement to cut and sort to  
10 normal market practice, and the requirement to scale  
11 all timber according to the metric system. The  
12 second is the minimum volume requirement for  
13 advertising in remote areas. And the third is the  
14 additional towing and log-retrieval services that  
15 result from the Regime.

16           Now, the important starting point is that  
17 Article 1106 sets a defined list of prohibited  
18 performance requirements, and the flaw with the  
19 Investor's allegation is that they don't identify  
20 any requirement that fits within that list. The  
21 allegations have nothing to do with local content  
22 requirements, requirements to export, or

10:38:44 1 restrictions on sales in Canada. Those are the  
2 three subarticles of 1106 that they have brought the  
3 case under.

4           And the arguments are, in fact, very  
5 contrived, if you look at their written submission.

6           Just as an illustration, for example, the  
7 allegation with respect to cutting to make it fit  
8 within the prohibition against local use  
9 requirements, the Investor has to argue that  
10 essentially it requires--the measure requires it to  
11 give a preference to its own trees.

12           I will now turn to the expropriation claim.  
13 The starting point for there to be an expropriation  
14 under NAFTA is that, in fact, not the starting point  
15 but the only test is that there has to be a  
16 substantial deprivation of an investment. And there  
17 is no question here that Merrill & Ring, the  
18 enterprise, its lands and its logs have not been  
19 substantially deprived or taken by the Government.

20           So, this is what the Investor had to argue.  
21 It's argued that the only investment that the  
22 Tribunal should look at in the context of the

10:40:00 1 expropriation claim is what it calls, and I quote  
2 from Paragraph 464 of the Reply, the Investor's  
3 interests in selling logs for a fair value on  
4 international market.

5           Now, there are three basic problems with  
6 this theory. The first is that the Investor has not  
7 proven that an interest or price differential  
8 exists.

9           The second is that such an interest is not  
10 an investment protected by Article 1139 of NAFTA,  
11 and as such it cannot be expropriated.

12           And, finally, the third point--problem with  
13 the theory is that really it makes a mockery of the  
14 substantial deprivation test under Article 1110.

15           I will say a few brief words about the  
16 Investor's damages claim. You will hear from Canada  
17 and the Investor's experts later this week on the  
18 proper measure of compensation if any breach is  
19 found. In fact, I suspect we will spend a lot of  
20 time hearing about various expert witnesses about  
21 that. And Canada's experts will explain how the  
22 Investor has adopted an inappropriate methodology in

10:41:38 1 support of its assumptions that it suffers lost  
2 export premiums because of the Regime. They will  
3 bring to your attention the flaws in the Investor's  
4 methodology and the fact that the case is not  
5 documented and that it's biased. And they will also  
6 demonstrate that the damages being claimed are  
7 grossly exaggerated. But I won't get into all of  
8 this this morning. I just want to draw your  
9 attention to the two fundamental flaws in the  
10 Investor's claim which are sufficient for you to  
11 reject the claim outright.

12           The first one is that the Investor present  
13 a damages claim that is in no way related to the  
14 allegation it makes under each of the NAFTA  
15 obligations. The question you need to ask yourself,  
16 if you conclude that there is a breach of a Chapter  
17 Eleven obligation, is what is the appropriate basis  
18 for compensation resulting from that particular  
19 breach? Obviously the same compensation will not  
20 flow from breaches of Article 1102 and from breaches  
21 of Article 1105 or 1106 or even Article 1110.

22           The compensation will also depend on the



10:43:02 1 aspect of the measure that you find to be in breach.  
2 The cancellation of an FTEAC meeting will not result  
3 in the same damages as if you find that the  
4 fee-in-lieu of manufacture that Merrill & Ring has  
5 to pay on its Provincial land is a breach of NAFTA.  
6 But the Investor has ignored this. And, in fact,  
7 they have only provided you with a single measure of  
8 damage that results from the Regime--or at least  
9 that they claim result from the Regime.

10           And in essence, their claim, their damages  
11 claim requires you to find that all aspects of the  
12 procedure under Notice 102 and the B.C. Export  
13 Procedures are contrary to Chapter Eleven. And, in  
14 fact, you would also have to find that the log  
15 export controls themselves are contrary to Chapter  
16 Eleven. That's the fundamental problem with the  
17 Investor's damages case.

18           The second one is, in fact, they have  
19 failed to establish that the Regime causes the lost  
20 export premiums and the cost of compliance that they  
21 claim. They have failed to establish that there is  
22 a casual link--sorry, a causal link--between the log

10:44:17 1 export controls or the Regime and those alleged  
2 heads of damages.

3           So, for those two reasons alone, you should  
4 conclude that the Investor has failed to make its  
5 damages case.

6           Thank you. That concludes my opening  
7 statement.

8           PRESIDENT ORREGO VICUÑA: Thank you,  
9 Ms. Tabet, for your opening presentation on behalf  
10 of the Respondent.

11           So, we will now have a break of 15 minutes,  
12 and we will resume at 11:00 with Mr. Schaaf. That's  
13 the first witness; right?

14           Okay. Thank you.

15           (Brief recess.)

16           PRESIDENT ORREGO VICUÑA: Fine. We are  
17 ready to resume our work.

18           Now, we have a decision to make in respect  
19 of the situation, one particular witness who at the  
20 same time is a representative for the Respondent who  
21 is Mr. Cook. We have discussed with the parties the  
22 different views before we have actually deliberated

11:16:23 1 on that, and we have taken good note of the argument  
2 that each has presented.

3           So, there is basically a question of  
4 whether the fact of him being a witness or the fact  
5 of him being a party representative the one that  
6 should prevail in the decision, and the Tribunal has  
7 deliberated and come to the conclusion that it is  
8 the fact that he is a representative of a party  
9 whose measures are under discussion, and that then  
10 he should be allowed to stay in the room in spite  
11 that he will be a witness, I think, tomorrow  
12 morning. So, if you can live with that, then we  
13 would rule it in that sense. And, of course, it is  
14 a very peculiar situation, but that is what we have  
15 finally decided.

16           So, having said that, we are--

17           MR. APPLETON: Mr. President, we'd like an  
18 opportunity to speak on the record on that matter.

19           PRESIDENT ORREGO VICUÑA: If briefly,  
20 please.

21           MR. APPLETON: I will speak from the  
22 podium.

11:17:40 1           PRESIDENT ORREGO VICUÑA: Okay.

2           MR. APPLETON: Mr. President, I thought it  
3 was important that we put some matters on the record  
4 with respect to Mr. Cook.

5           In our view, Mr. Cook is simply just a  
6 regular witness and like the other witnesses  
7 involved in giving evidence in this matter; that, in  
8 fact, the Tribunal has made three rulings in advance  
9 on this matter that have carefully canvassed the  
10 issues, and so to give a change on those rulings  
11 right now is something that causes some distress  
12 which is why we want to put this formally on the  
13 record.

14           The Province of British Columbia is not a  
15 party to this proceeding. In the scheme of the  
16 NAFTA, Canada represents British Columbia and is  
17 responsible for British Columbia. Mr. Cook, in any  
18 event, has no authority to speak for British  
19 Columbia. And even if he did, counsel represents  
20 Canada and not the Province of British Columbia who  
21 does not have representation in this hearing.

22           And counsel for Canada can only take

11:18:46 1 instructions from Canada. Now, in my view,  
2 actually, I'm not sure that the other person  
3 designated by Canada as a representative is senior  
4 enough to be able to instruct counsel, but  
5 Ms. Tabet, who is counsel for Canada, lead counsel  
6 here, has said that's who she would like to  
7 designate, and that's entirely up to her. I don't  
8 take issue, but I would say normally both of those  
9 persons should be excluded in the normal course,  
10 especially when we have issues of conflicting  
11 testimony of factual matters that can be involved  
12 with their own conduct in their own issues.

13           But counsel clearly for Canada cannot  
14 accept contrary instructions from Mr. Cook, and that  
15 is really what key issue is. The reason to have  
16 instructing counsel is to be able to instruct  
17 counsel on issues of that, and that doesn't get  
18 served in any way with respect to having Mr. Cook  
19 present.

20           Now, as the Tribunal confirmed in its very  
21 carefully set out decision of April 23rd, British  
22 Columbia Timber Sales is a direct competitor to

11:19:57 1 Merrill & Ring, and this Tribunal ordered that the  
2 B.C. Ministry of Forests could not have information  
3 and could not be made privy to that information; yet  
4 Mr. Cook is from that department. Mr. Cook, as you  
5 will see in the evidence or you have already seen  
6 from his Witness Statements, is in charge of what  
7 goes on there, and that would basically be turning  
8 over all of the restricted access information over  
9 to that governmental entity, and we find that  
10 exceptionally difficult from the perspective of our  
11 client, who is now having all of its competitive  
12 business information turned over that way.

13           That's the reason that the Tribunal already  
14 ordered that Mr. Cook should be restricted, so not  
15 only was he excluded with respect to one of the  
16 other orders, but he was restricted as well, and so  
17 the effect of having him here will now change all of  
18 that.

19           The way the Regime was set up here was  
20 basically each side had two witnesses that would be  
21 excluded: Mr. Kurucz and Mr. Ringma for us, and  
22 Mr. Cook and Mr. Bustard for Canada. And so, we

11:21:04 1 find it very difficult to now have a situation where  
2 that changes where we are not prepared to deal with  
3 that. It's difficult for us, and we wanted to put  
4 formally on the record our extreme concerns about  
5 this decision, especially in light of the fact that  
6 there were three decisions. I can give you the  
7 dates if you would like. They're all in April;  
8 they're all recent: Decision of April the 7th,  
9 April the 10th, and April the 23rd, all dealing with  
10 this matter, and all being consistent in that one  
11 direction.

12 I just wanted to be brief, but I wanted to  
13 make sure I formally put this on the record.

14 PRESIDENT ORREGO VICUÑA: Fine. Thank you,  
15 Mr. Appleton.

16 Would Ms. Tabet like to make a statement.

17 MS. TABET: Very briefly, I will make three  
18 points in response.

19 First, as we've indicated before this,  
20 Mr.--the Provincial measures are also specifically  
21 at issue in this arbitration. Mr. Appleton has said  
22 so. Therefore, it is appropriate that there is a

11:22:22 1 Provincial Government representative there to  
2 instruct the Government of Canada in respect of that  
3 aspect of the case.

4           Second, the issue of the internal dealings  
5 of the Government and who is the appropriate  
6 instructing clients are not something for this  
7 Tribunal to decide.

8           But I do want to bring to your attention to  
9 the Free Trade Commission Note of Interpretation  
10 because it does give an indication as to the  
11 importance that the Federal Governments that are the  
12 three NAFTA Parties give to sharing information with  
13 Provinces. And this is the Note of July 31, 2001:  
14 "The parties further reaffirm that the Governments  
15 of Canada, the United Mexican States, and the United  
16 States of America may share with officials of the  
17 respective Federal, State, or Provincial Governments  
18 all relevant documents in the course of dispute  
19 settlement under NAFTA Chapter Eleven, including  
20 confidential information." This is a Binding Note  
21 on this Tribunal.

22           Now, we have not objected to the fact that



11:23:31 1 because there is restricted information. The  
2 specific nature at issue, we understand that the  
3 Tribunal has decided that Mr. Cook cannot have  
4 access to the specific numbers and the damages. And  
5 we accept that. We are prepared to have Mr. Cook  
6 out of the room when there are specific numbers  
7 dealing with Merrill & Ring's information that is at  
8 issue.

9           Frankly, Mr. Cook in his dealings with  
10 companies has access to all kinds of confidential  
11 information, but we have argued this, and it has  
12 been dealt with.

13           So, for the purpose of facilitating  
14 matters, we are prepared to accept that he be out of  
15 the room when restricted access information is dealt  
16 with.

17           PRESIDENT ORREGO VICUÑA: Thank you,  
18 Ms. Tabet.

19           Well, the Tribunal appreciates the parties'  
20 views. This issue has been taken, but I must  
21 mention in addition that the concern expressed by  
22 Mr. Appleton about one particular company from

11:24:41 1 British Columbia being linked up with the pertinent  
2 Government department that Mr. Cook represents was  
3 the matter of a ruling that that information is not  
4 to be conveyed, and that is still the ruling that it  
5 is not to be conveyed. And as you mentioned, it  
6 would be to that extent and needs helpful to add to  
7 the ruling that we've made is that Mr. Cook, in  
8 spite of being present, would not be cleared for  
9 attending specific parts of the discussion that will  
10 lead to--will relate to this kind of restricted  
11 information.

12           So, thank you so much, and we are now ready  
13 to proceed with the witness statement of Mr. Schaaf.

14           (Discussion off the record.)

15           NORM SCHAAF, INVESTOR'S WITNESS, CALLED

16           PRESIDENT ORREGO VICUÑA: Good morning.

17 Mr. Schaaf. You're welcome to provide your  
18 testimony.

19           Will you please read the witness statement  
20 that is before you for the record.

21           THE WITNESS: I solemnly declare upon my  
22 honor and conscience that I shall speak the truth,

11:27:29 1 the whole truth, and nothing but the truth.

2           PRESIDENT ORREGO VICUÑA: Thank you,  
3 Mr. Schaaf.

4           You will be now subject to direct  
5 examination.

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

7           Mr. President, Members of the Tribunal, one  
8 of the difficulties of leading Mr. Schaaf through  
9 his evidence and trying to parse out the restricted  
10 portions from the unrestricted portions, which will  
11 impact upon whether Mr. Cook can be in the room or  
12 not, is that there may be in the narrative in the  
13 way the evidence comes out some unexpected order of  
14 the evidence, and what we are going to do is when it  
15 appears to me that Mr. Schaaf is heading into an  
16 area that contains commercially sensitive  
17 information or information which Mr. Cook should not  
18 hear, I will endeavor to advise you, Mr. President,  
19 of that and ask for Mr. Cook to be excluded for that  
20 portion of the evidence, and it may be intermittent,  
21 and it may come from time to time.

22           PRESIDENT ORREGO VICUÑA: Eloise reminds me

11:28:52 1 that in any event, one would need to state clearly  
2 that the recording procedures should stop for that  
3 effect because there is the public room also that  
4 has to be cut off for that particular part of the  
5 statement. So, thank you so much. Please proceed.

6 MR. NASH: We will do our best to deal with  
7 the logistics of that.

8 DIRECT EXAMINATION

9 BY MR. NASH:

10 Q. Mr. Schaaf, you are the Vice President of  
11 Timberlands and Administration for Merrill & Ring?

12 A. Yes, I am.

13 Q. And what are your responsibilities in that  
14 position?

15 A. In that position, I manage the company's  
16 timberlands in British Columbia, the state of  
17 Washington, and in New Zealand. I manage a staff of  
18 foresters to conduct those operations within that.  
19 We are responsible for the harvesting, pre-Harvest  
20 Planning, road building, the regeneration of the  
21 forests, all of the management of those forests that  
22 goes on between harvests and the next time that we

11:29:56 1 come into harvest, and a whole host of other  
2 activities, public issues that occur on those  
3 timberlands and related to those timberlands.

4 Q. Mr. Schaaf, you have been with Merrill &  
5 Ring since 1993?

6 A. Yes, I have. I started in 1993 essentially  
7 in the same position. I believe the title was  
8 Operations Forester at that time, and then was  
9 promoted to Vice President the following year, and  
10 this follows about 19 years in the forest industry  
11 where I worked previously for Scott Paper Company  
12 and then Crown Pacific in Washington State.

13 Q. And why has Merrill & Ring brought this  
14 claim to this Tribunal?

15 A. Merrill & Ring is a family-owned company,  
16 and it's owned timberlands in British Columbia since  
17 the 1880s. The earliest records that I've looked at  
18 and found indicated Crown grants in 1884, 1885, '86  
19 that were signed by the original founders, by Clark  
20 Ring, by Thomas Merrill, and then by the Lieutenant  
21 Governor on on behalf of Queen Victoria at that  
22 time.

11:31:13 1           And the lands are still held by the  
2 families, and now into the third, fourth, and fifth  
3 generations. The Chairman of our board, Peter  
4 Garrett, is the grandson of Clark Ring, and 91 years  
5 old. He still comes to the office and is directly  
6 involved in the business.

7           One of the first things I remember him  
8 asking me after I came on board was what are you  
9 doing for my grandchildren? And those grandchildren  
10 at the time were in elementary and middle and high  
11 school. Three of them, the boys, now are all  
12 married. Two of them have families and work within  
13 the companies. So, they now are the fifth  
14 generation, and their children are the sixth  
15 generation of this family ownership. And they're  
16 very vested in it.

17           Because of the Log Expert Control Regime,  
18 Merrill & Ring has been unable to obtain the value  
19 that we should be able to obtain from our  
20 timberlands in British Columbia. This value has  
21 been expropriated and given to domestic processors.  
22 We suffer additional costs as a result of the Regime

11:32:29 1 that lower value. We are forced to engage in this  
2 blockmail, essentially an extortion process that  
3 occurs when domestic processors require us to sell  
4 to them at below fair market value in order that we  
5 can then get some logs approved for export by going  
6 through the process.

7           We suffer additional costs related to our  
8 inability to manage effectively on the lands. We  
9 are unable to make advance Purchase Agreements with  
10 our preferred customers because we have no way of  
11 guaranteeing that we can actually get the wood to  
12 them.

13           We are treated in this way unfairly  
14 relative to some of our competitors. There are  
15 exemptions that are granted within the Province and  
16 by suppliers that are providing the exact same  
17 species and quality and type of wood as we are, and  
18 yet we are not able to get and to take advantage of  
19 these exemptions from the export process.

20           While we are waiting for a determination on  
21 surplus designation, the rafts of these competitors  
22 are being towed right past our properties into the

11:33:55 1 exact same markets that we otherwise could be  
2 selling into, and at prices that we are unable to  
3 obtain due to the procedures and because we have to  
4 wait.

5           Because of these unfair practices that are  
6 part of the Regime, and because Canada and British  
7 Columbia have not changed those practices, we have  
8 brought this action and are seeking damages for what  
9 we have suffered in the past and into the future.

10       Q.    Thank you.

11           You have an undergraduate degree in  
12 forestry?

13       A.    Yes, I do.  I received my undergraduate  
14 degree from Washington State University in 1973, and  
15 then in 1998 received a master of business  
16 administration from the University of Washington.

17       Q.    And you have been in the forestry industry  
18 for your entire career; is that correct?

19       A.    Yes, I have.

20       Q.    Can you describe the Merrill & Ring Group  
21 of families--sorry, the Merrill & Ring family of  
22 companies, please.



11:35:07 1           A.    As I mentioned earlier, the companies are  
2 all family owned, and the businesses are set up  
3 essentially around various generations of the  
4 families in terms of their ownership, but the  
5 ownership has always and consistently been directly  
6 by members of the family and not with outside  
7 ownership. In that context, Merrill & Ring Forestry  
8 Limited Partnership owns the timber and the  
9 properties that are in question in this case. There  
10 are other entities that own timberlands in the state  
11 of Washington. Some of the ownerships are  
12 consistent; that is, the exact same members. Others  
13 are slightly different. But again, all family  
14 owned.

15                 Within Canada, we also own what's referred  
16 to as Georgia Basin Holdings. These are properties  
17 that were identified, I believe, in 1996 for  
18 potentially higher value and possible development  
19 use in the British Columbia area. These are lands  
20 that are right near Campbell River and Squamish  
21 developed communities, and so those lands were sold  
22 from Merrill & Ring Canadian Properties,

11:36:25 1 Incorporated, another one of our family companies,  
2 into Georgia Basin Holdings, which is made up again  
3 of a different generational group of the family  
4 members.

5 Q. Could you refer to your Witness Statement,  
6 please, at Tab 1, Exhibit 1 to your Witness  
7 Statement.

8 You see there a document entitled Merrill &  
9 Ring Pillarpoint (ph.) Garrett & Ring Organizational  
10 Chart?

11 A. Yes.

12 Q. And does that comprise all of the Merrill &  
13 Ring companies in the Merrill & Ring family of  
14 companies?

15 A. The main group of jointly held companies  
16 are represented here. They're all in the large  
17 boxes right in the middle of the page. And again,  
18 the second from the left, Merrill & Ring Forestry  
19 L.P., is the company in direct dispute on this.

20 The ownership of those companies is  
21 essentially displayed above those large, four large  
22 boxes. The various entities and individuals of the

11:37:43 1 families that make up the ownership. These are all  
2 on the Ring side of the ownership. The Merrill side  
3 of the ownership is not shown on this page, so if  
4 you were to have a sort of a mirror image of the top  
5 half on the bottom, it would show the R.D. Merrill  
6 Company ownership that contributes to this  
7 partnership.

8 Q. You refer to the second box from the left  
9 in the center of the page there. Merrill & Ring  
10 Forestry L.P. is the Investor in this case?

11 A. Yes, it is.

12 Q. And it shows on the chart, the chart was  
13 dated October 25, 2006, that there were  
14 approximately 7,600--7,890 acres owned in British  
15 Columbia owned by that entity; is that correct?

16 A. Correct.

17 Q. And then to the right you mention the  
18 Georgia Basin Holdings L.P., and you mention that  
19 Georgia Basin, which is also one of the family  
20 companies, had title to the lands transferred in  
21 1996; that is correct?

22 A. Yes.

11:38:49 1 Q. And it showed as of October 25th, 2006,  
2 that it owned approximately 2,950 acres in British  
3 Columbia?

4 A. That's correct.

5 Q. Does Merrill & Ring have a guiding  
6 philosophy?

7 A. We do.

8 Q. Go ahead.

9 A. We do have a guiding philosophy. As a  
10 family business that has been in existence for over  
11 120 years in both British Columbia and the state of  
12 Washington, sustainability is right on the top of  
13 that list, if you will, of guiding philosophies.  
14 And again, that's why Mr. Garrett asked me the  
15 question of what am I doing for his grandchildren  
16 because he wants to make sure that that  
17 sustainability exists well beyond the time that he's  
18 involved in the company.

19 In addition to that, the qualities that we  
20 tend to--that we seek to embody with those that we  
21 deal with--honesty, integrity, and a quality of  
22 product or service that we provide to all of them,

11:40:11 1 and that guides all the work that we do.

2 MR. NASH: Mr. President, you should have  
3 available to you a binder called Investor's Core  
4 Bundle, which I will be referring to presently, and  
5 specifically at Tab 1.

6 BY MR. NASH:

7 Q. Now, the head office of Merrill & Ring, the  
8 company that you work for, is located in Port  
9 Angeles, Washington, and there is a map up on the  
10 screen there, and I'd like you to take the laser  
11 pointer and as accurately as you can identify where  
12 the head office is in Washington.

13 A. Approximately right there.

14 Q. And you're pointing to the tip of Vancouver  
15 Island across the ocean?

16 A. No, it's actually in Washington State just  
17 south of the tip of Vancouver Island, just south of  
18 Victoria.

19 Q. Thank you.

20 And while we're there, Merrill & Ring owns  
21 timberlands in Washington State as well as in  
22 British Columbia; that is correct?

11:41:15 1           A.    Yes, we do.  Our timberlands in Washington  
2    are right on the Coast and extending down further  
3    into the State below where the map shows as well as  
4    here in Whatcom and Skagit County just below the  
5    southern boundary of British Columbia.

6           Q.    And how far are those Whatcom and Skagit  
7    County properties away from the city of Vancouver by  
8    drive--by car?

9           A.    They're about an hour's drive by car.

10          Q.    And are they timberlands that Merrill &  
11    Ring actively harvest?

12          A.    Yes, we harvest and manage those properties  
13    as we do our other lands in Washington and in a  
14    similar fashion to those that we manage in British  
15    Columbia.

16          Q.    All right.  And do you have a team that  
17    works with you on the management of Merrill & Ring's  
18    timberlands?

19          A.    There are four other foresters on my staff  
20    in Port Angeles that assist me in all of the general  
21    management functions, and then as well we utilize  
22    some marketing services that's provided by an

11:42:22 1 affiliate company, Merrill & Ring Forest Products  
2 L.P. And we have an accounting group in Port  
3 Angeles as well that manages all of the  
4 administrative issues.

5 Q. And Mr. Stutesman, who has been identified  
6 as Vice President of one of the Merrill & Ring  
7 companies, also works with you at Port Angeles?

8 A. Yes. Paul works in our Port Angeles  
9 office, and we very work very closely on log  
10 marketing for our products from British Columbia as  
11 well as in Washington.

12 Q. And Mr. Stutesman is responsible for the  
13 marketing of these Canadian operations, the logs  
14 that are produced from them internationally; that's  
15 correct?

16 A. Yes, he is.

17 Q. And approximately how many acres of forest  
18 land do you have in the State of Washington?

19 A. The companies own about 60,000 acres in  
20 state of Washington. That would be pretty much all  
21 on the west side, Puget Sound area and the Olympic  
22 peninsula.

11:43:27 1 Q. Taking the pointer again, if you will, and  
2 pointing to Vancouver Island, can you locate on the  
3 screen where the properties we are referring to  
4 today are located in British Columbia.

5 A. I'll do my best.

6 One block is approximately here just north  
7 of Vancouver near the city of Squamish. The bulk of  
8 the properties are located near Campbell River, and  
9 a little bit further up, Vancouver Island up as far  
10 as Rock Bay, and then in the islands, Quadra Island,  
11 East Thurlow Island, in between Vancouver Island and  
12 the mainland, and the largest block is just north of  
13 Powell River, and on this it's a little bit hard to  
14 tell, but I'm guessing it's right about there.  
15 Unwin Lake and Theodosia are located there. Those  
16 are the main blocks.

17 Q. Thank you.

18 If you turn to Tab 2 of the Core Bundle of  
19 documents, that depicts a--zoom in, if you will,  
20 thank you--of the properties that we were discussing  
21 today?

22 A. Yes, it does. They're all identified there



11:44:49 1 with a little name and arrow in the way that we  
2 refer to them.

3 Q. And which of those is the largest  
4 properties or collection of properties?

5 A. The largest is the Theodosia block, and  
6 then right nearby there is Unwin Lake.

7 Q. Now, if you need to get to those properties  
8 from Port Angeles, Washington, how do you get there,  
9 and how long does it take?

10 A. To get to the properties on Vancouver  
11 Island or the Theodosia Unwin Lake properties, we  
12 first take a ferry from Port Angeles to Victoria,  
13 that's about an hour-and-a-half, and then we drive  
14 from Victoria to Campbell River. That's another  
15 three hours, three and a half hours. That gets us  
16 to Campbell River. And then if we were to go to the  
17 Menzies Bay property, of course, it's right there.  
18 The others, Rock Bay would be another hour's drive.  
19 The Theodosia/Unwin Lake properties are hour--half  
20 hour to an hour helicopter ride depending on how we  
21 go, or a longer ferry ride if we happen to take the  
22 ferry and drive over there. There is no direct

11:46:07 1 access to Theodosia by ferry, but it gets us to a  
2 road system where we can then connect up with a boat  
3 which then gets us to the property.

4 Q. And how long does it take you to get to the  
5 Charles Bay properties and those north of Campbell  
6 River, north of the Menzies Bay property?

7 A. From the time we would leave Port Angeles  
8 to the time we would arrive, Charles Bay, East  
9 Thurlow property, six hours.

10 Q. And how often would you personally attend  
11 at those properties, approximately, on average, over  
12 the course of a year?

13 A. I get up to our properties probably on  
14 average about once every two months. Others of my  
15 staff go much more regularly to meet with our  
16 contractors up there.

17 Q. And what is your purpose in going there and  
18 your staff going there on that level of frequency?

19 A. My purpose is to essentially just to check  
20 on how we are doing on any of them, to make sure  
21 that our wishes are carried out and that we are  
22 conducting our operations in the way that we should.

11:47:18 1           Also to go up to meetings occasionally in  
2 various locations.

3           The field days are the best ones,  
4 obviously, to get out into the woods. These are  
5 some very beautiful properties. The others on the  
6 staff will go, depending on operations, weekly or  
7 every other week to meet again with the contractors  
8 that are conducting our logging and road building  
9 and reforestation activities.

10       Q.    If you turn back to your statement and go  
11 to Exhibit 2, which should be in front of you, to  
12 your statement.

13       A.    Exhibit 2?

14       Q.    Exhibit 2, Tab 2.

15       A.    Okay.

16           MR. NASH: At this time, I'd like to ask  
17 that Mr. Cook be excluded for this portion of  
18 Mr. Schaaf's testimony as there will be reviewing of  
19 some of the history of the properties. It's  
20 confidential.

21           MS. TABET: It's confidential, so you also  
22 want that hearing closed from the public?

11:48:44 1 MR. NASH: Yes, please.

2 Thank you.

3 (Mr. Cook leaves the room.)

4 BY MR. NASH:

5 Q. Going to Exhibit 2, Mr. Schaaf, does that  
6 depict when the properties were purchased by Merrill  
7 & Ring?

8 A. Yes, these were the Crown grant periods.  
9 Some of them may have been purchased by an agent on  
10 behalf of Merrill & Ring. But to the best of my  
11 knowledge, this is when we acquired the properties.

12 Q. And you'll see that there are three  
13 categories. There at the top it's Merrill & Ring  
14 Forestry L.P. Federal timberlands, and I take it  
15 that those were lands that were purchased by Merrill  
16 & Ring prior to March 12, 1906?

17 A. Yes. These were all the lands that  
18 preceded the March 12, 1906, date.

19 Q. And as of December 31, 2007, you will see  
20 that there is approximately 7,043 acres in that  
21 category?

22 A. Yes.

11:49:44 1 Q. And the next category is Merrill & Ring  
2 Forestry L.P. Provincial timberlands.

3 Do you see that?

4 A. Yes.

5 Q. And in that category--those were properties  
6 that were purchased after March 12, 1906?

7 A. Yes, they are.

8 Q. And in that category, there are  
9 approximately, at least as of the date of this  
10 document, 852 acres of timberlands?

11 A. Yes, that's correct.

12 Q. And then at the bottom you'll see the  
13 Georgia Basin Holdings L.P. Federal timberlands, and  
14 the total acreage in that group is 2,452 acres as of  
15 that date; that's correct?

16 A. Yes.

17 Q. For a total of all the lands of 10,347  
18 acres; right?

19 A. Yes.

20 Q. All right. Now, when the Georgia Basin  
21 lands were transferred to Georgia Basin Holdings in  
22 1996, what was done with the right to harvest timber

11:50:41 1 on those properties?

2 A. The right at the time of that sale from  
3 Merrill & Ring Canadian properties to Georgia Basin,  
4 the timber harvesting right was held by Merrill &  
5 Ring Forestry Limited Partnership by way of a  
6 forestry license that had been in agreement since  
7 1992 or '91. That license remained in effect.  
8 Thereby Merrill & Ring Forestry L.P. owns the rights  
9 to the timber on those lands, even though Georgia  
10 Basin Holdings acquired the underlying land itself.

11 Q. And the effect of that was that Merrill &  
12 Ring Forestry L.P. was entitled to harvest the  
13 timber on those lands through to the expiry of the  
14 license in 2007?

15 A. Yes, Merrill & Ring Forestry L.P. retained  
16 the right then to harvest that timber through  
17 December 2006.

18 Q. And those lands that were bought back in  
19 the 19th century have been owned, managed, harvested  
20 continuously by Merrill & Ring for about 120 years;  
21 is that correct?

22 A. Yes. The first harvesting was in the early

11:51:59 1 1900s. Second harvesting began in the 1940s, and  
2 some of the areas are now actually being harvested a  
3 third time.

4 Q. And are you familiar with the terms first  
5 growth and second growth?

6 A. Yes.

7 Q. And what is first growth?

8 A. First growth also may be referred to as old  
9 growth or virgin timber. It is that which has not  
10 previously been harvested. Second growth is the  
11 crop of trees and the harvest of them that occurred  
12 after the virgin or old growth forest was removed.  
13 And third growth, after the second harvest crop had  
14 been removed.

15 Q. How long does it take a tree after it's  
16 planted to grow to maturity for commercial purposes?

17 A. A tree could reach commercial value in  
18 probably about 40 years. It may have some value  
19 earlier, but it's not very profitable at that point.  
20 Most of our harvests are 50 to 60 years. That's  
21 when the growth rates and--the growth rates begin to  
22 slow, and the value of the timber is such that

11:53:23 1 holding it longer will not generate additional  
2 revenue. Harvesting it then is about the  
3 maximization of the value from that property.

4 Q. And I'd like to turn you then to Exhibit 3  
5 of your statement, Tab 3 in the document in front of  
6 you. And that, as I understand it, shows an  
7 inventory of the timber on each of these properties;  
8 is that right?

9 A. Yes. This is the timber inventory of trees  
10 that are of 40 years of age and older on the Merrill  
11 & Ring Forestry Limited Partnership lands. This  
12 does not include the Georgia Basin holding lands.  
13 And this was as of January 1st, 2008.

14 Q. And so if you just go down, for example, to  
15 the Theodosia property, the second from the bottom,  
16 and work our way across that chart, it shows in the  
17 first column 1,307 acres. That's the number of  
18 acres in the entire Theodosia group of properties?

19 A. That's the number of acres that have  
20 commercial timber on them 40 years and older. There  
21 are other acres that don't have that old of timber  
22 on them.



11:54:39 1 Q. And then in the next several columns we  
2 have the breakdown of the species that are on each  
3 property; is that right?

4 A. Right. Hemlock, balsam together, Douglas  
5 fir, cedar, various spruce and pine species, hard  
6 woods and then a total 467,682 cubic meters.

7 Q. For the Theodosia property?

8 A. Yes.

9 Q. And then if we work our way down to the  
10 very bottom of that final row, which is the total of  
11 all of the cubic matters on all of the properties,  
12 there is total of 786,324 cubic meters of  
13 harvestable timber on all of the properties? Have I  
14 got that right?

15 A. That's correct.

16 Q. And there is--in the second row from the  
17 left there is a column entitled "Grant."

18 Do you see that?

19 A. Yes.

20 Q. And as I understand it, all of the  
21 properties in the top category are Federal grant  
22 lands?

11:55:43 1 A. Right.

2 Q. And then there is one property that is  
3 Provincial grant. That is the Rock Bay property  
4 that's at the bottom?

5 A. Yes.

6 Q. And there are 1,764 cubic meters of  
7 harvestable timbers on that property?

8 A. Yes.

9 Q. And is that your only provincially  
10 regulated, if we can use that term, timber?

11 A. It's the only mature timber that falls  
12 under the Provincial regulation.

13 Q. So, of 786,324 cubic meters, 1,764 are  
14 regulated by the Provincial Regime?

15 A. Yes.

16 Q. How is this inventory calculated? What is  
17 the process that you go through to arrive at these  
18 figures on a certain date?

19 A. We started with an independently conducted  
20 inventory in 1996. This was done by Coast Forest  
21 Management, a forestry consulting business, and they  
22 initially conducted an inventory of our timberlands

11:56:47 1 taking a large number of plots, sample plots,  
2 throughout the property. They calculated a volume  
3 of standing timber on all of the properties,  
4 provided that information to us, and we input that  
5 into our GIS, Geographic Information Systems,  
6 program.

7           From that point in time, then, we've  
8 applied a computerized growth model that is  
9 appropriate for the sites and the species and the  
10 age class that we own. We have depleted the  
11 inventory for timber that has been removed and  
12 harvested, roads that were built, that sort of  
13 thing. We have added into the inventory lands that  
14 we've replanted.

15           And we've also then taken out any lands  
16 that may have been sold, so that every year we  
17 produce a new inventory of whatever our standing  
18 merchantable timber is as well as all of the age  
19 classes and numbers of acres.

20           We deduct from our total inventory  
21 inoperable areas, areas that we think may not be  
22 able to be harvested due to physical conditions,

11:58:15 1 regulation, whatever else may prevent us from  
2 obtaining the timber off those, so those are not  
3 included in this inventory that you see. This is  
4 what we expect to be a net harvestable inventory  
5 from these properties.

6 Q. And is there a science to that procedure,  
7 the taking and establishing of inventory of  
8 timberlands?

9 A. Very much a science. Tree growth has been  
10 studied for hundreds of years. Certainly in British  
11 Columbia and Washington, studied for a hundred years  
12 at least.

13 And the inventory program that we used  
14 utilizes thousands of remeasured plots to develop a  
15 growth model, and these plots, while scattered in  
16 the entire western part of the U.S. and British  
17 Columbia, can also be very specifically utilized for  
18 the particular geographic area. We can parse out  
19 that portion of the plots that are representative  
20 for the area that we're studying.

21 Q. And I'd like to refer you now to the  
22 exhibit portion of Mr. Ruffle's Report, Exhibit 25

11:59:29 1 to the Report of Mr. Ruffle's, which is dated  
2 December 11, 2008.

3 Have you got that exhibit in front of you,  
4 Exhibit 25?

5 A. Yes, I do.

6 Q. And as I understand it, this document shows  
7 an update to the inventory we just looked at as of  
8 November 1st--sorry, November 10, 2008, last  
9 November; is that correct?

10 A. Yes.

11 Q. And it shows there that the volume of  
12 harvestable timber, again falling within the  
13 definition that you earlier gave, is 781,282 cubic  
14 meters as of last November?

15 A. Yes.

16 Q. And did you prepare this document  
17 for--well, did you prepare this document?

18 A. Yes, I did.

19 Q. And you prepared the last document we  
20 looked at as well?

21 A. Yes.

22 Q. Approximately how many acres of private

12:01:14 1 timberland is there in British Columbia?

2 A. I believe the number is about 5 million  
3 acres of private timberland in British Columbia.

4 Q. And of that portion, approximately--well,  
5 there are 10,000 acres approximately owned by  
6 Merrill & Ring?

7 A. Yes, 10,000 by the Merrill & Ring Forestry  
8 L.P. and the Georgia Basin properties.

9 Q. And of all timberlands in British Columbia,  
10 which proportion is owned by the Government--i.e.,  
11 the Crown--and which proportion is owned privately?

12 A. The Crown owns approximately 96 percent of  
13 the timberlands in British Columbia, and the  
14 remaining 4 percent, then, by private companies and  
15 individuals.

16 Q. If you go to Tab 3 of the Core Bundle, in  
17 that white binder in front of you, which is also up  
18 on the screen, does that depict the distribution of  
19 public and private forest land, the public being in  
20 the green and the private being in the pink?

21 A. To the best of my knowledge, this is  
22 accurate.

12:02:32 1 Q. So, from your standpoint, how would you  
2 classify Merrill & Ring in this scheme? Is Merrill  
3 & Ring a large player or a small player in the  
4 British Columbia timber market?

5 A. If the Merrill & Ring properties were given  
6 a color all their own, I don't think you could see  
7 it on the map.

8 Q. In the log market, is there a relationship  
9 between international and domestic prices?

10 A. There is a relationship. Generally  
11 speaking, the international market for logs is  
12 higher than the domestic market for logs of a given  
13 grade.

14 Q. Are there sometimes exceptions to that  
15 general relationship?

16 A. There are exceptions. The logs that are of  
17 the essentially the lowest value in any marketplace  
18 probably don't have a significant differential from  
19 British Columbia to the international marketplace.  
20 These are logs that are going to be sold into the  
21 pulp market into the very low end, domestic saw log  
22 market. But once we get into the higher quality

12:03:58 1 logs, the international marketplace is willing to  
2 pay a higher price for that log than will the  
3 British Columbia market for the very same log.

4 Q. I would like to turn to the subject of  
5 harvest plans. Can you describe for the Tribunal  
6 the process which you go through and Merrill & Ring  
7 go through to establish a Harvest Plan.

8 A. The first thing that we have to consider in  
9 preparation of a Harvest Plan is the direction that  
10 we get from our owners and from our Board of  
11 Directors. And this is a fairly high level  
12 strategic direction. They don't tell us to harvest  
13 a given number of cubic meters in any particular  
14 year or a particular species, but they give us a  
15 general direction and a long range plan. So, that  
16 becomes our foundation.

17 We then begin to develop much more of an  
18 operational plan. We consider things like  
19 particularly what is the market at a given point in  
20 time. What type of wood do our customers want, and  
21 at what price.

22 We consider where we have roads built,



12:05:22 1 where we would need to build roads. Where the  
2 timber quality and quantity particularly matches up  
3 with the customer preferences at that particular  
4 time.

5           We consider operational constraints, if  
6 there may be weather or other issues that we have to  
7 deal with in order to have an efficient operation.  
8 We will look at how we can group our operations to  
9 utilize our staff to the greatest extent possible  
10 and the most efficient way possible.

11           And then we also have to consider within  
12 the marketplace in British Columbia what the  
13 likelihood is that logs that we produced will be  
14 blocked from export through the Log Expert Control  
15 Regime. And this happens seasonally and something  
16 we take into account as we plan operations for a  
17 year.

18       Q.    If you go to Exhibit 5 to your statement,  
19 you have before you an example of such a Harvest  
20 Plan.

21       A.    Yes.

22       Q.    Did you prepare this document?

12:06:57 1 A. Yes, I did.

2 Q. Are you responsible for preparing harvest  
3 plans for Merrill & Ring?

4 A. Yes, I am.

5 Q. And what this document shows us, it's dated  
6 February 5th, 2008; that is correct?

7 A. Yes, sir.

8 Q. And it shows us on the left-hand side the  
9 various years from 2004 down to 2016; correct?

10 A. Yes, it does.

11 Q. And it shows us this document having been  
12 prepared in early 2008, it shows retrospectively  
13 what was actually harvested from 2004 through to the  
14 end of 2007?

15 A. Yes.

16 Q. And then from 2008 forward, it's a plan of  
17 what you intend to harvest over the next eight  
18 years, from 2008 to 2016; correct?

19 A. Correct.

20 Q. If you go across the top of the document,  
21 again it gives the--shows the grant. It shows the  
22 number of acres on each property. It shows the

12:08:01 1 various species from hemlock over to hardwood on the  
2 right-hand side, and then there is a column for the  
3 total.

4           So, to take 2004, for example, it shows a  
5 total of 121,783 cubic meters were harvested on all  
6 properties in 2004; is that correct?

7       A.   That's correct. That's the actual harvest.

8       Q.   And similarly, for 2005, 144,061 cubic  
9 meters were harvested and so on down the list;  
10 correct?

11      A.   Yes.

12      Q.   And then this plan shows that you're  
13 projected at the very bottom, your projected harvest  
14 going across from left to right, and in the far  
15 right you project a harvest of in total over the  
16 period 2004 to 2016, 893,899 cubic meters; correct?

17      A.   That's correct.

18      Q.   And can you briefly describe how you would  
19 arrive at a plan as specific as this. You have  
20 given us the general approach that you take in  
21 formulating a Harvest Plan. How would you  
22 specifically come up with this Harvest Plan?

12:09:16 1       A.    The part through 2007, of course, is very  
2    easy because those are actuals.  From 2008 and  
3    beyond, this is essentially a conceptual plan of how  
4    we might harvest the properties over that period of  
5    time through 2016 with the goal then of achieving  
6    all of the harvests that we intended to during that  
7    period of time.

8            Because Theodosia, for example, is our  
9    largest area, we know that every year we would be in  
10   there harvesting something.  The other areas may  
11   have enough harvest to sustain a reasonable  
12   operation for two or three years, and we would pick  
13   a period of time when we can operate that  
14   efficiently and again estimating what we thought  
15   economic and market conditions would be in various  
16   years to establish this.  It's again a very high  
17   level conceptual type of plan.  Every year we update  
18   this into an operational plan.

19        Q.    And within the high level conceptual plan  
20   that you've referred to, you have an annual Harvest  
21   Plan; that's correct?

22        A.    Yes, that's what I will refer to as the

12:10:32 1 operational plan.

2 Q. Okay. So, let's give the Tribunal an  
3 understanding of how you would develop that annual  
4 plan, and let's say, for example, at the end of 2007  
5 you were looking at what you were planning for 2008.  
6 Can you describe the process you would go through to  
7 establish the annual plan in 2007 for 2008, just to  
8 take an example.

9 A. Actually, early on in 2007, we will begin  
10 to discuss what we think will be happening in 2008,  
11 and if we need to build roads in advance or survey  
12 property lines, that sort of thing, those activities  
13 we try to complete a year in advance so that we're  
14 ready to go.

15 As we get into the fall of the year, we  
16 begin to discuss particularly with Mr. Stutesman and  
17 myself and with our customers what we expect markets  
18 to be. And this, then, helps to identify the areas  
19 that we can find the species and the quality that  
20 will be most in demand for our customers.

21 Once we've made this as a general idea, we  
22 begin to conduct actual harvest unit layout because

12:11:59 1 this happens in generally small blocks of acreages  
2 40, 50, 60, maybe up to a hundred acres in a block,  
3 and so we have to lay that out, and again identify  
4 where any roads need to be built or stream  
5 protection areas need to be marked out and so on.  
6 This generally happens through the fall, and we  
7 prepare a detailed plan, then, for our Board of  
8 Directors that they review. We put together a  
9 financial evaluation for that plan so that we can  
10 estimate harvest revenues and costs. The board  
11 approves that plan as an operational plan early on  
12 in the year, and then throughout the year we go  
13 about implementing that plan, making adjustments as  
14 we need to, depending on especially what we see with  
15 markets probably more than anything throughout the  
16 year.

17 Q. And do you have a person on the ground up  
18 in the Campbell River area who assists you with the  
19 development of that operational plan?

20 A. We have an agent, Progressive Timber Sales,  
21 that assists us with market information as well as  
22 on-the-ground assistance in quality control and

12:13:21 1 managing the log movement process, but we don't have  
2 employees.

3 Q. And briefly describe for the Tribunal the  
4 implementation of the plan, how that is done and who  
5 is involved in that.

6 A. I'm not sure I exactly get your question.

7 Q. Who you start cutting trees, who's involved  
8 in that?

9 A. Okay, thank you.

10 So once we've decided on this plan and  
11 decided to proceed, we contract with a logging  
12 contractor. These are independent groups. They  
13 come out, and they cut the trees that we've  
14 identified in the stand area that's going to be  
15 harvested. The trees are bucked into logs; that is,  
16 the tree itself is cut into sections into the  
17 various logs that make up the appropriate sizes and  
18 take into account the quality that is inherent in  
19 that particular tree and is then translated into the  
20 log.

21 The logs are trucked to a sort area, and we  
22 have some of these of our own, others that we may

12:14:38 1 contract with. But in that sort, sort yard being in  
2 place, the logs are sorted and put into decks, the  
3 deck being of logs of a similar--of the same  
4 species, the same quality, generally the same size,  
5 and they're identified with what we will call a log  
6 sort that again is specific to that species quality,  
7 length, and generally the intended market.

8           Once they're in that sort, when we've  
9 accumulated enough volume, we dump the logs into the  
10 water into a raft, and--well, let me back up one  
11 step before I get there.

12           After they are brought up, brought into the  
13 sort yard, the logs are scaled. That is, that  
14 they're measured for length and diameter and with  
15 deductions for any kind of defect, and there is a  
16 third-party entity that comes out and provides that  
17 scale information for us. At that time, they're  
18 also identified as to which sort they are  
19 appropriate to go into. That takes into account the  
20 dimensions, length, diameter, as well as the species  
21 and the surface quality and other qualities of the  
22 log.



12:16:07 1           So, now moving ahead again, when we've  
2 built enough logs to build to form a raft, they're  
3 dumped into the water. That raft is then towed to a  
4 marketplace or in the case of logs that we seek to  
5 export, generally towed to a Government approved  
6 location where we would then advertise them for  
7 export.

8       Q.   Are there different preferences with  
9 respect to cut, the size of the log internationally  
10 than there are domestically?

11       A.   Every market and every processor has their  
12 own preferences for log lengths and log diameters.  
13 There are some that are quite specific to the Asia  
14 market. For example, 40 feet in length is a very  
15 preferred length. It's not necessarily the same  
16 preference for some of the domestic customers. Some  
17 of the domestic customers want a 34-foot length for  
18 their particular product. And even though that log  
19 may have the qualities to make either a domestic or  
20 an export market, they are of different preferred  
21 lengths. So, that's one of the instances in which  
22 that occurs.

12:17:34 1 Q. Ms. Tabet was just trying to signal  
2 something to me, I believe.

3 MS. TABET: I don't mean to interrupt. I  
4 was just wondering if you had finished dealing with  
5 restricted because a lot of what we've heard has no  
6 numbers or any confidential information, so I was  
7 just wondering if we could call Mr. Cook back into  
8 the room.

9 MR. NASH: No, I think we are going to be  
10 getting intermingled with numbers here, so the  
11 international customers are important matters that  
12 he should be restricted for.

13 MS. TABET: Thank you.

14 BY MR. NASH:

15 Q. Under the current Regime, the Export  
16 Control Regime, at the point at which you cut the  
17 tree, are you able to know who your customer is  
18 going to be for that tree and the logs you produce  
19 from that tree with certainty?

20 A. No, we have no certainty at the time that  
21 we cut the tree. We only have certainty when we've  
22 gone through the Export Control Regime process and

12:18:33 1 have gotten a determination of whether or not the  
2 log is surplus to domestic needs.

3 Q. You referred to the sort. Are you able to  
4 design the sort of logs that you wish to put  
5 together in a bundle for your international customer  
6 knowing that that international customer will  
7 purchase that sort in advance?

8 A. We're unable to make that sort specifically  
9 to a customer because we don't know. We have no  
10 certainty as to whether we can sell to that  
11 customer, so we have to make the sort suboptimal.  
12 It cannot be optimized to the needs of that customer  
13 because we have no certainty we can get the log to  
14 that customer.

15 Q. And are there requirements under the  
16 current Regime for you to sort in a particular way?

17 A. Yes, there are requirements as far as the  
18 sort, and there are also requirements as far as the  
19 rafting of the logs. The sorts have to be of one  
20 species. We can't mix species even though a  
21 customer may be willing to buy mixed species. For  
22 example, alder and maple may be bought by the same

12:19:52 1 customer. Hemlock and spruce may be bought by the  
2 same customer, but we are restricted from joining  
3 those together.

4           We also have to make the sort by one of  
5 several different diameter descriptions. They're  
6 referred to as standard gain. Chip-n-saw  
7 essentially sets the diameter range for the size of  
8 the logs, and so, as in a raft, we have to maintain  
9 all the logs of that same diameter range regardless  
10 of whether our customer may be willing to buy a  
11 different range.

12       Q.    If you refer to Tab 5 of the Investor's  
13 Core Bundle of documents in the white binder in  
14 front of you, you will see there a copy of Notice  
15 102.

16       A.    Yes.

17       Q.    And if you go down to Paragraph 1.5 on the  
18 first page at the bottom, it states, "Only harvested  
19 logs will be considered for export."

20            Do you see that?

21       A.    Yes.

22       Q.    "Logs must be sorted, boomed, or decked or

12:21:00 1 confirm to normal log market practices of not less  
2 than 90 percent," and it continues.

3           Is that what you're referring to as the  
4 requirement under the current Regime which requires  
5 you to sort in a certain way that you would not sort  
6 otherwise?

7       A.    Yes, that is correct.

8       Q.    You'll see that it provides as I stated,  
9 only harvested logs will be considered for export.  
10 How does that impact your business and the way you  
11 plan your harvest?

12       A.    Without having any certainty of where we  
13 can market, we are taking a chance always.  Maybe  
14 the best way to describe how this impacts our  
15 business is to describe how we do things differently  
16 in Washington with the exact same species, the exact  
17 same log qualities, and the exact same markets.  In  
18 Washington, when we operate, we are able take log  
19 buyers to our site where we are planning to harvest  
20 before we ever cut the trees down.  We will receive  
21 a price that that particular buyer will pay for the  
22 logs that come off of that site before we ever cut

12:22:19 1 them. If we don't like the price, then we can  
2 decide not to harvest. If we don't like the price,  
3 we can negotiate something different, but we have  
4 not had to commit to selling or to harvesting until  
5 we've actually reached agreement on the sale of  
6 those logs to what--how they would be manufactured,  
7 and what the customer preferences are, where they  
8 would be delivered, and in what quantities and in  
9 what time periods.

10           And so, virtually every log that we sell  
11 from our Washington operations already has a known  
12 location, market price, and specification before the  
13 tree is ever cut down; and, because the Log Expert  
14 Control Regime in British Columbia, we can do none  
15 of that. We cannot market that log until it has  
16 gone completely through the process that I described  
17 earlier of essentially cutting it, making it into a  
18 log, scaling it, sorting it, moving it, and then we  
19 can begin to decide how we can best market it after  
20 we have gone through the Surplus Testing Procedure  
21 as part of the Regime.

22       Q.    So, is this phrase fair that you can

12:23:39 1 cut-to-suit in Washington whereby you can't do that  
2 in British Columbia?

3 A. We do cut-to-suit in Washington, and we  
4 have no ability to do that in British Columbia.

5 Q. Are you able to enter into long-term supply  
6 contracts with respect to your Washington  
7 timberlands as distinct from what you do in B.C.?

8 A. We typically offer at least three months of  
9 log supply, and it's not uncommon to have longer log  
10 supply agreements with a particular buyer at an  
11 agreed-upon price for a given quality.

12 Q. If you can for a moment turn back to Tab 4  
13 of the Investor's Core Bundle, now that's a map of  
14 North America showing a Coast range of western  
15 hemlock going from, in fact, up in Alaska all the  
16 way down to, it looks like Northern California; that  
17 is correct?

18 A. That's correct.

19 Q. And this hemlock is of the same essential  
20 characteristic throughout from the north to the  
21 south?

22 A. Yes, it's exactly the same species from

12:24:53 1 north to south. It is sold into the same markets  
2 and produces the same products when sawn or pulped  
3 or whatever use is made of the log.

4 Q. So, a South Coast British Columbia hemlock  
5 is the same as a Washington hemlock?

6 A. Yes, it is.

7 Q. And you mentioned that you have harvesting  
8 timberland properties just at the border in Whatcom  
9 and Skagit Counties, an hour away from Vancouver.  
10 Do you harvest hemlock on those properties?

11 A. Yes, we do.

12 Q. And are you able to follow the procedures  
13 on those properties as you've described with respect  
14 to identifying your customers in advance, having  
15 long-term supply contracts--I think you mentioned  
16 preferential supply relationships--with your  
17 Washington logs?

18 A. Yes, we do.

19 Q. And are you able to do that with your  
20 British Columbia logs?

21 A. No, we are not.

22 Q. To your knowledge, has Merrill & Ring ever



12:25:56 1 been asked for a South Coast hemlock or a Washington  
2 hemlock, or are they interested simply in getting  
3 the hemlock?

4 A. Our customers buy by the sort, and the sort  
5 providing the description of what the log quality  
6 is, they don't specify the location.

7 Q. So, do I take it, then, that you're not  
8 asked for a particular North Coast hemlock as  
9 opposed to a South Coast hemlock?

10 A. No, we are not.

11 Q. So, a tree is a tree?

12 A. A tree is a tree.

13 Q. Okay. You've touched briefly on the  
14 Regime, the Export Control Regime. Could you  
15 describe how the Export Control Regime, beyond what  
16 you've already said, affects your business.

17 A. Well, the first, again, is the complete  
18 uncertainty of how and where we may market the logs.  
19 Moving sort of past that uncertainty into actually  
20 operating because we do have to operate with the  
21 uncertainty, then after we've built the logs into  
22 the decks that will meet the specified requirement

12:27:26 1 that's contained within the regulation, and we move  
2 them to a location where we can advertise them, then  
3 we provide notice to the Government, as is  
4 prescribed that we wish to advertise for export. We  
5 wait through the advertising process to see if  
6 offers have been received. Assuming that none were  
7 received, then we wait until we can obtain  
8 notification of that from the Government. We then  
9 can begin to market that log because then we know at  
10 that point how we may market and to whom we may  
11 market the log. Once that's been determined, we  
12 then get an Export Permit from the Federal  
13 Government that actually entitles us to move the  
14 logs, and then they are typically towed to a  
15 customer, wherever that may be.

16           So, this is in the event that we advertised  
17 and no offers were received, and we obtained an  
18 export surplus designation.

19       Q.    And what happens if an offer is received?  
20 What happens then in terms of the time line?

21       A.    Well, if offers are received, then the--as  
22 I understand, have to all be reviewed by the FTEAC

12:28:59 1 to determine whether or not it's a fair offer. And  
2 if so, then, while we would not receive the surplus  
3 designation, if there is a determination that it is  
4 not a fair offer, they can grant a surplus  
5 designation. This decision is made by them after  
6 their regularly scheduled meeting, so there is a  
7 wait, a period of time in which we have to wait,  
8 after the closing of the advertising period and the  
9 date by which offers have to be received, then there  
10 is some time whereby we have to wait for FTEAC and  
11 the Federal Government to make their decision and  
12 their determination.

13           And then I guess other things that may  
14 occur, there may be a negotiation. If an offer is  
15 made, we may negotiate with that offeror to either  
16 provide other volume or to provide some of the  
17 volume, and all of this occurs during this waiting  
18 process, but it's--an indeterminate amount. There  
19 is no specified point by which we will or will not  
20 make an agreement with the company that's made the  
21 offer.

22       Q.    In a general sense, can you describe how

12:30:32 1 many weeks is involved in that process in British  
2 Columbia as distinct from your experience in  
3 Washington selling the same trees to the same  
4 market, same logs to the same market.

5       A. Well, in the state of Washington, we've  
6 made the designation of where we are going to sell  
7 the log before we ever cut it down, and it can be as  
8 little as a few hours to a few weeks at the most,  
9 probably three weeks from the point at which we've  
10 actually severed the tree to the point at which we  
11 sell it to the customer.

12               In our British Columbia operation, there is  
13 about a three-week period of time in which it takes  
14 us to just conduct the harvest, get enough logs  
15 ready to raft and transport, regardless of the  
16 procedures. But it's from that point on that the  
17 Log Export Control Procedures begin to add time.  
18 And they, from that point on, will add easily seven  
19 to 12 weeks of processing time that we have to  
20 undergo in order to get logs to the marketplace.

21       Q. And in that seven to 12 weeks, where are  
22 your logs sitting?

12:32:01 1       A.   For most of that time they're sitting in  
2 the water.  They're either at the location right  
3 where we've dumped them or in one of these  
4 Government approved locations where they can be  
5 advertised.  Eventually they may be stored in the  
6 Fraser River, which is a very common log storage  
7 area.

8       Q.   You mentioned negotiation.  Have you heard  
9 the term blocking?

10      A.   Yes, I'm pretty familiar with it.

11      Q.   And what is blocking?

12      A.   Blocking is an offer that's made by a  
13 domestic processor that prevents us from getting a  
14 surplus designation on logs that we're seeking to  
15 sell for export.

16      Q.   Have you heard the term blockmailing?

17      A.   Blockmailing is, I guess, a derivative of  
18 blocking.  Blockmailing is either the actual or the  
19 threat to block logs, in other words, to make an  
20 offer on logs that we seek to export and in exchange  
21 for which we would be asked to sell logs to that  
22 supplier at a lower price than what we could

12:33:15 1 otherwise achieve on the international market and  
2 often in the domestic market.

3           And so our only way of getting out of this  
4 situation of blockmailing is essentially to pay  
5 off--pay the ransom to that particular buyer for the  
6 difference in value that we could otherwise achieve.

7       Q.   And I get the sense from your terminology  
8 you don't consider this to be a fair negotiation?

9       A.   It's not a fair negotiation because it's  
10 not a negotiation where we have a choice.  The  
11 domestic processor essentially holds all the control  
12 cards, and they can prevent us from obtaining the  
13 fair market by making an offer on the logs, and we  
14 have essentially no effective way of getting out of  
15 that short of selling them logs at below market  
16 prices.

17       Q.   You mentioned threats.  Does Merrill & Ring  
18 receive threats that your logs are going to be  
19 blocked for export?

20       A.   Yeah, they're in the forum of, "We're  
21 really needing some logs, and we know that you have  
22 some that are up for advertising.  We need you to

12:34:44 1 sell us some, and here is our price."

2           And I'm not as actively engaged in this  
3 personally as Mr. Stutesman and Mr. Kurucz are, but  
4 this type of communication is very common.

5       Q.   And that communication can happen before an  
6 offer is made and after an offer is made prior to  
7 TEAC's consideration of the offer?

8       A.   Yes.

9       Q.   Now, within the process that you've been  
10 describing, is there an established appeal process  
11 whereby if TEAC or FTEAC make a decision with  
12 respect to whether the offer is fair or not, an  
13 appeal process whereby you can appeal that decision?

14       A.   There is no defined appeal process for us  
15 to work within in this process. We have made phone  
16 calls and we have written letters in the instances  
17 where we believe that offers were not fair or that  
18 we may be targeted in terms of blocking our log  
19 exports, but there is no official appeal process  
20 that we can access FTEAC or the Minister.

21       Q.   If you don't like an FTEAC decision, what  
22 do you do or what can you do?

12:36:10 1       A.    We can complain.  We can write a letter.  
2       And beyond that, we essentially then would be forced  
3       to sell to the domestic market.  
4       Q.    And if you--who do you complain to?  
5       A.    Typically we have complained to the  
6       representative, the Minister more recently, to  
7       Ms. Korecky.  Prior to that, her predecessor,  
8       Mr. Thomas Jones.  
9       Q.    And if you don't get satisfaction there, do  
10      you know to whom you go?  
11      A.    We've never found an avenue beyond that  
12      that we can raise an appeal, short of this Tribunal.  
13      Q.    And if you have this ability to write a  
14      letter or make submission or have a discussion with  
15      Ms. Korecky, do you consider that to be a practical  
16      process for you from the standpoint of dealing with  
17      decisions of FTEAC, if you don't like them?  
18      A.    It's our only alternative.  I wouldn't go  
19      so far as to say that it's practical, because  
20      there's a limited ability to achieve results  
21      from it.  
22      Q.    And where are your logs when this appeal



12:37:29 1 process that you've described is going on?

2 A. During the appeal process, our logs are  
3 sitting in water, again in one of several locations  
4 typically or often in the Fraser River.

5 Q. If you appealed every contrary decision,  
6 would that be an effective alternative for you in  
7 terms of having your logs in the water?

8 A. I'm not sure I understand.

9 Q. So, your logs are in the water while this  
10 appeal process is going on. Is that an effective  
11 alternative for you, or do you simply accept the  
12 decisions as a practical matter?

13 A. We appeal those that are the most--where we  
14 have the largest differential in value, and some  
15 that may have a small differential in value, that is  
16 what we could achieve in an international market  
17 compared to the domestic market. We may not appeal  
18 all of them. We certainly would appeal some, and  
19 definitely we will appeal those where we think that  
20 the value is more significant.

21 Again, it's not a satisfactory process  
22 because we don't always achieve the results that we

12:38:53 1 would like to get.

2 Q. Now, in 2005, your board asked to you make  
3 recommendations with respect to Merrill & Ring's  
4 timberland assets in British Columbia?

5 A. Yes, they did.

6 Q. And if you turn to Exhibit 24 of the Ruffle  
7 statement, you will see that's a document dated May  
8 6, 2005, and you authored that document; correct?

9 A. Yes, I did.

10 Q. And you had been asked to make  
11 recommendations, and this document embodied your  
12 recommendations?

13 A. I was asked, yes.

14 Q. And this document was a result of going  
15 through that exercise?

16 A. Yes.

17 Q. Did the board of Merrill & Ring make a  
18 decision with respect to the B.C. timberland  
19 properties as a result of going through this process  
20 of your recommendations and their consideration  
21 of it?

22 A. They did. The board accepted this analysis

12:40:11 1 and a recommendation to commence an orderly exit, if  
2 you will, from the British Columbia holdings.

3 Q. And why did you make that recommendation?

4 A. Well, I made the recommendation and the  
5 board agreed with it upon the realization that we  
6 are unable to achieve the value that we should be  
7 able to achieve from the logs that we were producing  
8 in British Columbia as a result of the Log Expert  
9 Control Regime.

10 Q. If you go to Appendix 1 of the Ruffle  
11 Report, which is in a different binder, it's  
12 Appendix 1 as opposed to Exhibit 1. Appendix 1 to  
13 the Ruffle Report dated December 11, 2008. As  
14 opposed to Exhibit 1. We have been looking at  
15 exhibits.

16 Is this a document you created?

17 A. Yes, it is.

18 Q. And it's a Harvest Plan that says at the  
19 very top, without log export restrictions, dated two  
20 dates, but we will go with the November 19, 2008,  
21 dates.

22 Do you see that?

12:42:17 1 A. Yes.

2 Q. Now, what was the purpose of preparing this  
3 document?

4 A. This was created to analyze what could have  
5 been harvested from the Merrill & Ring timberlands  
6 in the absence of the Log Expert Control Regime what  
7 we likely would have done in the event that those  
8 restrictions did not apply.

9 Q. And it was made towards the end of 2008, so  
10 again you worked backwards from there to begin back  
11 to 2004?

12 A. Yes.

13 Q. And you projected retrospectively what you  
14 would have harvested from the various properties in  
15 the years 2004, 2005, 2006 and '07; is that correct?

16 A. Yes, it is.

17 Q. And how did you go about coming up with  
18 those retrospective calculations?

19 A. Well, first of all, I looked at what the  
20 markets were, what we knew them to be at the time  
21 when we were harvesting, and analyzed how we would  
22 have targeted species and qualities and volumes

12:43:39 1 based on those markets that we knew at that time.

2 And this was a time of very strong markets both in  
3 the U.S. and in Canada, a huge building spurt going  
4 on, a lot of export customers looking for logs as  
5 well.

6 So, as--with or without the procedure we  
7 would try to target our harvest to the best markets  
8 and we did this retrospectively as well.

9 I then identified also the timberlands that  
10 were--that had been sold to Georgia Basin Holdings  
11 but for which Merrill & Ring Forestry L.P. still  
12 held the timber right through 2006 and projected  
13 that those timberlands would have been harvested  
14 during that period of time. We made some  
15 adjustments to the total inventory because we were  
16 using a 2008 harvest base, so we had to essentially  
17 subtract the growth that otherwise had occurred up  
18 to that point in time, so we didn't overproject what  
19 could have been potential from those areas.

20 Q. And so, to take your example, keeping in  
21 mind the earlier Harvest Plan we looked at, for  
22 2004, retrospectively, you'd projected that you

12:45:08 1 would have harvested 227,343 cubic meters of timber?

2 A. Yes.

3 Q. As opposed to the 121,783 we have seen on  
4 that earlier document, which was Tab 5 of your  
5 statement, Exhibit 5?

6 A. Yes.

7 Q. And you did that for each of the years  
8 looking back from the point in time that you were  
9 establishing this plan?

10 A. Yes.

11 Q. And how did you, in your procedure,  
12 determine that this was a reasonable plan looking  
13 backwards and then looking forwards from around the  
14 end of 2008?

15 A. They would be reasonable from the  
16 standpoint of where and how we could operate. Our  
17 lands can typically be operated from February well  
18 up to the middle of December, and typically we shut  
19 down during January more often because the weather  
20 is just not very nice, rather than that we can't  
21 actually operate but it's stormy, and frequent  
22 snowstorms and the like, so we have pretty much an

12:46:23 1 11-month operating season, and this amount of volume  
2 could easily be harvested within that period of time  
3 using the contractors that we typically use.

4           The demand was there for the logs, so we  
5 knew that this could be sold, and the areas are  
6 operational; that is, there would be nothing there  
7 that would restrict us from being able to get into  
8 those properties at that time.

9           And also knowing that even with these  
10 accelerated volumes, this is still representative of  
11 such a small percentage of the volume that is  
12 harvested in British Columbia or in Washington for  
13 that matter, that we would have no trouble selling  
14 it into our existing marketplace.

15       Q.   And if you go to the very bottom figure on  
16 the right-hand side column, you'll see that there is  
17 a figure of 1,558,304, and that is the cubic meters  
18 that you would have harvested on these various  
19 properties over that period of time without the Log  
20 Export Regime in place; is that correct?

21       A.   Yes, that's correct.

22       Q.   As opposed to the figure we saw before,

12:47:35 1 which was 893,899?

2 A. Yes.

3 Q. Did you perform a calculation of what price  
4 you could have sold that extra volume of timber at,  
5 if you had been able to proceed with harvesting that  
6 timber in the absence of the Regime?

7 A. We believe that we could sell that volume  
8 at the same prices that we were selling other  
9 volumes at the time.

10 Q. Did you go back and do a review of the  
11 contracts that you had entered into for the sale of  
12 previous timber that you'd actually sold to compare  
13 that to what you were calculating for the price of  
14 this extra timber?

15 A. Yes. I prepared some analysis that  
16 examined prices by species and by the various  
17 quality sort. On a periodic basis, some of those  
18 were done monthly, some of those were done  
19 quarterly. The entire period of the analysis, 2004  
20 essentially through 2008, actuals and utilized  
21 actual invoices, actual log sale agreements for  
22 Merrill & Ring logs for those periods of time.



12:49:10 1 Q. And what was the general approach you took  
2 to that analysis? Were you thinking of the most  
3 optimistic price you could get, or did you take  
4 another approach?

5 A. Well, first I would make sure that I stayed  
6 consistent with the specifications of the log sort;  
7 that is, it is the same sort, for one. There's not  
8 some special condition about where the logs would be  
9 delivered or that they would be de-barked, for  
10 example, that would add value, to make sure that we  
11 are always looking at the same--delivery of the same  
12 product.

13 And within this analysis period, there were  
14 a few instances where we had the opportunity to  
15 receive a real high price for something, I stayed  
16 away from using that high price occasional market in  
17 preference to the more prevailing highest available  
18 price during a market, but not--but to eliminate  
19 those niche opportunities that occur uncommonly.  
20 They're nice to take advantage of, but they're not  
21 the sort of thing that you plan your business  
22 around, so we selected the generally highest

12:50:27 1 available price that prevailed during the period of  
2 time and for which we thought that we could ship  
3 additional volume at that same price.

4 Q. If we could go back to the issue of sorting  
5 again, how do you go about comparing the value of  
6 two different sorts? Is there a way of doing that?

7 A. Do you mean the price?

8 Q. Exactly. The price that you can sell that  
9 volume at.

10 A. Well, the price that we can sell that at is  
11 really based on the qualities of the logs that are  
12 in it. Assuming they are both the same  
13 species--let's take hemlock, for example--if the  
14 diameter range is the same for two different sorts  
15 and the lengths are the same for two different  
16 sorts, it's because of something else that's  
17 different in quality. And typically, and that is  
18 based on straightness, and the number of knots that  
19 might be contained in the log, and the amount of  
20 defect there might be in it. Those type of factors  
21 that are--that influence the recovery of whatever  
22 product it is that the buyer can get out of that

12:51:42 1 log.

2 Q. Are your sorts consistent over time and  
3 over harvest?

4 A. We try to make our sorts as consistent as  
5 we can over time, and certainly within a given  
6 harvest area, but also consistent in the way we make  
7 the sort in British Columbia as to the way we make  
8 it in the state of Washington, if we are selling  
9 into the same markets and they're in both cases.

10 Q. If you cut a log at a length that is  
11 suitable for export, and you're forced to sell that  
12 log domestically, is there any extra left over  
13 typically in the kinds of cutting and sorting that  
14 you do?

15 A. There can be. It doesn't always occur, but  
16 some of the customers, peeler customers, for  
17 example, may seek a 34-foot log as their preferred  
18 length.

19 Q. What is a peeler customer?

20 A. A peeler customer is one that purchases the  
21 log for the purposes of peeling it into veneer which  
22 is then made into plywood, and so they have

12:52:51 1 preferred lengths for their product, and 34-foot  
2 length would be a preferred length for them. The  
3 other 4 feet or, excuse me, 6 feet, is not a size  
4 that they want to utilize, and that ends up being  
5 chipped, so they will buy based on the recovery that  
6 they can obtain of 34 feet of product. The other  
7 6 feet is something they cannot obtain product from,  
8 so their price will be reduced commensurate with  
9 that.

10 Q. And that extra 6 feet would be the 6 feet  
11 that you would have had for the international  
12 market; is that right?

13 A. Yes, because the 40-foot is a preferred  
14 length for the international market, and the 34-foot  
15 is absolutely not a preferred length.

16 Q. Are you able to realize the value of that  
17 extra 6 feet in its entirety?

18 A. Yes.

19 Q. If you have to sell domestically, if you're  
20 forced to sell domestically?

21 A. Not if we are forced to sell domestically.  
22 No, the mill will pay based on what they can

12:53:57 1 recover.

2 Q. If you go back to Tab 5 of the Investor's  
3 Core Bundle of documents, which is Notice 102.

4 Mr. Chairman--Mr. President, would it be  
5 the Tribunal's preference to break for lunch at  
6 1:00 p.m. for one hour?

7 PRESIDENT ORREGO VICUÑA: Yes, for one  
8 hour, but how long will your direct take us from  
9 now?

10 MR. NASH: It will be beyond 1:00. Exactly  
11 how long, I can't tell you, but it won't be a long,  
12 long time after 1:00, but it will be beyond 1:00.

13 PRESIDENT ORREGO VICUÑA: Well, I think it  
14 is preferable to stop maybe now, if it's convenient?

15 MR. NASH: Now would be a perfectly  
16 convenient time.

17 PRESIDENT ORREGO VICUÑA: Okay. And we  
18 will resume in one hour sharply because I must  
19 remind you all that we are to finish by 5:30 this  
20 afternoon, and then we have the cross-examination,  
21 and we have still the Witness Statements of  
22 Mr. Kurucz. So, I'm not sure how you will manage to

12:55:32 1 do all of that, but--

2 MR. NASH: From our standpoint, we are  
3 working well within our time frame. Mr. Kurucz will  
4 not be that long in direct examination.

5 PRESIDENT ORREGO VICUÑA: Okay. Is that  
6 all right with you?

7 MS. TABET: Yes.

8 PRESIDENT ORREGO VICUÑA: Okay. So,  
9 Mr. Schaaf, you are still the witness, so are you  
10 supposed to have lunch alone hidden in a corner, not  
11 talking to anyone. But you are under oath.

12 THE WITNESS: Thank you, Mr. President. I  
13 will remember that.

14 MR. NASH: Just for clarification,  
15 Mr. President, there is no restriction on my ability  
16 to speak to Mr. Schaaf about his evidence over the  
17 lunch period, I take it? He's simply in direct  
18 testimony.

19 PRESIDENT ORREGO VICUÑA: No, I think that  
20 the direct should be before the whole room. No  
21 private direct.

22 MR. NASH: There wouldn't be any further

12:56:29 1 testimony given, but it's customary that the witness  
2 can be spoken to by counsel at least during direct  
3 examination, certainly in Canada. And even in some  
4 jurisdictions even during cross-examination, but  
5 certainly during direct examination.

6 PRESIDENT ORREGO VICUÑA: Do you feel--how  
7 do you feel, Ms. Tabet?

8 MS. TABET: Perhaps our preference in that  
9 case if you're not going to be much longer so you  
10 finish your direct examination now?

11 MR. NASH: Actually, I don't think that is  
12 the governing principle. I think if the Tribunal  
13 feels that the moment would be the appropriate  
14 moment for the lunch break, that's what we should  
15 do, and if there are some minor matters that I have  
16 to or want to discuss with Mr. Schaaf, it would be  
17 customary that we would have an opportunity to do  
18 that.

19 PRESIDENT ORREGO VICUÑA: What's your  
20 reaction to that? Are you happy or unhappy?

21 MS. TABET: We are not going to prolong  
22 this. He can speak to his client if he wishes

12:57:52 1 during the break.

2           We'd also like to just point out that  
3 Mr. Cook has been excluded from most of this, but  
4 there hasn't been much discussion of confidential  
5 information, so I would like to remind you, if  
6 possible, to recall Mr. Cook for the rest of it.  
7 Just as a reminder. Thank you.

8           MR. NASH: I have this to say about that,  
9 we are--actually much of what we are discussing is  
10 of a restricted nature. It speaks to retrospective  
11 projections and forward projections and harvest  
12 plans and the company's intentions, so I will  
13 certainly consider Ms. Tabet's, my friend's  
14 comments, but that's my initial reaction to it.

15           ARBITRATOR ROWLEY: Perhaps I might just  
16 say something at this stage. As regards the latter  
17 point, I would have made the point whether or not  
18 Ms. Tabet had made it. The intention of Tribunal  
19 proceedings such as these is that they be in public  
20 and that we go into in camera sessions only for  
21 restricted information.

22           And yes, there have been--you have referred



12:58:55 1 this witness on about three occasions to restricted  
2 material. At least 90 percent of what you've  
3 covered with him since you've gone into in camera  
4 has had nothing to do with restricted material, I  
5 believe.

6           So, I'm not sure that that makes all that  
7 much difference now, but it does as a matter of  
8 principle for these proceedings, so that's point  
9 one.

10           Point two, I must say, and I haven't  
11 discussed with my colleagues, and we will discuss it  
12 over lunch, but I am a bit surprised by the nature  
13 of the examination-in-chief. And it has been  
14 inconsistent, in my view, with the intention of the  
15 Tribunal that the examination-in-chief be provided  
16 by way of Witness Statement in these proceedings,  
17 written Witness Statement, and generally in  
18 proceedings such as these, that is what is done.  
19 The Witness Statement is introduced, perhaps one or  
20 two important points are referred to, but as I've  
21 observed the examination-in-chief that you have  
22 made, virtually all of it has not been covered in

13:00:13 1 written statement. It is other evidence.

2           Now, again, if that's what the parties had  
3 intended, then I am surprised, but perhaps it is  
4 only I that will be surprised, and it is of no  
5 relevance if that is the case. But what will be  
6 relevant is sticking to the time that we have  
7 allotted, and the appropriate division of time. So,  
8 perhaps we will all consider that over the break.

9           MR. NASH: Thank you very much.

10           PRESIDENT ORREGO VICUÑA: Thank you. So,  
11 we will resume at 2:00.

12           (Whereupon, at 1:00 p.m., the hearing was  
13 adjourned until 2:00 p.m., the same day.)

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14:06:02 1 have them introduce new evidence through witnesses  
2 is contrary to that order.

3           If the Tribunal does accept this, however,  
4 we would like to have an opportunity to recall  
5 Mr. Schaaf once his--once we get to the damages case  
6 in the context of cross-examining Mr. Low and  
7 Mr. Ruffle.

8           I also want to come back to the issue of  
9 exclusion because Mr. Cook is waiting patiently, and  
10 again we don't believe there has been a lot of  
11 references to specific numbers, so to the extent  
12 possible, we would like to have clear indications,  
13 and maybe my colleague could kindly take his  
14 specific detailed questions--leave them at the end,  
15 and then we can have Mr. Cook excluded from the room  
16 at that point if there are real confidential  
17 information to be dealt with.

18           MR. NASH: Mr. colleague, Mr. Appleton,  
19 will respond to that.

20           MR. APPLETON: Thank you very much,  
21 Mr. Nash.

22           Let's see if I can cover all of the points

14:07:20 1 that we have here.

2           First of all, let's talk about specifically  
3 the nature of the evidence that we are allowed to  
4 give today.

5           The evidence of Mr. Schaaf, and any other  
6 witness that may come to a witness hearing, I  
7 believe that they're entitled to give evidence  
8 that's necessary and relevant to what's at issue,  
9 especially if it's responsive specifically to the  
10 questions put to them by experts from the other  
11 side. In this case, there are very specific  
12 questions that are posed by experts from the other  
13 side, saying that they need the information or they  
14 didn't understand or maybe they were just wrong.

15           And so, I can't see how that could be  
16 inappropriate. We are not talking about leaving  
17 evidence about issues that are unrelated, evidence  
18 on matters that are not put in issue by Canada  
19 itself. These are specific responsive issues about  
20 matters that Canada chose to raise and which can be  
21 answered specifically by the witness that's on the  
22 stand.

14:08:32 1           Second, that comes out of our direct time,  
2 and we have strict deadlines with respect to our  
3 time, and direct time means that I have less  
4 opportunity to be able to cross-examine. But it's  
5 all witness time that's all carefully accounted for,  
6 and as we are all clear, no one is getting any extra  
7 time. The time is what the time is.

8           Now, in some hearings--and I have been in  
9 some of those hearings--the Tribunal has issued  
10 orders to say there shall be no direct examination,  
11 and in other ones they say there shall be limited  
12 direct examination up to 10 minutes. In this case,  
13 we had a procedure that said that it's up to us to  
14 allocate the time and that we have to account for  
15 that time, and I think we have tried to be as  
16 careful as we can to deal with that.

17           And, of course, even with the direct  
18 examination, you don't know how long it's going on  
19 to go. Certainly this examination went longer than  
20 I thought, but I thought the evidence was relevant.  
21 And as the Tribunal, it will be up to you to decide  
22 what you want to make and weigh of the evidence

14:09:39 1 that's there.

2           But if Ms. Tabet says she doesn't like the  
3 nature of the evidence or the weight of the  
4 evidence, she can cross-examine on it. And she will  
5 perfectly have that opportunity very soon, but that  
6 would be the appropriate way. Generally, you have  
7 direct and you have cross-examination. That's how  
8 that works.

9           I personally don't think that we would  
10 generally recall a witness unless there would be an  
11 extraordinary circumstance. I was in a case, Pope &  
12 Talbot, where the Tribunal, after getting an answer  
13 that was clearly untruthful from the Director of the  
14 EICB recalled that witness to the stand. They  
15 ordered him to reappear the next day because he  
16 clearly had lied, and that was their decision--in  
17 their decision--that he lied about the number of  
18 recommendations and had made a recommendation that  
19 he had not disclosed, and they were very upset about  
20 that, so the Tribunal recalled him. That, to my  
21 mind, is the only time a witness has been recalled  
22 with respect to a NAFTA set of processes, but it

14:10:45 1 would make sense in the extraordinary circumstance.

2 I don't see this as an extraordinary circumstance.

3           Now, on the issue of restriction, I'm very  
4 interested in trying to have the hearing as open as  
5 possible. As the Tribunal knows as I mentioned in  
6 the First Procedural Hearing, I had the first law  
7 firm to ever posted the decisions in the NAFTA to  
8 make them available to the public. We pushed  
9 heavily for transparency. We've been the first set  
10 of counsel that would be involved in amicus  
11 processes. We want to have the proceeding to be as  
12 open as possible, but where there is confidential  
13 business information, courts and tribunals need to  
14 take some measures to deal with that. In this  
15 context, where there are documents that are  
16 restricted and where the testimony relates to a  
17 restricted document, it is very difficult to be in a  
18 position to say as the witness is answering, I'm  
19 sorry, we have to go back now and put the genie back  
20 in the bottle. I'm sure you all have to ignore  
21 what's there, and that's the difficulty that we  
22 have.



14:11:57 1           It's been made even slightly more  
2 complicated today by having to now consider how to  
3 deal with the issue of British Columbia and  
4 Mr. Cook. So, you can have my assurance that we  
5 will be reviewing how we are trying to deal with  
6 witnesses as best as we can to deal with that, but  
7 it is impractical, Ms. Tabet's suggestion that we  
8 have to reorganize at the last minute all of our  
9 cross-examination to have every restricted question  
10 and every restricted document which are strewn  
11 throughout the materials so that they could only be  
12 at one time because then we could no longer organize  
13 our examination or cross-examination as we see fit  
14 to be able to present our case, and that would be  
15 very difficult.

16           Now, arbitration is a very practical  
17 process, and I believe that there must be practical  
18 answers, and we'll do our best to find practical  
19 answers, but at this point that seems to be the  
20 closest practical answer that I can give you to try  
21 to make this work as simply as possible.

22           I want to make sure I have covered all the

14:13:05 1 issues. I don't want to have missed any of Tabet's  
2 points.

3 (Pause.)

4 MR. APPLETON: I believe I said what I  
5 wanted to say, but just to reiterate, the points in  
6 evidence that have been raised are responsive  
7 specifically to points that have been raised by  
8 Canada, and these are generally, by the way, points  
9 that are raised by Canada for the first time in its  
10 Rejoinder.

11 Second, we have issues that are about  
12 restricted access. We are trying as well as we can,  
13 and I spent a good portion of the lunch today  
14 specifically trying to deal with that as well, so  
15 that we can find the most efficient way as possible.  
16 But again, when it relates to restricted access  
17 information that's already in this record, we must  
18 take those steps to protect that information, and  
19 that's the same steps that would be taken by a  
20 domestic court or by other international tribunals.

21 Thank you.

22 PRESIDENT ORREGO VICUÑA: Okay. Thank you.

14:14:19 1           So much for your respective view. Do you  
2 want to add something?

3           MS. TABET: Very briefly. I think the  
4 argument that this is new information in response to  
5 Canada's case doesn't make any sense here. He's  
6 talking about the Investor's damages case.  
7 Mr. Schaaf is talking about evidence that they  
8 should have provided in the first place. Canada has  
9 attempted through the document production process  
10 and through its submissions to raise these issues  
11 and to try to get answers, and they had Mr. Schaaf  
12 provide two Witness Statements, and he has never  
13 provided any of that evidence before. To now allow  
14 them at the very last minute to introduce new  
15 evidence to rehabilitate their case when they've had  
16 several expert reports on the issues doesn't make  
17 any sense.

18           And just to be clear, we are not asking to  
19 recall Mr. Schaaf on all issues, just on specific  
20 issues, an opportunity to recall them, if necessary,  
21 on specific issues related to the damages case as  
22 their experts have put forward.

14:15:28 1           PRESIDENT ORREGO VICUÑA: Fine. Thank you  
2 very much for your views.

3           Now, we have also discussed a bit of the  
4 characteristics of the progress of the hearing, and  
5 let me offer you some other practical ideas.

6           The first is that to the extent that it's  
7 possible to put restricted material together at some  
8 point in time, it's a good thing to let the other  
9 side know, and then Mr. Cook can come in. If not,  
10 you will be able to judge and say to us, you know,  
11 in all good faith. But in any event, this will not  
12 last beyond tomorrow morning. Mr. Cook is  
13 immediately most likely tomorrow afternoon.

14           Well, so that's the only thing that could  
15 be said at this stage.

16           And as to the evidence, additional  
17 evidence, provided, it's something the Tribunal, of  
18 course, will look at as we move along. If we find  
19 that there has been additional evidence, it is right  
20 to conclude that that's not part of the arrangements  
21 for the hearing, but it's not that easy to judge as  
22 we are hearing it because one has to make one's mind

14:17:05 1 whether it is related or not to what has been  
2 provided in the Witness Statements.

3 But in the possibility that you might still  
4 wish to raise questions as you cross-examine or so,  
5 that might be helpful to also bring in everyone's  
6 point of view, but the principle is that no new  
7 evidence will be allowed.

8 So, having said that, why don't you  
9 proceed, Mr. Nash.

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

11 CONTINUED DIRECT EXAMINATION

12 BY MR. NASH:

13 Q. In your statement, Mr. Schaaf, you have  
14 referred to various extra costs that you have said  
15 are related to the existence of the Regime, and one  
16 of those costs that you referred to were the  
17 increased brokerage fees. Can you explain why the  
18 absence of the Regime would decrease your brokerage  
19 fees.

20 A. Yes. We pay a brokerage fee to Progressive  
21 Timber Sales as part of the functions that are  
22 necessary for our operation in Canada. A good share

14:18:16 1 of the work that they are required to do for us is a  
2 direct result of the process and the Regime itself;  
3 the advertising, the documentation that's necessary  
4 to get logs into the advertisement, tracking that  
5 process, working post-advertising to negotiate deals  
6 where necessary, managing inventories that are  
7 necessary, once again, because of the need to have  
8 logs in certain locations for the advertising  
9 process.

10           So, it is our estimation that of those  
11 fees, which have been between about a dollar 75 and  
12 \$2 per cubic meter, that we would be able to reduce  
13 that fee by \$1 per cubic meter across all of the  
14 volume that we produce.

15       Q.   And similarly, with respect to marketing  
16 fees, how would they be impacted if you were not  
17 subject to the Regime? Absent the Regime?

18       A.   These are the marketing fees that are paid  
19 to Merrill & Ring Forest Products L.P.

20           Similarly, we would be able to reduce the  
21 amount of effort that is required by Merrill & Ring  
22 Forest Products L.P. in two respects. One is simply

14:19:38 1 the additional management of inventories and  
2 movements of logs and the additional process that is  
3 involved in marketing as a result of the Regime.  
4 Once again for that area, we believe that's about \$1  
5 per cubic meter, and there are some administrative  
6 fees that we incur in our Port Angeles office that  
7 are also related to managing all of the process.  
8 It's a combination of several people's time that is  
9 allocated to this process, and that would be a  
10 further reduction in costs that we could develop if  
11 the Regime was not in place.

12 Q. You also made reference in your statement  
13 to the towing, storage, and transportation risks  
14 associated with the Regime. Can you explain that to  
15 the Tribunal.

16 A. Towing is part of the necessary process of  
17 moving logs from where we are operating to the  
18 markets in which we sell the logs, but the Regime  
19 requires movement of those logs. It has required  
20 movement of those logs to a Government approved  
21 facility where we can advertise them because we are  
22 located in what has been known as a remote area.

14:21:05 1 And that involves towing to a place that we would  
2 not necessarily take the logs otherwise. If we had  
3 certainty of sale, if we had certainty of market,  
4 when we developed logs of a given sort and of a raft  
5 that was ready to be towed, we would be able to tow  
6 that directly to the marketplace. We would not have  
7 to take it to a marshaling location. If that raft  
8 had been able to be presold, it would go directly to  
9 the market whether in Puget Sound, in Washington  
10 State or to shipside in the Fraser River, and would  
11 not have to go through the various other locations  
12 and other storage areas as are necessary to fulfill  
13 the requirements of the Regime.

14           There are other handling again primarily  
15 and storage issues that are part of this. Just the  
16 length of time that is required. And when we store  
17 logs in the river, we have to pay a fee to the owner  
18 of the right to use that area of river, so we do pay  
19 a fee for that as well as for the movement--well,  
20 when they actually get around and move and tow logs.

21       Q.   Speaking of source, once again, how do  
22 Canadian log grades and sorts from Merrill & Ring



14:22:25 1 sorts differ from Merrill & Ring sorts and in the  
2 description of their log quality?

3       A.    There are two aspects of the Canadian  
4 grades and sorts that we deal with.  One of those is  
5 contained in their log scaling rules, and they are  
6 letter grades.  For what Merrill & Ring produce,  
7 typically these are H, I J, U, X, and Y letter  
8 grades, and the first of those is the larger logs  
9 and the better grade--better in the case of the H,  
10 actually a defined log quality.  Once you get down  
11 into the I, J, and so on, down to the bottom, they  
12 are essentially diameter-driven log grades.  They  
13 speak little, if at all, about other quality aspects  
14 of the log.  There is simply a diameter range and a  
15 length range that has to be met for the log.  It  
16 doesn't speak to the quality.

17           The other Canadian grading methodology is  
18 quite similar, and this is what we use in the  
19 advertising process.  We identify a raft as being  
20 logs of standard size, gang size, or chip-n-saw size  
21 typically, and there could be pulp, although we  
22 wouldn't generally advertise that.  Standard again

14:23:54 1 just defining the diameter of the logs but saying  
2 nothing about the quality of the logs that would fit  
3 within that particular designation, gang,  
4 chip-n-saw. Similarly, they define the size, but  
5 not the quality.

6           The Merrill & Ring sorts will have often  
7 multiple sorts that would fit within, for example,  
8 gang description, and these would be defined further  
9 by the specific qualities, so they are both a range  
10 of diameters and lengths that would meet a preferred  
11 customer preference, and then they also define  
12 surface quality, things like knots, the taper of a  
13 log, the straightness of the log that are not  
14 inherent in any of the Canadian grading systems,  
15 grading or sort systems.

16           So, our Merrill & Ring sorts further define  
17 the log to its quality characteristics within a  
18 given diameter and length range.

19       Q.   Whereas the Canadian log grades are defined  
20 around the diameter; is that right?

21       A.   The diameter and length and, to a limited  
22 degree in quality in the H grade and the higher

14:25:28 1 grades, which we don't produce a lot of the higher  
2 grades. They're more of an old growth grade.

3 Q. In the U.S., in your Washington operations,  
4 are customers prepared to commit to a price knowing  
5 your sorts without actually inspecting the logs?

6 A. Customers commonly offer a price without  
7 inspecting the logs. Often, this is trees that are  
8 still standing, and they offer a price based on our  
9 ability to deliver logs cut from those trees to  
10 their specification at a price which they set for a  
11 period of time, and they may never even have gone on  
12 to the ground before the trees were cut, much less  
13 seen them in log form.

14 Other customers will also purchase rafts of  
15 logs that have been formed to meet a given set of  
16 specifications, and those are delivered straight to  
17 their mill. And when they arrive, we are paid.

18 Q. You referred also in your statement to--

19 MS. TABET: Excuse me, again, I wish to  
20 emphasize this is all new information not in the  
21 statement.

22 MR. NASH: I think that issue has been

14:26:36 1 addressed, Mr. President.

2 BY MR. NASH:

3 Q. You have said in your statement that the  
4 Regime affects your economic planning and results in  
5 what you've termed backward economic planning. Can  
6 you explain that.

7 A. Yes. This really gets to our operational  
8 planning, that which occurs every year. And as I  
9 discussed a little bit earlier, when formulating  
10 that plan, we look at a lot of factors, including  
11 the likelihood of whether or not logs will receive  
12 offers, will be blocked from export. And so we have  
13 generally timed our harvest within a given period of  
14 the year to that period when we think the likelihood  
15 of getting blocked is the least.

16 Now, that happens when the market has the  
17 most wood in it as the greatest supply, and that  
18 also means that in typical economic analysis when  
19 the supply is high, the price goes down, and that is  
20 what we face. But if we were to try to harvest  
21 interest into the periods when the market is  
22 generally highest, it also means that the supply is

14:27:54 1 generally lower, and the likelihood therefore of us  
2 getting logs blocked is greater. And so, we have  
3 arranged our harvest to try to minimize that time in  
4 which log exports would be blocked.

5 Q. In the dealing with the customers you have,  
6 what are your customers interested in with respect  
7 to a given log? What are they interested in  
8 knowing?

9 A. Well, they're looking for the log quality  
10 being consistent within the range of sizes and  
11 surface qualities that they want to utilize in their  
12 mill. Certainly price is an issue, and then  
13 assurance of supply and us living up to our  
14 commitment of supply are the things that are most  
15 critical to them.

16 Q. To your knowledge, have you ever been told  
17 or do you understand that they take Merrill & Ring's  
18 costs into account, your customers?

19 A. No, they're not concerned with our costs.  
20 They're concerned with what they have to pay for the  
21 logs.

22 Q. If you refer to the statement of Mr. Ruffle

14:29:09 1 at Appendix 2 as opposed to Exhibit 2, there is a  
2 question that has been raised regarding the  
3 calculation of the inventory on the Charles Bay  
4 property, and if you refer to the third page in of  
5 Appendix 2--

6 A. Okay.

7 Q. --you will see at the top of the page  
8 refers to Charles Bay. Do is see that?

9 A. Correct.

10 Q. And there is an issue around the inventory  
11 for Charles Bay, and you will see at the end of  
12 2007, at the bottom of the chart under 2007, the  
13 inventory is identified as being 26,327 cubic  
14 meters.

15 Do you see that?

16 A. Yes.

17 Q. And at top of the next year, 2008, the  
18 inventory is 3,827 cubic meters.

19 Can you explain the question around those  
20 two figures.

21 A. Yes. The inventory was adjusted in 2006  
22 for the harvest that occurred in 2006, and that left

14:30:47 1 an undepleted inventory in 2007 of showing 26,000  
2 cubic meters. The inventory had been adjusted for  
3 the actual harvest that occurred. What it did not  
4 take into account was the pulp wood that was left on  
5 the unit--harvested cut, that is--but not removed,  
6 and it was left because it did not have sufficient  
7 value to warrant the cost of moving it off-site, so  
8 it was, again, harvested but not removed, and we  
9 adjusted our inventory initially based on harvest.  
10 When we went back and looked at the actual standing  
11 timber inventory on the ground, then we further  
12 reduced it for that amount of pulp wood that had  
13 been left on the site.

14           We did, however, harvest essentially the  
15 same volume of saw logs from that site as our  
16 inventory indicated would be there.

17       Q. Did that adjustment affect the accuracy of  
18 your overall inventory for all of the properties?

19       A. It did not. Our harvest to inventory has  
20 been well within the reasonable expectation that one  
21 would get from a sampling, which is what an  
22 inventory is, to an actual--and it varies plus or

14:32:23 1 minus every year, but certainly within the accuracy  
2 range that we would expect.

3 Q. If you could turn to Mr. Jendro's Report at  
4 Appendix A, you will see there a map which is Figure  
5 6.4-1. Have you got that before you?

6 A. Yes.

7 Q. And it's at Page A-75.

8 (Pause.)

9 MR. NASH: We are looking for a map which  
10 we have identified as Page A-75 of Appendix A of  
11 Mr. Jendro's Report. I believe the Secretary and  
12 Ms. Ki will momentarily assist. You're not seeing a  
13 map, I think.

14 (Comment off microphone.)

15 MR. NASH: Perhaps we will come back to  
16 that. I have a few questions on another topic  
17 before I conclude, so I will go to those questions  
18 and come back and see if we can get that cleaned up.

19 Mr. Schaaf, have you ever had an  
20 environmental protest either on one of your  
21 properties or around one of your properties?

22 THE WITNESS: No, we have not.



14:35:41 1 BY MR. NASH:

2 Q. Have you had any protests by aboriginals?

3 A. No, we have not.

4 Q. Have your harvesting activities ever been  
5 protested by the public?

6 A. No.

7 Q. Have you had any environmental infractions?

8 A. No.

9 Q. Or work order stoppages?

10 A. No.

11 Q. My last question is on that map, so perhaps  
12 I will proceed and we will come back to it.

13 If you have the map before you, you will  
14 see that it shows the Unwin Lake property.

15 A. Yes.

16 Q. And it shows Theodosia.

17 A. Yes.

18 Q. And there is a square piece of property  
19 located next to the Theodosia lands.

20 Do you see that?

21 A. Yes.

22 Q. And do you see the figure of 1.10

14:36:32 1 kilometers?

2 A. Yes.

3 Q. In the middle of that square.

4 And who owns that? And that's identified  
5 as lot 2314.

6 A. Yes, it is.

7 Q. Who owns that piece of property?

8 A. R. D. Merrill Company owns that property,  
9 and they are a one half owner in all of the  
10 remaining Merrill & Ring Forestry L.P. property.

11 Q. And an issue has been raised as to whether  
12 you could economically log the Unwin Lake property;  
13 that's correct?

14 A. Yes.

15 Q. And the question is whether you could  
16 efficiently and economically transport logs from the  
17 Unwin Lake property to an area where your trucks  
18 could have them loaded with those logs and then  
19 transported elsewhere. You're familiar with that?

20 A. Right, it would be helicopter logging.

21 Q. That's helicopter logging?

22 A. Yes.

14:37:27 1 Q. That's done in British Columbia?

2 A. Yes, it is.

3 Q. And is that property available to be used  
4 for helicopter logging at lot 2314?

5 A. Yes, that would be the logical place for  
6 logs to be landed from Unwin Lake to get to the  
7 Theodosia block road system. That block was  
8 harvested several years ago. There is a road system  
9 fully accessing it, and lots of space in which logs  
10 could be landed.

11 Q. So, effectively, you could heli log there,  
12 drop the logs there. There is a road there to take  
13 the truck--that trucks can take away?

14 A. Yes, we could.

15 Q. Okay. Thank you, Mr. Schaaf. Those are my  
16 questions. My colleague will have some questions  
17 for you.

18 PRESIDENT ORREGO VICUÑA: Thank you,  
19 Mr. Nash.

20 We will now have the cross-examination,  
21 Ms. Tabet?

22 MS. TABET: Yes.

14:38:19 1           PRESIDENT ORREGO VICUÑA: Now, you may wish  
2 to point now or later when we have the transcript  
3 available to those subjects which you consider are  
4 beyond the statement because the issue will be  
5 whether they are related to the statement or not,  
6 but maybe you will raise that as you go.

7           MS. TABET: Thank you. We may raise a few  
8 now and deal with it as well later on.

9           PRESIDENT ORREGO VICUÑA: Are we open to  
10 the public now?

11          MS. TABET: Indeed, we are.

12          PRESIDENT ORREGO VICUÑA: And for Mr. Cook?

13          MS. TABET: Yes, and Mr. Cook.

14          PRESIDENT ORREGO VICUÑA: Okay.

15          (End of confidential session.)

16

17

18

19

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22

14:39:10 1

OPEN SESSION

2

CROSS-EXAMINATION

3

BY MS. TABEL:

4

Q. Mr. Schaaf, my name is Sylvie Tabet. I am

5

counsel for Canada, and I will have a few questions

6

for you regarding the company's history under the

7

Regime, and my colleague, Mr. Watchmaker, will have

8

a few brief questions on the damages aspects that

9

you have raised.

10

I want you to have with you the Core Bundle

11

that I have just distributed as well as your two

12

Witness Statements. Do those have your two Witness

13

Statements?

14

A. I believe so.

15

Q. Okay, thank you.

16

Mr. Schaaf, you said in your statement that

17

your responsibilities include managing and

18

monitoring the entire Merrill &amp; Ring Group company's

19

operation, and in particular their regulatory

20

requirements, including in British Columbia; is that

21

correct?

22

A. Yes, that is correct.

14:41:24 1 Q. And you said you had those  
2 responsibilities, I heard, since 1993?

3 A. Yes.

4 Q. And we heard this morning that the company  
5 has been operating in British Columbia for a very  
6 long time.

7 A. Over 120 years.

8 Q. All right. And we've also heard that they  
9 mostly have Federal lands in British Columbia?

10 A. That's correct.

11 Q. Okay. I have just a few questions about  
12 your history and your involvement in Canada.

13 So, as I understand it, in 1993, when you  
14 came to Merrill & Ring and you took responsibility  
15 for the regulatory requirements, you became aware of  
16 Notice 23, the predecessor to Notice 102?

17 A. Yes.

18 Q. And then Notice 102 was issued in 1998; is  
19 that correct?

20 A. I believe that's the correct date.

21 Q. And I understand that you were consulted  
22 before Notice 102 was issued. Could you turn to

14:42:28 1 Tab 3 of your Core Bundle, please.

2 A. This is the notebook you just gave me?

3 Q. Yes, thank you.

4 As you see, this is a letter from Mr.  
5 McCue, from your lawyers, Code Hunter Wittmann,  
6 dated January 24, 1997. That responds to  
7 Ms. Watson's invitation to provide comments on  
8 Notice 102, and I understand that Ms. Watson at the  
9 time was the Director of the Export Controls  
10 Division, and says so at the beginning of the  
11 letter.

12 Is that correct?

13 A. Yes, it is.

14 Q. And this letter discusses your company's  
15 concern about the Regime and your hope that it would  
16 be altered, that the Regime under Notice 23 will be  
17 changed by Notice 102?

18 A. Yes.

19 Q. You complain at the bottom of the Page 1 of  
20 this letter--I'm reading from the very bottom, the  
21 second to last sentence--that the system is  
22 manipulated by participants, and then you go on to

14:43:48 1 describe how participants blocked your sales.

2           Does that accurately reflect the content of  
3 the letter?

4       A.   Generally so, yes.

5       Q.   And I understand that in your view when  
6 Notice 102 was introduced, it didn't address this  
7 concern to your satisfaction?

8       A.   As the letter points out, we've made  
9 numerous efforts to try to get the regulation  
10 changed and have had indications by Government that  
11 there would be changes made, but they have not been  
12 made.

13       Q.   And these are the same issues that you're  
14 now raising before this Tribunal?

15       A.   Yes, they are, and we face them every time  
16 we bring a raft of logs advertised for export.

17       Q.   Okay. Let's take a look at Tab 4 of the  
18 bundle. This is a letter by you January 30, 1997,  
19 and one of the issues you raise here relates to your  
20 ability to provide additional information on the  
21 recommendation of the Advisory Committee; is that  
22 right?



14:45:11 1 A. Could you allow me a moment to review this?  
2 Q. Yes.  
3 A. Thank you.  
4 Q. In particular the second to last paragraph.  
5 Of the first page, sorry.  
6 A. Oh, okay.  
7 Okay. And your question again, please?  
8 Q. You raise here the issue of not being able  
9 to provide--you would like to provide more  
10 information and provide--have an opportunity to  
11 provide more information with respect to the  
12 recommendations that are made to the Minister.  
13 A. Yes, this is a point that we made then.  
14 Q. And you're also making it now?  
15 A. Yes, we are.  
16 Q. You also say in this letter that the policy  
17 is discriminatory in that it applies only to British  
18 Columbia and not to other Provinces. Just as I'm  
19 clear, you're talking about the fact that the  
20 surplus test applies for British Columbia logs but  
21 not to logs from other Provinces; is that right?  
22 A. That is correct.

14:46:20 1 Q. And you're also bringing this issue up in  
2 this arbitration?

3 A. Yes, we believe it is discriminatory.

4 Q. Let me--if you could turn to Tab 5 of your  
5 Core Bundle.

6 Now, this is a follow-up letter to your  
7 meeting with the Export Control Division, and the  
8 letter is addressed to the Department of Foreign  
9 Affairs and International Trade. And in this  
10 letter, you reiterate your concerns about the  
11 Regime. And one of the issues you raise, the second  
12 paragraph, is the issue of conflict of interest of  
13 members on the Advisory Committee; is that right?

14 A. Yes.

15 Q. And you also raise a little bit later on in  
16 the next paragraph the issue that the Federal  
17 Government--you would like the Federal Government to  
18 adopt what you call standing green exemptions for  
19 Federal land.

20 A. Yes.

21 Q. These are the types of exemptions that are  
22 available to Provincial land that you would like

14:47:32 1 also to be applicable?

2 A. Yes, these are exemptions that are not  
3 available to us but are available to our  
4 competitors.

5 Q. And these are also the issues you are  
6 raising here in this arbitration?

7 A. Yes, they are.

8 Q. Let me now take you to Tab 6, please. This  
9 is a letter dated April 18, 1998, so a few weeks  
10 after Notice 102 was issued, and this is a letter  
11 from your lawyers Pomerance & Company.

12 The letter states in the first paragraph  
13 that exporters from British Columbia have for a  
14 number of years had to deal with a system of  
15 obtaining a number of Export Permits that in their  
16 opinion has become arbitrary, unfair, and  
17 discriminatory.

18 I understand that that refers to Notice 23;  
19 is that right?

20 A. I believe so, but I can't recall the  
21 specific Notice 23.

22 Q. All right. I imagine it does refer to

14:48:52 1 about Notice 23 because you're then talking about  
2 Notice 102 a little bit later on in the letter. And  
3 you say that exporters will be closely  
4 monitoring--I'm quoting from this letter--closely  
5 monitoring and documenting the process in order to  
6 determine whether they feels it addresses the  
7 concerns raised in respect of Notice 103  
8 essentially.

9           ARBITRATOR ROWLEY: When you quote,  
10 Ms. Tabet, can you tell us where you're quoting  
11 from, please.

12           MS. TABET: My apologies. Yes.  
13           I'm looking at Page 3 of the--well, it's  
14 Page 2 of the letter, the second page of the letter,  
15 and in particular the second to last--the last  
16 sentence of the second to last paragraph. It starts  
17 with, "Our clients and other exporters will be  
18 closely monitoring and documenting the process in  
19 order to make a further determination in that  
20 regard."

21           And then if you read the previous part of  
22 the paragraph, it's clear it makes reference to

14:49:55 1 Notice 23 and Notice 102.

2 BY MS. TABET:

3 Q. Mr. Schaaf, did you closely monitor the  
4 process? In fact, it appears that there are several  
5 follow-up letters on the record that you have sent  
6 to DFAIT, so would it be accurate to say that you  
7 did closely look at how Notice 102 affected you  
8 afterwards?

9 A. Yes, we have followed the process, yes, for  
10 all of the advertisements that we have made as well  
11 as programmatically, if you will, to seek changes  
12 not just for a particular raft that were advertised  
13 but to the entire program.

14 Q. And you have particularly paid close  
15 attention to how Notice 102 affected your company?

16 A. Yes, we have.

17 Q. But you have only brought this claim, this  
18 NAFTA claim before this Tribunal in 2006; is that  
19 right?

20 A. Yes, 2006 is when we filed the claim.

21 Q. Mr. Schaaf, are you a member of the Private  
22 Forest Landowners Association? I'm sorry. You are

14:51:10 1 a member of the Private Forest Landowners  
2 Association?

3 A. Merrill & Ring is a member.

4 Q. Merrill & Ring is.

5 And they have been a member since Notice  
6 102 was in place? For a number of years?

7 A. I'm trying to recall when the association  
8 was founded. We were one of the founding members.

9 Q. Thank you.

10 Can you turn to Tab 7 of your Core Bundle,  
11 please. This is a publication from 1998 by the  
12 Private Forest Landowner Association. Sorry, it  
13 says 2000, in fact.

14 Can you turn to Page 6. Sorry, the pages  
15 are not numbered, but it is the page that has 3.0 at  
16 the top.

17 A. Yes.

18 Q. Do you have it?

19 A. I have that.

20 Q. Thank you.

21 You will note at the bottom of that page  
22 that your industry Association of which you're a

14:52:25 1 founding member, threatens the Government to pursue  
2 a NAFTA Chapter Eleven challenge at the very bottom;  
3 yes?

4 A. I see that reference. I'm not sure what  
5 the exact context is.

6 Q. I think it would be fair to say, wouldn't  
7 it, that you had contemplated a NAFTA Chapter Eleven  
8 challenge since that time?

9 A. This is a report of the association. This  
10 is not of Merrill & Ring, so I can't say whether  
11 this was a Merrill & Ring plan.

12 Q. All right. Thank you.

13 I think you said earlier this morning that  
14 you had no certainty that logs can be exported. But  
15 isn't it true that almost all your logs that are  
16 advertised on the Bi-Weekly Lists do receive surplus  
17 status?

18 A. Many of the logs that we advertise do  
19 receive surplus status ultimately after we have gone  
20 through the entire process. But we do have no  
21 certainty that that will be the outcome.

22 Q. No certainty.

14:53:30 1           Ms. Korecky talks about almost 98 percent  
2 of your logs receiving surplus status. Does that  
3 sound right to you?

4       A.    That seems high, but regardless, we still  
5 have no certainty, and we cannot guarantee that we  
6 can deliver those logs to a market at any price at  
7 any time without that certainty.

8       Q.    Thank you, Mr. Schaaf.

9            That completes my questions. My colleague,  
10 Mr. Watchmaker, will have a few questions.

11       A.    Thank you.

12            BY MR. WATCHMAKER:

13       Q.    Now, I will be talking, Mr. Schaaf, to you  
14 about some of the comments that you've made in your  
15 Witness Statement with regards to incremental costs,  
16 so this is restricted access information. However,  
17 I'm confident that I can do the examination in  
18 public. However, I should advise you, if you feel  
19 like you cannot answer except on the restricted  
20 access record, then we would have to clear the  
21 Chamber.

22       A.    I guess I would like to refer to my counsel



14:55:07 1 with that decision.

2           MR. APPLETON: I'll not sure how Mr. Schaaf  
3 would be in a position to make that determination,  
4 but we are prepared to go with you up front. This  
5 is exactly the problem we were trying to avoid, but  
6 if you're convinced that you are going to elicit  
7 answers that don't require restricted access  
8 information, we are prepared to give you one to try,  
9 and we'll see how it goes, and then we may have to  
10 get in there before an answer comes just to make  
11 sure we don't have a problem with the record, okay?

12           MR. WATCHMAKER: I assure you my questions  
13 aren't meant to elicit restricted access  
14 information, but again I do advise you please be  
15 wary of it, and if you need to respond with  
16 restricted access information, please do tell us  
17 first.

18           THE WITNESS: Okay.

19           BY MR. WATCHMAKER:

20           Q. Thank you.

21           Now, I understand that Merrill & Ring has  
22 claimed damages for incremental costs associated

14:55:56 1 with a variety of different incremental costs  
2 associated with the Log Expert Control Regime; is  
3 that correct?

4 A. That is correct. We have a number of  
5 incremental costs that are associated with the  
6 Regime.

7 Q. Okay. Now, I would like to ask you some  
8 questions about some of these alleged incremental  
9 costs that you complain about in your Witness  
10 Statements. I would like to take you to your Reply  
11 Witness Statement, if I could, and as I've  
12 mentioned, there are confidential numbers here, but  
13 I would just like you to take a look at it. And  
14 specifically, I would like to take to you  
15 Paragraph 5 of your Reply.

16 A. And is this starting, "In my original  
17 Witness Statement"?

18 Q. No, your Reply Witness Statement.

19 ARBITRATOR ROWLEY: The paragraph starts  
20 that way.

21 THE WITNESS: I want to make sure I'm in  
22 the right place.

14:56:58 1 BY MR. WATCHMAKER:

2 Q. Okay. So, you claim here that you incur  
3 certain incremental costs as a result of the Regime;  
4 is that right?

5 A. Yes.

6 Q. Okay. Now, I'm looking specifically at the  
7 first sentence that begins, "In my original Witness  
8 Statement," and you claim a figure here associated  
9 with two particular costs; is that right?

10 A. You're referring to the incremental  
11 staffing and overhead.

12 Q. That's right.

13 A. Yes.

14 Q. And you claim a figure there, and then you  
15 go on to say a little while later that a portion of  
16 it is attributable to what you call sales  
17 commissions, as you mentioned in your direct  
18 evidence, and another portion that goes to overhead;  
19 is that right?

20 A. That's correct.

21 Q. Okay. Now, would you agree with me that  
22 the portion that you are attributing to sales

14:58:01 1 commissions is 80 percent of the total that you cite  
2 there?

3 A. I believe that's the correct math.

4 Q. Okay. Now, I understand that Mr. Low of  
5 Deloitte calculates a rather significant amount of  
6 the alleged incremental costs associated with this  
7 particular claim. But, Mr. Schaaf, you don't  
8 actually rely on any documentation here to attribute  
9 this 80 percent to the Regime, do you? It's just  
10 your Witness Statement; isn't that right? There's  
11 no documents that you've provided?

12 A. There is not a document that we've  
13 provided, I don't believe, that shows specifically  
14 that amount.

15 Q. Okay. And you haven't supplied, say, a  
16 contract that would actually explain these sums or  
17 these costs, have you?

18 A. I believe that the contract that contains  
19 the amounts has been provided.

20 Q. Is that your understanding that the  
21 contract with respect to these sales commissions has  
22 been provided?

14:59:13 1 A. I believe so.

2 Q. Okay.

3 MR. APPLETON: I think we might be getting  
4 to the restricted access material if you're  
5 referring to the Progressive contract in the record?  
6 Is that what you're referring to?

7 MR. WATCHMAKER: No. Mr. Appleton, I'm  
8 talking about sale commissions right now, not the  
9 Progressive contract.

10 MR. APPLETON: Then perhaps you might  
11 assist us so we can just--all I want to know is  
12 whether we are restricted or not restricted. Is  
13 there a particular document you're trying to get us  
14 to so that we could at least know--I'm a little  
15 confused--it's difficult to deal with this, and it's  
16 one of the difficulties of trying to operate in this  
17 way, and so we may basically need to understand--I  
18 mean, it seems to me that we are starting to relate  
19 to restricted access information, and as we start  
20 relating to restricted access information, I think  
21 that means that we have to be in restricted session.  
22 Now, I don't want to be in a restricted session, and

15:00:14 1 in fact I believed you we weren't going to have to  
2 go there. So if you can help me to understand where  
3 you might be going, that would be very good.  
4 Otherwise, I think we're going to have to restrict  
5 at this point so I don't have to keep jumping up and  
6 down all the time.

7 MR. WATCHMAKER: Well, I would just comment  
8 to the Tribunal that I don't think that we have  
9 actually elicited any restricted access information.  
10 Obviously the Tribunal does have it in front of  
11 them, the counsels have it in front of them, even  
12 the witness does, but it's not on the screens. I  
13 think that we can proceed in public.

14 Again, my only hesitation is for the  
15 witness and his confidential business information.  
16 If he feels uncomfortable, that's my only concern.

17 MR. APPLETON: But the witness is not in a  
18 position to be able to determine, and so he's  
19 feeling uncomfortable, and I can see this, and I'd  
20 like him to be able to give an answer so we can deal  
21 with this.

22 Wouldn't the simplest answer be that since

15:01:12 1 you're asking questions that seem to relate to  
2 restricted access information for us just to make  
3 this arbitration work effectively, and just let's  
4 close down for a short bit, and we'll go restricted  
5 and we'll get the answers we need so the Tribunal  
6 does what it needs to do and then we can go from  
7 there?

8           PRESIDENT ORREGO VICUÑA: Well, let us be  
9 practical, again. Why don't you make your  
10 questions, and if the answer calls for something  
11 that someone considers restricted, then we might  
12 stop at that point on the public session, but the  
13 other one is pure speculation whether that will  
14 happen or not.

15           MR. APPLETON: The difficulty is then  
16 someone has to sit with the witness. For example,  
17 the dollar figures now in Paragraph 5 are, as far as  
18 I understand, restricted access information, and  
19 so--and they were redacted into the materials that  
20 were put out in the nonredacted version which is a  
21 very good indication to me--does someone have this  
22 here? All the page. They're the areas that have

15:02:17 1 been blocked out, so it seems to me that is exactly  
2 the type of information that we are supposed to  
3 restrict--

4 MR. WATCHMAKER: That information has not  
5 been spoken of in open hearing.

6 MR. APPLETON: But the witness won't know.  
7 That's my problem. You're asking questions to the  
8 witness. The witness will not know, and therefore  
9 since all we want is the answer, let us please have  
10 a situation where we can get the answer. I know  
11 it's difficult, but it is much easier if we just  
12 close it for a few minute, we can get the answers,  
13 and then we don't have to argue about this. It's  
14 just a practical solution.

15 MR. WATCHMAKER: Mr. President, I don't  
16 want to belabor this point, but it does seem odd  
17 that the witness wouldn't know what his own  
18 confidential information is, but that's the last  
19 point I will make on this.

20 ARBITRATOR ROWLEY: Could I just make an  
21 observation. It is the witness's statement. The  
22 question that has caused all of this back and forth



15:03:15 1 in the last few minutes did not call for  
2 confidential information. It was whether the  
3 witness came up with these figures based on  
4 documents or contracts, and that was the question,  
5 was it not?

6 MR. WATCHMAKER: Yes, sir, it was.

7 ARBITRATOR ROWLEY: That doesn't call for  
8 restricted information. Yes, I did rely on  
9 contracts or I relied on documents when I prepared  
10 my testimony or I did not. If then one wants to ask  
11 what contract, show it to us, and if that discloses  
12 confidential information or restricted information,  
13 that's another thing, but I think it would be  
14 helpful if the question could be put and the answer  
15 could be made responsive to the question without too  
16 much back and forth.

17 MR. WATCHMAKER: May I proceed?

18 ARBITRATOR ROWLEY: Of course.

19 MR. WATCHMAKER: Thank you.

20 BY MR. WATCHMAKER:

21 Q. Mr. Schaaf, I would like you to take a look  
22 at the very same paragraph again.

15:04:17 1            Now, you also say at this same paragraph  
2 that you incur certain costs as a result of, as you  
3 just mentioned, timber management work conducted by  
4 Progressive Timber Sales; is that right?

5        A.    It's not for timber management per se as it  
6 is for managing the process of the Log Expert  
7 Control Regime, but yes, we do refer to the fees  
8 that we paid them.

9        Q.    Okay. And I will draw your attention to  
10 the final sentence of this paragraph where you  
11 testify as to a per cubic meter charge that  
12 Progressive earns.

13            Do you see that?

14        A.    Yes.

15        Q.    Okay. Again, I understand that Mr. Low,  
16 based on this testimony of yours, calculates a  
17 significant amount of alleged incremental costs  
18 associated with these fees; isn't that correct?

19        A.    That is correct. We incur these fees based  
20 on the Regime, and we would reduce these costs in  
21 the absence of the Regime.

22        Q.    Right. Now, as you put it in Paragraph 5,

15:05:22 1 "Progressive Timber Sales earns approximately  
2 another, and I won't read the figure out, for the  
3 additional work it does for us as a result of the  
4 Log Expert Control Regime." That's your testimony,  
5 sir?

6 A. Yes, that is right.

7 Q. Okay. Now, as I understand Mr. Low's  
8 Report, this is a premium you paid to Progressive  
9 sales on your export logs above and beyond what you  
10 pay on your domestic logs; is that right?

11 A. It's not a premium that we pay. It's a  
12 part of the fees that we pay to Progressive in the  
13 contract that we have with them.

14 Q. Okay. You said it's not a premium?

15 A. No, we don't pay this as a premium. In the  
16 contract that we have, there have been two different  
17 forms of contract over the last several years. One  
18 of those most recently has had the fees for export  
19 and domestic sales of logs the same regardless of  
20 whether they're sold in the export or the domestic  
21 market. The previous contract had a slightly larger  
22 amount of fee paid for export sales as an incentive

15:06:54 1 to Progressive to help us get export sales. It was  
2 not a premium for selling into the export market as  
3 much as it was an incentive for them to assist us in  
4 that process. And in either case, the entire fee  
5 was calculated on what it was costing them to assist  
6 us in working through the export log marketing  
7 process.

8 Q. Okay. Now, then, is it safe to say that  
9 the greater your imports, the more Progressive  
10 stands to earn?

11 A. The contract, and I believe this was 2004  
12 and '5, possibly 2006, would earn slightly more for  
13 logs that we were able to export than for logs we  
14 were able to sell at domestic, and then we changed  
15 the contract, and it is the same fee regardless of  
16 whether they're sold export or domestic.

17 Q. Okay. Well, thank you, Mr. Schaaf. I  
18 appreciate you being able to do this with me in  
19 public setting.

20 MR. WATCHMAKER: Those are my questions,  
21 Professor Vicuna. Canada does reserve the right to  
22 re-cross-examine, should the need arise. Thanks.

15:08:19 1 PRESIDENT ORREGO VICUÑA: Thank you.

2 Mr. Nash, do you have any redirect?

3 MR. NASH: Yes, two questions,

4 Mr. President.

5 REDIRECT EXAMINATION

6 BY MR. NASH:

7 Q. If you return, Mr. Schaaf, to Tabs 3, 4, 5  
8 and 6, just to take a look at those in Canada's Core  
9 Bundle of documents that my colleague just put  
10 before you. It's the series of letters beginning in  
11 January 1997 and ending on April 18, 1998. And the  
12 Notice 102 was brought in to refresh your memory on  
13 April 1st, 1998; correct?

14 A. Correct.

15 Q. At the time these letters were written,  
16 some of them by you, did you know how the Regulatory  
17 Regime was going to be administered and how  
18 decisions would be made and rules would be made in  
19 the implementation of the Regime?

20 A. We did not. We offered this as suggestion.

21 Q. Did you have the resources as a company of  
22 your size to monitor the operation of the process

15:09:48 1 relating to the implementation of the Regime? In  
2 other words, to act as a sort of police force to  
3 make sure it was being complied with?

4 A. Only as it would relate directly to rafts  
5 that we were trying to advertise would we have an  
6 opportunity to monitor, but not on a whole.

7 Q. And there are how many applications for  
8 export of logs out of British Columbia in a given  
9 year? Do you have a sense of that? Is it in the  
10 thousands?

11 A. Oh, it would have to easily be in the  
12 thousands. There is the weekly, biweekly  
13 advertising list is something like 150,000 cubic  
14 meters every two weeks, so that's like all of the  
15 harvests that Merrill & Ring could do in a year  
16 would have been included in the two-week period, so  
17 that times 26 at least.

18 Q. Right. Thank you. Those are my questions.

19 QUESTIONS FROM THE TRIBUNAL

20 PRESIDENT ORREGO VICUÑA: Thank you.

21 Mr. Schaaf, I have a question for you, and  
22 our colleagues who might have others, just a very

15:11:01 1 brief one.

2           You mentioned at some point in your direct  
3 examination that you had, of course, applied to the  
4 administrative bodies that had taken part of the  
5 decisions on offers and prices and so forth and that  
6 you were not successful, and then that the only  
7 appeal you had before that was before this Tribunal.

8           Now, would you not have had a recourse  
9 before the Canadian courts? I assume that any  
10 administrative regulation or measure or decision has  
11 a way of being appealed domestically. Or am I  
12 totally wrong?

13           THE WITNESS: I would not suspect that  
14 you're totally wrong. We were not aware of avenues  
15 of appeal that we would have within the Canadian  
16 court system in a dispute relative to the way in  
17 which the Regime was managed.

18           PRESIDENT ORREGO VICUÑA: Thank you.

19           ARBITRATOR DAM: Well, I do have one  
20 question, if we could go back to the very beginning,  
21 and that was some hours ago, and I of course don't  
22 have it before me here, but you will know what you

15:12:33 1 said. You said something along the lines of the  
2 fact that you saw sailing or steaming by logs of  
3 other producers while you were busy complying with  
4 the regulations of the log export control process  
5 because, of course, you had to advertise and so  
6 forth.

7 Whose--those were logs of your competitors;  
8 correct? Whose were they?

9 THE WITNESS: I'm not sure the exact  
10 specific owner of those logs, but logs that are  
11 produced on the North Coast and The Queen Charlotte  
12 Islands typically then are towed south by barge or  
13 in raft to be sold into the same markets that we  
14 sell.

15 ARBITRATOR DAM: And there was no  
16 regulation that required the advertising process  
17 that you were subjected to for those logs; is that  
18 correct?

19 THE WITNESS: Logs that are produced in  
20 those areas have the opportunity to get one form of  
21 exemption or another from the Export Control Regime,  
22 whereas we are not.



15:13:45 1           ARBITRATOR DAM: That's because where you  
2 are located. If you were located in their area,  
3 would you be required to comply with the advertising  
4 requirements?

5           THE WITNESS: I believe that the  
6 restriction on federally regulated private lands  
7 exists regardless of where it is on the Coast, is  
8 somewhat different in the Interior, but regardless  
9 of where we might be on the Coast, we would fall  
10 under the same regulation. However, our  
11 competitors, if you will, the Provincial Government  
12 that is supplying the same type of log and other  
13 perhaps aboriginal lands would not be subject  
14 necessarily to the same log export restriction, even  
15 though they're selling the same log into the same  
16 marketplace. They would have an opportunity that we  
17 do not.

18           ARBITRATOR DAM: Whether they were an  
19 American firm or Canadian firm?

20           THE WITNESS: I would guess so. I don't  
21 know specifically the answer to that.

22           ARBITRATOR DAM: All right. Perhaps we

15:14:49 1 could clarify that later. Thank you.

2 MR. NASH: Mr. President, I had one  
3 question arising from that question.

4 ARBITRATOR DAM: Please.

5 FURTHER REDIRECT EXAMINATION

6 BY MR. NASH:

7 Q. With respect to federally regulated lands  
8 if it's on the North Coast, your understanding is  
9 that you would not be able to get one of those  
10 exemptions to have your barge sailing by in tandem  
11 with that barge?

12 A. I believe that's true.

13 PRESIDENT ORREGO VICUÑA: Fine.

14 Mr. Schaaf, thank you for your participation, and  
15 you are excused now.

16 THE WITNESS: Thank you, sir.

17 (Witness steps down.)

18 PRESIDENT ORREGO VICUÑA: Well, I guess we  
19 should proceed directly with Mr. Kurucz, and then  
20 perhaps after the direct examination, we might break  
21 and have the cross. Is Mr. Kurucz here?

22 MR. NASH: He's in the region. He's out of

15:15:53 1 the room, but we will attempt to get him.

2 (Comments off microphone.)

3 PRESIDENT ORREGO VICUÑA: Good afternoon,  
4 Mr. Kurucz. Welcome to the hearing.

5 TONY KURUCZ, INVESTOR'S WITNESS, CALLED

6 PRESIDENT ORREGO VICUÑA: And if you would  
7 read the Witness Statement for the record.

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 So, Mr. Nash will direct the examination  
13 now.

14 MR. NASH: Mr. President, just before we  
15 begin, there are portions of Mr. Kurucz's second  
16 statement which have been blacked out and are  
17 restricted, and in this direct examination we will  
18 be involved with naming some names, and therefore I  
19 would ask that Mr. Cook be excluded for this  
20 witness's evidence.

21 PRESIDENT ORREGO VICUÑA: Do you need to do  
22 that since the outset or at some point as you go

15:23:03 1 along?

2 MR. NASH: The names will be named pretty  
3 much from the outset. And my direct of Mr. Kurucz  
4 is going to be relatively brief, but we are going to  
5 be dealing with some names that have been  
6 restricted.

7 PRESIDENT ORREGO VICUÑA: Okay.

8 THE SECRETARY: Please close the proceeding  
9 to the public, thank you.

10 PRESIDENT ORREGO VICUÑA: So we will need  
11 Mr. Cook to do some walking.

12 (End of open session. Confidential  
13 business information redacted.)

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15:23:36 1

CONFIDENTIAL SESSION

2

DIRECT EXAMINATION

3

BY MR. NASH:

4

Q. Mr. Kurucz, you're the President and owner

5

of Progressive Timber Sales?

6

A. That's correct.

7

Q. And your company is a small company. It's

8

the exclusive broker for Merrill &amp; Ring?

9

A. That's correct.

10

Q. Do you do timber sales only for Merrill &amp;

11

Ring?

12

A. No. I do timber sales for other clients.

13

Q. Okay. And you have been involved in the

14

forestry industry for over 35 years?

15

A. Yes.

16

Q. And you have been a log trader in British

17

Columbia for the past 20 years?

18

A. That's correct.

19

Q. And for about 15 of those last 20 you've

20

had your own company?

21

A. That's correct.

22

Q. And how long have you worked for Merrill &amp;

15:24:23 1 Ring?

2 A. Since 1994.

3 Q. And are you involved in the harvesting  
4 process and the other process around getting timber  
5 from site to sale?

6 A. That's correct.

7 Q. And just very briefly describe your  
8 involvement in that process.

9 A. In that process, as a broker, I try to  
10 identify the markets, what we are going to try to  
11 accomplish at the end of the day. In doing so, I  
12 come up with a bucking card or bucking spec to give  
13 to the logger, and specifically the people that are  
14 harvesting the tree, knocking--taking the tree down,  
15 cutting it into specific lengths.

16 Then from the bush we bring it into the  
17 sort yard, and from the sort yard we boom logs or  
18 from the sort yard we scale and grade the logs, and  
19 then from there it goes through to a bundle,  
20 bundling system. We bundle the logs into the water,  
21 and then we raft them from there. We put them into  
22 specific packages.

15:25:27 1 Q. Are you familiar with the term "blocking"?

2 A. Blocking, yes.

3 Q. And are you familiar with the term

4 "blockmail"?

5 A. Yes.

6 Q. How is your familiarity with that term?

7 A. First of all, what I would like to say to  
8 the panel is that in our business we are sellers of  
9 logs. We have people phoning us on a regular basis  
10 looking to buy logs. They know we have logs for  
11 sale. Those conversations are very fair in the  
12 respect that they want logs, we offer them logs,  
13 they go and look at them and give us fair market  
14 prices. They definitely need the logs, they want to  
15 pay the best price that they can to attract me to  
16 sell them.

17 On the blockmail program, we have a  
18 situation where the customer knows we want to get  
19 the logs out of the country, but they know that they  
20 have a hammer over my head, so to speak, where--if I  
21 don't do a deal with them in some respect. The  
22 blockmailing comes where we are not really getting a

15:26:40 1 fair price for the logs.

2 Q. And can you give the Tribunal some examples  
3 of some of the experiences that you've had with  
4 blockmailing.

5 A. The examples come in all shapes and forms,  
6 but the normal one is just as I've described: They  
7 want a specific log at a specific price, a price  
8 that might be or is below normally on the  
9 blockmailing end of it below market price. I know I  
10 can sell that log to somebody else at a much higher  
11 value.

12 There are two things that are at stake when  
13 it's coming to negotiating with these particular  
14 people. One is the price, and one is the volume  
15 that they want in lieu of us shipping these logs out  
16 of the country, to get the package that we want out.

17 Q. And can you give a couple of specific  
18 examples of companies you've dealt with that have  
19 used this technique.

20 A. Yes. As CIPA Lumber is one of them, and  
21 Interfor is one of them. Some of the examples I  
22 could give you, one particular one in CIPA's case,



15:27:58 1 they continue to block us at, if we don't produce  
2 the logs on a peeler length, and I--

3 Q. What's a peeler length?

4 A. Peeler length, we have two different types  
5 of lengths when it comes to sorting logs. One is  
6 peeler length. And if the panel can think in blocks  
7 of 8-foot increments, and sawlog lengths are in the  
8 realm of 10- and 13-foot blocks. So, when we make  
9 logs on the peeler length, the peeler mill can give  
10 us the optimum price for those logs. If the logs  
11 are sorted, if we can--if we have a market, for  
12 instance, to Japan, and we have to sort the logs in  
13 increments of 10- and 13-footers, Japanese can pay  
14 us a considerable amount more money for those logs.  
15 But if we advertise those logs for export and they  
16 are blocked by a peeler mill, the peeler mill will  
17 give us less value for those logs because they're  
18 not on their specific lengths. But, in fact, if we  
19 put those logs on peeler lengths, then they could  
20 pay us much more money.

21 And to these terms, let's just say on the  
22 export market we can get 80 to \$90 a cubic meter

15:29:20 1 Canadian for the logs on the export market. If I  
2 sort those logs and CIPA is going to block me on  
3 those logs that run 10- to 13-foot increments, then  
4 we have a situation where CIPA will only pay me \$50  
5 for those logs. But if I make the log on the 8-foot  
6 increments for CIPA, they will pay me 62 to 63 to  
7 \$65 today, depending on some p-size (ph.) issues.

8           So, what we have done--and CIPA has claimed  
9 that if we do not continue to make the sort them  
10 for, they will block us. If they block us, they are  
11 blocking us at the \$50 level today and not the \$62  
12 if I make the peeler length. We have made the  
13 decision over the last few years that we will just  
14 continue to make a peeler-length log for CIPA  
15 Lumber, and we have been producing that log over the  
16 last four or five years probably for them.

17       Q. Even though you get more for it by  
18 exporting?

19       A. Even though I could get more for it on the  
20 export market, absolutely.

21           Where am I going on this one?

22           So, anyway, I have produced this log for

15:30:38 1 CIPA Lumber so that they will not block me. I would  
2 rather get the known \$65 a cubic meter than take the  
3 chance of them blocking me and getting the \$50 a  
4 meter. If I don't have the peeler lengths, they're  
5 going to have a bunch of waste when it goes through  
6 their system so they could only afford to pay me the  
7 \$50 a cubic meter.

8 Q. Have you had incidents where you are  
9 required to make a specific sort of logs for a  
10 domestic log buyer in order to avoid them blocking?

11 A. Yes. Interfor approached me one time. We  
12 had just started harvesting the timber from the  
13 bush. We just started our scaling program.  
14 Interfor heard that we were involved in doing so.

15 Mr. Phil Warnery from Interfor, he phoned  
16 me up--this is on a Monday morning. On every second  
17 Friday, they get the list of logs that are available  
18 on the export list. I basically call this the  
19 "shopping list." He called me up. And this one  
20 particular Monday morning I also had conversations  
21 with Paul Stutesman and these guys, and I told them  
22 that there is plenty of logs on the market right

15:31:55 1 now. I don't think we are going to have any  
2 concerns whatsoever.

3           Just out of the blue, Mr. Phil Warnery  
4 calls me up in the afternoon of their Monday morning  
5 meetings and says to me specifically that they had  
6 the Monday morning meeting. It was brought to his  
7 attention a spreadsheet that Merrill & Ring the  
8 previous year had advertised, and they suspected  
9 that we got out X amount of volume.

10           And Mr. Phil Warnery is the one that looks  
11 after my account. They have other log buyers  
12 looking after other accounts. And he was put in a  
13 position where supposedly Merrill & Ring's  
14 percentage that we gave to him in the previous  
15 year--we made our deals, we did our thing, they were  
16 all happy, but in the previous year he said his  
17 previous percentage was down, and that his  
18 management wanted that percentage up this year.

19           So, I said, "Phil, why are you calling me?  
20 Because there's tons of log on the market. I even  
21 hear that you guys are backing up on lumber."

22           So, he said, "Well, the story this year is

15:33:05 1 going to be that we want you to make a sort  
2 specifically for Queensboro mill." The Queensboro  
3 mill is a small log mill, and he tells me that the  
4 8- to 11-inch logs are too small for his mill that  
5 we produce. We produce an 11-inch sort and  
6 12-inch-plus sort. On the 12-inch-plus sort, he  
7 wanted to make sure that the butt diameter--what he  
8 told me is that on the 12-inch-plus sort they don't  
9 like those logs because they're too big. So, the 8-  
10 to 11- are too small for them. The 12-inch-plus  
11 have too big a butt diameters on them.

12           So, he told me that I had to specifically  
13 make a sort for him. Otherwise, if I didn't do  
14 this, that they would block every log that was  
15 coming out of our operation that they could use in  
16 their facilities, not just that particular mill but  
17 in other applications that they had going at that  
18 particular time.

19           So, here I am, I've got a gun to my head.  
20 I have got to put my tail between my legs and phone  
21 up Paul Stutesman who I just had the conversation  
22 that morning, telling him that I felt I would be

15:34:07 1 able to get out all the hemlock logs. Mr. Paul  
2 Stutesman said, "Well, this is all part of this  
3 Regime, this game. Go and see what they will pay  
4 for the logs."

5           So, I got on the phone and phoned up  
6 Mr. Phil Warnery, "What do you think you are going  
7 to be able to pay for the logs?"

8           "Well, we are not going to give you a price  
9 now. We want it on a raft-by-raft basis." Okay,  
10 well, that's fair enough. There might be more 8- to  
11 11-inch logs and 12-inch-plus, so I said okay, I go  
12 back, they won't give me a price. Okay.

13           So, we discussed it further. We decided,  
14 well, let's just bite the bullet and let's go ahead  
15 and do this deed. So, I have to go up, take the  
16 time to go to the sort yard and explain to them what  
17 we're going to do now because we had this one system  
18 going. I had to put in another sort, call it the  
19 "Interfor sort." Away we go. We make this sort.  
20 We start selling the rafts to Interfor. Quite a few  
21 cubic meters later--and I think if the number serves  
22 me correctly, it's 8,000 cubic meters and we're out

15:35:09 1 the door.

2           The office--the girls in my office get a  
3 phone call. The phone call is from a towing company  
4 asking for a release on logs, and the company that  
5 they wanted release on logs to was for A&A Trading,  
6 one of the largest brokerage companies in British  
7 Columbia, export companies also. So, right away I  
8 go, "Okay, what's going on here?" So I get on the  
9 phone, I phone up Mr. Phil Warnery. "Mr. Phil  
10 Warnery, what's going on, you know?" You could hear  
11 his jaw hit the floor, and he stammered (ph.),  
12 stammered and whatever else, and I said, "I just  
13 found out that A&A is looking for a raft of logs.  
14 Have you guys sold them a raft of logs?"

15           He said, "Uh, yuh, eh, eh, yuh, I will get  
16 back to you."

17           So, anyways, he gets back to me, and yeah,  
18 he knew, but you know he gives me the story, yeah,  
19 they did sell this raft of logs to them.

20           I said, "You are giving another log broker  
21 in town logs that we are giving to you in lieu of  
22 you not blocking us?" I said, "What is going on,

15:36:20 1 you know?"

2 I asked him to get his general manager, Mr.  
3 Brian Bustard, or John McCutcheon to give me a phone  
4 call. Now, Mr. John McCutcheon, as you will know,  
5 is on the TEAC committee. I never received a phone  
6 call from them. But I told him, "Personally, if you  
7 guys think that A&A are going to export this log,  
8 you could tell A&A they will never export this log  
9 as long as I live. I will fight this myself."

10 So, anyways, I told him I would really like  
11 the opportunity to bring in all the rest of the  
12 stuff to Merrill & Ring. Can you give us these  
13 movements back? So, I asked--so, obviously, I  
14 conversed everything that's going on here with Paul  
15 Stutesman and not. It turned out that Phil--I asked  
16 him even for the raft that they had sold to A&A, but  
17 he came back and told me that that transaction was  
18 too far down the pipeline.

19 So, I said, "Well, you just tell A&A I'm  
20 going to be following this raft around, and I don't  
21 want you to export it."

22 There was such a glut of hemlock on the



15:37:29 1 market at that particular time, they told me that  
2 they had--for me to stop making the sort for them.  
3 They didn't want the sort anymore, obviously, and  
4 that the mill--there were problems with sales and  
5 blah blah blah. They had a gazillion excuses for  
6 me, but on and on it went.

7 Q. So, those hemlock logs were logs you could  
8 have sold at a higher price in the international  
9 market?

10 A. Yes, that's correct.

11 Q. But you sold at a reduced price to  
12 Interfor?

13 A. To Interfor.

14 And to this day, it always bothers me  
15 because I knew I sold those logs to Interfor on a  
16 boom-by-boom basis probably one to three dollars a  
17 cubic meter cheaper than I could have got if I sold  
18 those same logs to anybody else in the domestic  
19 market at that particular time. And that's even in  
20 a falling market.

21 Q. And does Interfor have U.S. and Canadian  
22 operations?

15:38:22 1 A. Yes, they do, yeah.

2 Q. How does that impact your view of what was  
3 going on here?

4 A. Well, Interfor--Interfor--we have an  
5 Interfor Vancouver, we will call it, and we have an  
6 Interfor U.S. And Interfor U.S., we had found, had  
7 bought a barge of logs from a log trader that does  
8 export in Vancouver, Timberwolf Trading. We found  
9 out about this barge, so right away I got on the  
10 phone with John Cook specifically to see if he could  
11 do something about it, and I believe Paul Stutesman  
12 got in touch with Judy Korecky.

13 In our system, Merrill & Ring/Progressive  
14 Timber Sales, Merrill & Ring looked after talking to  
15 the Federal Government, Judy Korecky  
16 specifically--she hasn't heard from me for quite  
17 some time--and I tried to converse with John Cook  
18 and TEAC members regarding any issues.

19 So, here's a situation where we've got  
20 Interfor Vancouver and Interfor U.S. all part and  
21 parcel of a project that was at one time Interfor's  
22 licensed wood that was given to a First Nations

15:39:38 1 band. So, you know, I believe, in my eyes, this  
2 whole thing is collusion to the maximum degree. You  
3 see Interfor Vancouver, Interfor U.S. walking around  
4 with other log brokers that they have friendly  
5 relationship with. It drives me wild when I see it  
6 because me--as an independent log broker, if I want  
7 to go out and look at timber and I've got this going  
8 on where this broker is going to be able to get out  
9 all his logs and me as an independent timber buyer,  
10 if I want to export any of these logs, I'm going to  
11 have to say I'm only going to get 50 percent of  
12 these logs out because I'm going to have to give  
13 Interfor something to buy them off.

14 Q. Do you have the time and resources to be  
15 able to police this whole system?

16 A. I'm a one-man show, so it gets pretty  
17 convoluted sometimes. Sometimes, most of my--most  
18 of my time and energies are spent on how to get  
19 through all these issues. I've got Interfor, who  
20 won't--who threatened on a weekly or  
21 biweekly-by-biweekly basis constantly threatening to  
22 block me, trying to work out the deals with them,

15:40:56 1 and then I have other people on occasion coming and  
2 looking for offers also on logs. So, I'm trying to  
3 make this whole convoluted system work.

4 Q. Do you have experience where sometimes a  
5 specific sort of logs will be blocked by--have you  
6 had that experience?--by a specific sawmill.

7 A. Specific sort...

8 Q. I'm thinking an example of McKenzie  
9 sawmills.

10 A. Oh, right. Exactly.

11 Just recently--well, not recently, but  
12 October of last year, we had a situation where we  
13 had--it was actually a 20-inch plus but it had some  
14 18-inch logs, so I will call it 18-inch-plus sort.  
15 Interfor or--pardon me, Interfor used to own this  
16 McKenzie sawmill, now it's under a private tenure.  
17 This particular mill blocked me at \$78 a cubic  
18 meter.

19 Q. What do you mean by that, that they issued  
20 an offer--

21 (Simultaneous conversation.)

22 MS. TABET: May I ask, for the last 20

15:42:14 1 minutes, we've heard about something that's nowhere  
2 in Mr. Kurucz's statements. I'm just raising it  
3 again, as this is obviously brand new testimony.

4 MR. NASH: So, I don't have any response at  
5 this stage, Mr. President. I will simply continue.

6 BY MR. NASH:

7 Q. You were about to say that you had a  
8 specific sort request from a mill at \$78?

9 A. That's correct, yes.

10 Q. Could you continue with that, please.

11 A. So, we made this sort 18-inch plus, fairly  
12 good logs, a log that I figured or estimated on the  
13 domestic market that I could get 100 to \$110 a cubic  
14 meter for. This particular mill phoned me up and  
15 offered me \$78. We tried to--he first originally  
16 tried to talk the talk. I said, "No, this log is  
17 worth a considerable amount more than \$78."

18 I even asked him, "How did you come up with  
19 the \$78 a cubic meter?"

20 He threw at me that he put all the  
21 calculations into a matrix into his computer and the  
22 computer came up that it was \$78. I asked him if he

15:43:27 1 inspected the logs, and he said yes, he did.

2           So, I said, "Well, didn't you think the  
3 quality was up where it should be in the hundred  
4 dollar range at least?"

5           He said, "No, our mill at this particular  
6 time can only pay this much for the log."

7           Obviously, he ended up writing a letter to  
8 me, offer, and to TEAC, and I went to Mr. John Cook.  
9 I explained to him--or to TEAC. I wrote them a  
10 letter, saying exactly what I said to you, that this  
11 log I believe is worth--my marketing expertise tells  
12 me that this log is worth 100 to \$110 a cubic meter.  
13 It went to TEAC. They ended up holding up that  
14 particular thing and deemed my logs nonsurplus. So,  
15 in the meantime, I went out there, and I ended up  
16 getting a domestic customer go out and take a look  
17 at the logs.

18           Now, at this stage of the game, I have got  
19 a Korean customer that definitely wants the logs, he  
20 wants them now. We are trying to negotiate. We  
21 have got another package coming out, and I'm trying  
22 to negotiate with this gentleman.

15:44:41 1            Now, on these Korean logs, this Korean  
2 offer that I had, at the time with the Canadian  
3 dollar where it was, it equated to about \$148 a  
4 cubic meter that we could have got for this  
5 particular raft of logs if we got the export sale  
6 could have transacted.

7            As we waited for TEAC to make the response,  
8 they came back to me and said, "No, we say this  
9 price is fair."

10           I would say to John--well, I didn't have  
11 any conversations, I don't think, with Mr. John Cook  
12 at that time. Paul took it and went up to  
13 Ms. Korecky, and it went up that ladder. Over time,  
14 I had to give--hustle and go out and get a domestic  
15 customer. They ended up going and inspecting the  
16 logs. In a down market in the meantime--by this  
17 time we have lost four to six weeks, maybe even  
18 more. The domestic customer comes back to me,  
19 Western Forest Products, he comes back to me and  
20 offers me, he asked me what price I wanted for the  
21 logs, and I told him I wanted \$105. He came back to  
22 me and said, "Well, you know, the price for 105 was

15:45:51 1 there about a week or two ago, but today we can only  
2 pay \$95."

3 I said, "Okay."

4 So, giving this information to Paul  
5 Stutesman, he had discussions with Ms. Korecky that  
6 Tony has gone out, and I asked this  
7 gentleman--everything in Vancouver is done on verbal  
8 conversations, and I asked this gentleman, "Can you  
9 please"--I was on the road. I said, "Could you  
10 please send to my office a written Purchase  
11 Agreement or just a written offer?" So, he did. He  
12 sent me the two booms that were--one boom was at \$78  
13 and two applications, so say four weeks later. The  
14 next one was at \$84. So, this gentleman blocked at  
15 \$78 and he blocked at 84. Western Forest Products  
16 gave me an offer at 95 for all of the production,  
17 all of the production.

18 So...

19 Q. And you have been blocked at 78?

20 A. And I was blocked at 78, and then on the  
21 second boom I was blocked at 84, basically the same  
22 quality, but his matrix was able to give me--for



15:46:53 1 whatever log dimensions and sizes he was able to  
2 give me 84 on that next raft.

3 Q. You had a lot of experience dealing TEAC  
4 and FTEAC?

5 A. Yes.

6 Q. Did you deal with them in regards to  
7 exporting some red cedar?

8 A. Yes.

9 Actually, back in the Thomas Jones Days--

10 Q. Who is Mr. Jones?

11 A. Pardon me?

12 Q. Who is Mr. Jones?

13 A. Mr. Jones was the Judy Korecky of today.

14 Q. The predecessor on FTEAC?

15 A. Yes, predecessor.

16 Q. Okay.

17 A. And Mr. Jones, we had a situation where the  
18 market--this is in the late Nineties--we had cedars  
19 just coming out of our ying-yang. As a log broker  
20 on the provincial side, I had lots of routes that I  
21 was trying to get rid of for my customers, and then  
22 on the Federal side I had Merrill & Ring wood. I

15:47:43 1 could not sell it domestically at all.

2           At this particular time, there was a  
3 preconceived notion amongst the environment in the  
4 Vancouver Log Market that Federal logs were  
5 not--Federal red cedar logs could not be exported.  
6 I was in the business for--in trading logs for 10  
7 years at this particular time, and it was just  
8 always told to me, "No, you can't export red cedar."

9           I started thinking one day that, you know,  
10 why do--the Federal Government has control over the  
11 Indian reserve lands. Why can't the native Indians  
12 export their red cedar?" So, that was a question  
13 that I had for Mr. Jones. I asked him--I said,  
14 "This does not make sense to me. Can you explain  
15 why?"

16           He said, "No, you can export red cedar."

17           I said, "Well, in the Vancouver log market  
18 here, we have been forever. They have never  
19 exported red cedar."

20           He said "No, you are allowed it."

21           I said, "Okay. Can you please send  
22 Mr. Bruce Walders a memo, and I will put in an

15:48:52 1 application for Federal wood?"

2           In the meantime, I kind of sat back and  
3 thought, "Well, do I phone anybody else that would  
4 have red cedar, the McMillan Blodells, the Fletcher  
5 Challenges, whoever it was at that particular time,  
6 or do I just go down there--be the frontier and go  
7 down this road myself?"

8           I sat back, analyzed the whole situation  
9 because at the time that Mr. Jones gave me this  
10 clearance that I could go ahead, I had some time  
11 before I needed to get the application in.

12           So, what I decided to do is I sat down and  
13 I wrote down all the Provincial logs that I had on a  
14 fax and sent them--sent those provincial logs to  
15 every single cedar producer that I could think of.  
16 It had every mill, it had all the specification of  
17 logs that those mills are capable of cutting. I  
18 followed up on phone calls.

19           I could march from the mouth of the Fraser  
20 River up 20 miles, and I could probably dance all  
21 the way up the river for the amount of cedar that we  
22 had for this particular ad in the system.

15:50:04 1           I said this to--I phoned these people up,  
2 they phoned me up, we all discussed, no, we can't  
3 use them; we are all full.

4           In goes my application. Mr. Bruce Walders,  
5 same thing. He gets my application.

6       Q.   Who is Mr. Walders?

7       A.   Mr. Walders, he is--at this time,  
8 Mr. Walders was kind of the log export policeman for  
9 the Minister of Forests. He's in the Nainimo office  
10 in the regional office there, and what his job at  
11 this particular time was he critiqued every single  
12 application that came across his desk. He's the one  
13 that would tell you whether if you're out of spec or  
14 if he had a reason for disallowing or disqualifying  
15 it, he would phone you up, give you his reason for  
16 disqualifying it, and putting it in what him and I  
17 joked was the circular filing cabinet. He phoned me  
18 up and says to me when he got my application, he  
19 says, "Ha-ha, Tony, I had to check the calendar to  
20 see it was April the 1st. You know you can't  
21 export. Is this a joke?"

22           I said, "No. Did Thomas Jones not send you

15:51:15 1 a memo?"

2           And he said, "No, I have not received  
3 anything."

4           When I had that conversation with Thomas  
5 Jones, he told me that he was heading to Italy for  
6 quite some time and that he would do that. So, I  
7 had to get a hold of Diane Burke at the Department  
8 of Foreign Affairs in Ottawa and ask her if she  
9 capable of sending a memo to Mr. Walders so he could  
10 get it in this particular ad. We had a time frame  
11 before he could actually go before they actually put  
12 the Bi-Weekly List in printing, so he kept on  
13 putting pressure on me, "Have you heard from Thomas  
14 Jones?"

15           I said, "No."

16           So, to make a long story short, we ended up  
17 missing that particular application, so I told  
18 Bruce, I said, "This ad--this application is not  
19 going into the circular filing cabinet. Please put  
20 it on the top of your desk," so he did.

21           Ms. Diane Burke, she could not locate Tom  
22 in time. Therefore, he had to send a memo from

15:52:17 1 Italy to Diane Burke, and then it got off to Bruce  
2 Walders. In the ad goes. Once that ad hit, nobody  
3 in the Vancouver log market knew this was coming.  
4 Nobody at all. Once that ad hit, my phone system  
5 lit up, mostly from exporters that could--were  
6 definitely interested because they were all choking  
7 on red cedar, too. A few of the companies called up  
8 and just to discuss the scenario how can you? You  
9 know you can't export. And I said, "Well, we got  
10 the clearance on the Federal wood that we can now  
11 export red cedar."

12           Mr. Mike Wilson from Delta Cedar, he phoned  
13 up, and he was the most aggressive of the bunch, and  
14 he said, "Well, over my dead body are we going to do  
15 any log export here."

16           So, I said, "Well, Mike, there is a system  
17 in place," so he asked me for a copy of all the  
18 scale detail and stuff like that, so I sent him a  
19 copy of all the scale detail, but I also sent him  
20 the same fax that I sent him a week or two ago and  
21 showed him that these logs are also still available.

22           And it goes--Mr. Wilson did put an offer on

15:53:28 1 the table to me. My argument to TEAC--TEAC went,  
2 they upheld the offer.

3 Q. What does that mean, "they upheld the  
4 offer"? What does that mean? An effective block?

5 A. They said that that block, that price that  
6 they gave me was fair market value for the log.  
7 They did not take anything else into consideration,  
8 just that particular--the price is fair enough, end  
9 of story.

10 So, you know, I argue--I argued the fact  
11 that there is a surplus, everybody on TEAC at this  
12 time should know that you could march from the  
13 Fraser River up to Mission on cedar logs, so I had  
14 to wait. I got all my information together, and I  
15 had to send it off to Mr. Cook or, pardon me, Thomas  
16 Cook--Thomas Jones, and then him and I discussed the  
17 situation, and he went further.

18 He did overrule, okay? He did overrule  
19 TEAC.

20 The point I'm trying to get across here is  
21 the dance that I had to do in order to make sure  
22 that this point got proven.

15:54:40 1 Q. And where were Merrill & Ring's logs  
2 sitting during that process?

3 A. They were in the river at that particular  
4 time, up the river.

5 Q. You're familiar with the  
6 remoteness/nonremoteness issue arising out of Notice  
7 102?

8 A. Yeah, that's correct.

9 Q. And how does that remoteness provision  
10 affect what you do in your side of the operation in  
11 getting the logs out?

12 A. Yeah, in my side of the operation and other  
13 log brokers, we have to make sure that we are within  
14 the boundaries.

15 Now, the boundaries are very, very vague.

16 Q. The boundaries of what? Of remoteness?

17 A. Of remoteness.

18 Q. What's considered remote and nonremote?

19 A. Right.

20 If you went to any log broker and any  
21 person in log supply or whatever, what's remote and  
22 what's not remote, you definitely have to go and



15:55:32 1 talk to the regional--somebody in the regional  
2 office to find out whether that area is remote or  
3 not.

4 Q. And is the Theodosia property, has it been  
5 treated as remote for the purposes of Notice 102?

6 A. Yeah. Right from the start, in 1999--now,  
7 in 1999--now I live in Campbell River, which is on  
8 Vancouver Island, but in 1999 I lived in Surrey just  
9 outside of Vancouver. And for me to get to  
10 Theodosia was a major pain in the butt. To get to a  
11 ferry terminal, a 15-minute ride on a ferry  
12 terminal, an hour-and-a-half drive up to another  
13 ferry, another 50-minute ferry ride, 45. So, I was  
14 concerned in all respect that this area was remote.

15 I called up Mr. Bruce Walders and explained  
16 the situation. Mr. Bruce Walders said he would get  
17 back to me. It was in very short order, half a day  
18 or whatever. He got back to me and explained to me  
19 that it is considered remote. He went through--he  
20 explained that the excessive time and excessive cost  
21 to get there.

22 I said, "Okay, where do I take the logs?"

15:56:48 1 Do I have to go all the way to Vancouver?"

2           He said, "No, there is a marshaling area  
3 called Blind Bay. I'd heard of it, but I was  
4 unfamiliar with it at that particular time. I had  
5 been to Blind Bay once to look at logs. Blodell had  
6 done some stuff there.

7           So, that was the closest storage area I  
8 could take it to, and then they would deem it as  
9 nonremote.

10       Q.    So, then you take it from the Theodosia  
11 property to Blind Bay and then you unhook it and  
12 then store it?

13       A.    Yeah, if we decided that's where we wanted  
14 to advertise our logs for export.

15           At this particular time, we had to have our  
16 logs in position where they were going to be  
17 advertised. If the offeror or the Ministry of  
18 Forests came to inspect that log and it was not  
19 there, then they would disqualify your application.

20       Q.    And the logs sit there in the water  
21 awaiting the conclusion of the TEAC/FTEAC process  
22 and whatever other decisions are made?

15:57:53 1 A. That's correct.

2 Q. Just one moment.

3 (Pause.)

4 Q. Thank you, Mr. Kurucz. Those are my  
5 questions. My colleague may have some further  
6 questions for you.

7 MS. TABET: Are we taking a five-minute  
8 break?

9 PRESIDENT ORREGO VICUÑA: Yes. Now we take  
10 15 minutes, 4:15.

11 How long, if I may ask, your cross?

12 MS. TABET: Short.

13 PRESIDENT ORREGO VICUÑA: So as to take  
14 care of that today?

15 MS. TABET: Yes. Thank you.

16 PRESIDENT ORREGO VICUÑA: Thank you.

17 Fifteen minutes, please.

18 (Brief recess.)

19 PRESIDENT ORREGO VICUÑA: Ms. Tabet, do we  
20 have an open session?

21 MS. TABET: Yes, we do.

22 (End of confidential session.)

16:18:02 1

OPEN SESSION

2

CROSS-EXAMINATION

3

BY MS. TABET:

4

Q. Mr. Kurucz, we will distribute a Core

5

Bundle to you.

6

And can you also have your two Witness

7

Statements in front of you.

8

A. Pardon me?

9

Q. I have already indicated it's an open

10 cross-examination. I'm not going on ask any--sir,

11 you don't have a copy? There it is. Sorry. I'm

12 not starting until everyone has a copy.

13

Good afternoon, Mr. Kurucz.

14

A. Good afternoon.

15

Q. You said you were--earlier in response to

16 Mr. Nash's question, you said that you were the

17 exclusive log broker for Merrill &amp; Ring.

18

Do I understand they're your main client?

19

A. Are they my main client?

20

Q. Yes.

21

A. For the volume that they do, yes, I am

22 their main client.

16:19:32 1 Q. You said also that you were involved in  
2 timber sales. Do I understand correctly that you're  
3 not--you don't purchase advertised logs on the  
4 Bi-Weekly List?

5 A. Yeah, that's correct, I don't purchase  
6 them.

7 Q. As a broker, you help Merrill & Ring with  
8 the regulatory requirements in British Columbia; is  
9 that right?

10 A. Yeah, that's correct.

11 Q. And I understand that most of their logs  
12 are Federal land.

13 A. That's correct.

14 Q. Therefore, it's safe to say that you're  
15 pretty familiar with the requirement in Notice 102?

16 A. Yes.

17 Q. And Merrill & Ring advertises frequently on  
18 the Bi-Weekly List; is that right?

19 A. Yeah. When we are in production, yes, we  
20 do.

21 Q. So, when you had questions about the  
22 advertising requirements or concerns about the

16:20:25 1 permit process under Notice 102, you or

2 Mr. Stutesman have been in contact with the Export  
3 Control Division; is that correct?

4 A. Yes, it's generally Paul Stutesman that has  
5 the contact with whoever is a liaison, whether it  
6 was Mr. Jones or Ms. Korecky today, yes.

7 Q. And you said that on that one issue you're  
8 referring to on the red cedar, that when you had a  
9 question about advertising red cedar and whether it  
10 could be advertised from Federal lands, you spoke to  
11 Tom Jones, the predecessor to Ms. Korecky; is that  
12 right?

13 A. Yes, that's correct.

14 Q. And in that occasion, he, I think you said,  
15 overruled what Mr. Walders and TEAC had found.

16 A. Yeah, what had happened on that  
17 particular--

18 Q. You don't need to go into the details.

19 ARBITRATOR ROWLEY: I do think you need to  
20 let the witness answer the question once you have  
21 asked it.

22 MS. TABET: Yes.

16:21:22 1 BY MS. TABET:

2 Q. I just wanted to clarify whether Mr. Jones  
3 overruled what Mr. Walders and TEAC said.

4 A. Yes, that's correct.

5 MR. NASH: The witness should be able to  
6 say what he wanted to say in answer to your  
7 question.

8 MS. TABET: That's correct.

9 BY MS. TABET:

10 Q. You could go on. That was my question.

11 A. One of the points I would like to bring out  
12 here is I went through that whole escapade in order  
13 to prove a point.

14 TEAC took one thing into consideration and  
15 one thing only, and that was the price. Was the  
16 price fair? I couldn't argue the price because  
17 nobody was selling logs at that particular time, so  
18 in goes the application. My comment--my argument  
19 was there is a surplus here. You can dance  
20 everywhere on the Fraser River on cedar logs. Why  
21 did not TEAC--now, I look at TEAC as two entities  
22 here. You have TEAC as a jury, and Mr. Cook I call

16:22:28 1 as a judge. And when it comes to FTEAC, I look at  
2 Ms. Korecky as the judge. TEAC makes  
3 recommendations. Why these members who are supposed  
4 to be responsible on the TEAC committee, they all  
5 know what--they are supposed to know what the  
6 marketplace is doing at that particular time. Why  
7 could they not have made a decision at that specific  
8 time and place in order for us to go ahead and get  
9 the permit right away and we can get on with our  
10 procedure? No, we have to sit around, plead to--

11 Q. To the decision maker?

12 A. Pardon me?

13 Q. To the decision maker?

14 A. To the decision maker.

15 We have to plead and beg this is our  
16 argument, and it takes time, time, time, time, in  
17 order to get a response. And we don't know as it's  
18 going up that food chain in Department of Foreign  
19 Affairs, we don't know if we've got ears or we don't  
20 have ears. We don't have a clue. It's time, time,  
21 time.

22 Ms. Korecky, and there was one time I



16:23:30 1 argued about unfair practices. I had 800 cubic  
2 meters on the list that Interfor blocked. 200,000  
3 more--

4 Q. Sorry, I just want to remind you that we  
5 are in an open session, so you if you feel  
6 comfortable referring to that, go ahead, but I'm  
7 just reminding you that we are in a public hearing  
8 now.

9 A. And the point, ma'am?

10 Q. If you're referring to any restricted  
11 information, or is this public information  
12 knowledge, Mr. Kurucz?

13 MR. NASH: They're public names, they are  
14 restricted, and it should not be public. And if you  
15 could try avoid mentioning the companies for this  
16 purpose. But everything else, tell us everything  
17 else you want to tell us.

18 THE WITNESS: Sorry, I did not realize  
19 that.

20 Now I lost my train of thought.

21 MR. NASH: You were speaking about the 800  
22 cubic meters.

16:24:26 1           THE WITNESS:  Oh, the 800 cubic meters.  
2           Oh, this was a situation where I thought we  
3 were unfairly treated.  Why did not TEAC at that  
4 particular time--the 800 cubic meters that were at  
5 the table at TEAC's meeting, they declared that all  
6 they looked at was price, "Yes, the price was good;  
7 we are going to deem this nonsurplus."  
8           So, I go, "Okay, well, what about the other  
9 issue?  I have been attacked here.  Why can't they  
10 make the decision promptly so that we could carry on  
11 and go?"  But oh, no, we have got to go fight and  
12 argue and go up the food chain.  
13           Like I said, Ms. Korecky said that she was  
14 going to overturn that rule.  Well, we had no idea  
15 what she was thinking of doing.  Not a clue in our  
16 closet.  
17       Q.  Thank you, Mr. Kurucz.  
18           I want to ask you some questions about  
19 Theodosia.  
20       A.  Yes.  
21       Q.  You indicated in your first statement and  
22 today that you were told in 1999 that--

16:25:25 1 (Simultaneous conversation.)

2 Q. Let me finish the question.

3 You were told in 1999 that Merrill & Ring's

4 lands were remote.

5 A. That's correct.

6 Q. In Theodosia?

7 A. That's correct.

8 Q. And you explain in Paragraph 55 of your

9 first statement what the remote rule is, and you say

10 that it requires Merrill to advertise its logs from

11 remote areas at a minimum volume of 2,800 meters

12 cubed; that is right?

13 A. That's correct.

14 Q. So, just to be clear, this is a minimum

15 volume requirement for purpose of advertising?

16 A. That is probably the most controversial

17 rule in the book.

18 Q. But it is for the purpose of advertising.

19 A. It's for the purpose of advertising.

20 Q. Okay. Thank you.

21 If you can turn to Tab 1 on your Core

22 Bundle, the white binder there.

16:26:21 1 A. Yes.

2 Q. Tab 1 is Notice 102. You said you were  
3 familiar with this document.

4 A. Yes.

5 Q. If you go to the last page, it says--I will  
6 give you a moment to find it.

7 A. The very last page?

8 Q. Very last page of Notice 102.

9 It says, "Inquiries should be directed to  
10 the Department of Foreign Affairs and International  
11 Trade Export Control Division." Is that right?

12 A. (Off microphone.)

13 Q. Can you repeat your answer?

14 It does say that inquiries should be  
15 directed to the Department of Foreign Affairs?

16 A. That's what it says here, yes.

17 Q. And Theodosia is Federal land, we have  
18 established.

19 A. That's correct.

20 Q. So, I understand from what you said earlier  
21 that you spoke to Mr. Bruce Walders about whether  
22 Theodosia was remote.

16:27:28 1           Did you speak to the Department of Foreign  
2   Affairs and International Trade?

3       A.   I did not talk to Foreign Affairs, but if  
4   you also go into the B.C. procedures manual, it  
5   tells you that if you have any situation regarding  
6   whether it's a remote area or not, that you should  
7   be in touch with the regional office and the  
8   Nainimo.

9       Q.   And the B.C. procedures relates to B.C.  
10   land, Provincial land?

11      A.   That's correct, but in Notice 102, it also  
12   says that if you have any issues to anything  
13   regarding Remoteness Rule...

14      Q.   Okay.  Would you point me to where it says  
15   that.

16      A.   One second here.

17            Many times throughout Notice 102 here, it  
18   tells you to get a hold of the regional office,  
19   especially when it comes to deciding whether your  
20   logs are remote or not.

21      Q.   Sorry.  Can you point me to anything  
22   specific where it says that you should talk to the

16:28:54 1 regional office where it talks about logs are remote  
2 or not? I will give you a moment to take a look.

3 MR. NASH: Perhaps the witness could be  
4 directed to look at Paragraph 1.7.

5 MS. TABET: That's a bit leading, Mr. Nash.

6 MR. NASH: In the interest of saving time  
7 for the Tribunal.

8 THE WITNESS: Pardon me?

9 MR. NASH: 1.7.

10 THE WITNESS: Yeah, I have looked at that,  
11 and I don't think that pertains to this specific  
12 application.

13 BY MS. TABET:

14 Q. No, I don't think it does.

15 A. Yeah.

16 Q. I don't think there is anything in Notice  
17 102 that tells you to go to the BCMoF to deal with  
18 remoteness issues.

19 A. All other remoteness issues are dealt with,  
20 BCMoF.

21 Q. For Provincial lands?

22 A. Yeah, for Provincial lands.

16:30:24 1 Q. Okay. And Mr. Kurucz, you said in  
2 Paragraph 57 of your first statement that the rule  
3 is subject to change. It's your first statement at  
4 Paragraph 57.

5 A. I've got a binder here that is not  
6 cooperating very well.

7 Q. Take your time. I won't be too much  
8 longer. It's 57 of the first statement.

9 A. Yeah, go ahead.

10 Q. So, you say that the rule, the Remoteness  
11 Rule, is subject to change?

12 A. Yeah, what I'm explaining there, there was  
13 no--there was no boundary to identify which--if it's  
14 this half of the Province or that half of the  
15 Province, that sort of thing. Boundaries change all  
16 the time--

17 Q. Okay.

18 A. --within the Remoteness Rule.

19 Q. Despite you say the--despite the fact you  
20 say the rule is subject to change, you didn't bother  
21 checking again to make sure that Theodosia--since  
22 1999, to determine whether Theodosia's property was

16:32:08 1 still considered remote, did you?

2 A. Repeat that one more time, please.

3 Q. I'm asking whether you checked again after  
4 the first conversation that you say you had with  
5 Mr. Walders in 1999, whether you bothered checking  
6 after that date.

7 A. No, I didn't. Once Mr. Walders told me  
8 this specifically, why would I--why would I go  
9 against his word.

10 Q. And if in the red cedar example where again  
11 Mr. Walders told you something, you did go to  
12 Mr. Jones to have it overruled, as you said?

13 A. Mr. Walders didn't say anything regarding  
14 the red cedar.

15 Q. I believe in your testimony you said that  
16 Mr. Walders told you that red cedar could not be  
17 exported.

18 A. Well, that's correct, yes.

19 Q. Okay, thank you.

20 A. And I needed Thomas Jones to send  
21 Mr. Walders a specific memo to tell him to go ahead  
22 and accept it under the Federal Regime.



16:33:06 1 Q. In Paragraph 56 of your statement, you also  
2 say that "attempts to bring this problem to the  
3 attention of the Federal Government have been in  
4 vein," and in support of this you provided us a  
5 letter from Mr. Robertson to Mr. Jones, dated  
6 December 10, 2002, as evidence.

7 Can you--it's at Tab 3, in fact, that--we  
8 have reproduced it for you at Tab 3 of the Core  
9 Bundle, and it was attached to your first Affidavit  
10 in support of that statement that I just read you.  
11 Can you turn to Tab 3 of your Core Bundle.

12 A. Yeah, basically what we are saying there is  
13 it takes us a considerable amount of time to produce  
14 the required 2,800 meters if we are deemed--we were  
15 deemed a nonremote area, I would have to accumulate  
16 2,800 meters, and it takes a considerable amount of  
17 time to get to that volume for us to make the  
18 application.

19 Q. And you say in Paragraph 56 that you've  
20 attempted to bring this problem to the attention of  
21 the Federal Government, that they haven't done  
22 anything about it?

16:34:57 1       A.    Yes, there has been attempts.  Merrill &  
2   Ring has made attempts to do that.

3       Q.    Again, at Tab 3, is the letter that you've  
4   provided as evidence of that attempt, Tab 3 of the  
5   Core Bundle, here?

6       A.    What was that again?

7       Q.    Tab 3 of the Core Bundle.

8       A.    Tab 3.

9       Q.    That's the letter you attached in your  
10   first Witness Statement as attempts to bring it to  
11   the attention of the Federal Government.

12      A.    Yeah, this is from the Private Forest  
13   Landowners Association.

14      Q.    Is there anything in that letter about  
15   Theodosia or Merrill & Ring's properties?

16      A.    No.  He's speaking on behalf of the whole  
17   Private Forest Landowners Association.

18      Q.    And I don't see any mention in that letter  
19   of "remoteness."  I don't see the word "remoteness"  
20   anywhere or the issue of towing logs.

21      A.    Yeah, I will agree with that.

22      Q.    And this is the only attempt that you've

16:35:55 1 referred to in your statement of bringing this  
2 matter to the attention of the Federal Government?  
3 You haven't attached any other evidence to your  
4 statement on this point?

5 A. No, I haven't. This was the only one that  
6 was available, and I know that Merrill & Ring has  
7 discussed this issue with either Thomas Jones or  
8 Ms. Korecky, probably.

9 Q. You know that?

10 A. No, I don't know that.

11 Q. Thank you.

12 A. Sure.

13 Q. I want to briefly ask you a few questions,  
14 general questions, about what you referred to--what  
15 you referred to as "blockmail."

16 A. Yes.

17 Q. This morning--sorry, this afternoon  
18 earlier, we heard you talk about negotiations  
19 between the buyers and the sellers with respect to  
20 logs that are advertised on the Bi-Weekly List.

21 A. That's correct.

22 Q. And as I understood it, you were saying

16:36:50 1 that Merrill & Ring may agree to sell its logs to a  
2 buyer because it is worried that the buyer would  
3 otherwise block the export.

4 A. Yeah, there is--yeah, exactly. You know,  
5 if we do not--if we do not negotiate, they will put  
6 in an offer for those logs.

7 Q. Okay. And isn't it correct that for you to  
8 be blocked from export, so prevented from export,  
9 FTEAC would have to determine that that offer is at  
10 a fair market domestic price?

11 A. That's correct.

12 Q. We heard you talk about a few things  
13 earlier about a few examples of what you called  
14 "blockmailing," but you don't refer to any of those  
15 specific examples in your Witness Statements, do  
16 you?

17 A. Specifically?

18 Q. Do you have any reference to those examples  
19 in your Witness Statements?

20 A. Hoo, boy, I have lots of references to  
21 blockmailing, generally how it happens or whatever.

22 Q. But you don't describe those specific

16:38:06 1 examples in your Witness Statement?

2 A. No, there are so many specific ones I did  
3 not pick any one to put into this particular  
4 affidavit.

5 Q. And did you bring those specific examples  
6 that--you haven't provided, in fact, in your Witness  
7 Statement any evidence of instances where you  
8 brought those specific examples to the attention of  
9 the Government?

10 A. One more time, please.

11 Q. Yes. My apologies. It wasn't entirely  
12 clear.

13 I was asking you whether in your Witness  
14 Statements you provided any evidence of bringing  
15 these matters, bringing those specific examples of  
16 blockmailing that you were referring to earlier to  
17 the attention of the Government?

18 A. We have brought them to the attention of  
19 the Government.

20 Q. But you don't provide any of this evidence  
21 in your Witness Statements?

22 A. No, not in this particular case.

16:39:05 1 Q. Could you take a look at Paragraph 62 of  
2 your first Witness Statement, please.

3 A. Paragraph 62, yeah.

4 Q. You say in that paragraph that the  
5 Government does not usually know about the content  
6 of these negotiations because they are between  
7 private parties. Would that be accurate?

8 A. Yeah, that's correct.

9 Q. Thank you, Mr. Kurucz.

10 MR. NASH: No questions arising,  
11 Mr. President.

12 PRESIDENT ORREGO VICUÑA: Thank you.

13 Any questions from the Tribunal?

14 QUESTIONS FROM THE TRIBUNAL

15 ARBITRATOR ROWLEY: Mr. Kurucz, when you  
16 were answering questions asked by Mr. Nash, you said  
17 that when somebody put in a block against you, an  
18 offer, they were holding a hammer over your head, so  
19 to speak, where if you didn't deal with them in some  
20 respect, "the blockmailing comes where we are not  
21 getting a fair price for our logs," and it may  
22 be--let me just see that I understand what you mean

16:40:50 1 by "fair price," because a blockmail is either a  
2 threatened offer or an actual offer once you're  
3 planning to seek an Export Permit or have sought  
4 one; is that correct? If you don't understand my  
5 question--

6 THE WITNESS: Yeah, please, I apologize.

7 ARBITRATOR ROWLEY: Tell me what a  
8 blockmail is.

9 THE WITNESS: What a blockmail is, it's  
10 when you're--when I'm negotiating with Interfor,  
11 let's say, for instance, I've got some logs that I  
12 want to advertise for export, and I'm trying to get  
13 those logs out, Interfor will come to me. And there  
14 is--there is two conditions when we are trying to  
15 make a deal with Interfor.

16 ARBITRATOR ROWLEY: I want to interrupt  
17 you.

18 THE WITNESS: Okay.

19 ARBITRATOR ROWLEY: Because I don't want  
20 you to be telling me anything about Interfor at the  
21 moment, and I don't want to talk about a particular  
22 situation.

16:42:00 1 THE WITNESS: Okay, sorry.

2 ARBITRATOR ROWLEY: You want to export some

3 logs.

4 THE WITNESS: Yes.

5 ARBITRATOR ROWLEY: And sometimes you are

6 subject to blockmailing.

7 THE WITNESS: That's correct.

8 ARBITRATOR ROWLEY: Tell me what a

9 blockmail is.

10 THE WITNESS: Okay. When I'm trying to

11 negotiate the deal, there's two parts of the deal.

12 One is the price that they're willing to pay, and

13 number two is the volume that they want in lieu of

14 getting of our side getting a package out.

15 ARBITRATOR ROWLEY: Again, you're ahead of

16 me, and I don't know why I'm not getting this right.

17 THE WITNESS: Okay.

18 ARBITRATOR ROWLEY: You have some logs that

19 you want to export on behalf of Merrill & Ring.

20 THE WITNESS: That's correct.

21 ARBITRATOR ROWLEY: You're not negotiating

22 with anybody, and my assumption at this stage,



16:42:46 1 you've got some logs you want to export.

2 THE WITNESS: That's correct.

3 ARBITRATOR ROWLEY: Now, is why am I not  
4 understanding you the fact that you don't just make  
5 an export application, but before you do so you go  
6 to somebody else to see that they weren't going to  
7 oppose it?

8 THE WITNESS: We are trying to get our logs  
9 out to get the higher price in the world market.

10 ARBITRATOR ROWLEY: Yes.

11 THE WITNESS: Okay. And during that  
12 process, Interfor will come to me and unfairly tell  
13 me--they dictate what price they're willing to pay.

14 There is even times when I tried to  
15 negotiate with particular individuals, and I cannot  
16 make a deal with them. The price that they want to  
17 pay is too low in comparison to what's going on in  
18 the Vancouver marketplace.

19 ARBITRATOR ROWLEY: Now, stopping you  
20 there, one thing you could do at that point is you  
21 could say "get lost."

22 THE WITNESS: Yeah, and that's basically

16:43:42 1 what we have done.

2 ARBITRATOR ROWLEY: When you say "get  
3 lost," what do you do then?

4 THE WITNESS: When I can't negotiate the  
5 price properly with these people or the volume  
6 they're intending me to sell them, I tell them to  
7 get lost, and in the meantime, they put in the  
8 offers to TEAC or they offer me a price and then I  
9 have to argue this price with TEAC.

10 Now, the one thing about this offering  
11 situation is they always offer at the lowest part of  
12 the spectrum, if a log is--let's just take, for  
13 example, trading between a hundred dollars and \$110,  
14 there are sales going on in the bank or the  
15 marketplace between those two price areas, and  
16 you're told that they want to buy the logs at \$95,  
17 you know, when--you know that if you don't get them  
18 out, you could sell them at 100 or \$110 on the open  
19 market. So, this is what I'm up against all the  
20 time. They come in at \$95.

21 I've had situations, sir, where they are  
22 trying to buy logs from me at one price level, and

16:44:54 1 then when they actually put the offer in, when I say  
2 it's a no-deal situation, when they actually put the  
3 offer in, they bump it up a buck or two more to get  
4 it in line with what TEAC might accept.

5 ARBITRATOR ROWLEY: That is, to get it in  
6 line with--

7 THE WITNESS: The fair domestic price, so  
8 when it goes through the Timber Export Advisory  
9 Committee, that the committee will say that this is  
10 a fair price.

11 ARBITRATOR ROWLEY: So, coming back to my  
12 original question about your testimony, when you  
13 said you weren't getting a fair price, is it more  
14 accurate to say that you weren't able to get the top  
15 export price?

16 THE WITNESS: No, I'm just looking for fair  
17 market value at that particular time.

18 I'm trying to give them, but I'm actually  
19 trying in my heart to sell them volume of logs at a  
20 specific price, but I want that price to be in line  
21 with what anybody else in the Vancouver marketplace  
22 will buy. And they come in at low prices all the

16:45:55 1 time continuously.

2           So, now I'm forced either to give in to  
3 them and sell and get this low price. Mr. Paul  
4 Stutesman will tell me sometimes, "Tony, I really  
5 need these logs; you have got to get them out for  
6 me. We've got a customer we don't want to lose face  
7 with."

8           I have to accept whatever price Interfor or  
9 whatever company is offering me, I have to accept  
10 that price and the volume that they're insisting to  
11 get so I can get a package of logs out.

12           Does that answer your question, sir?

13           ARBITRATOR ROWLEY: Yes, I think so. Thank  
14 you very much.

15           PRESIDENT ORREGO VICUÑA: I have one  
16 question, Mr. Kurucz, in respect of a clarification.

17           If you go first to Paragraph 62 of your  
18 statement, Ms. Tabet pointed to you that particular  
19 sentence saying, "These deals are under the table in  
20 the sense that Government does not usually know the  
21 specific terms because they're private contracts,"  
22 and you confirm that this is your view.

16:47:30 1 THE WITNESS: Yeah.

2 PRESIDENT ORREGO VICUÑA: Let me finish  
3 now.

4 If you turn now to Paragraph 71 of the same  
5 statement, you will realize two aspects are added.  
6 One, the first sentence, is that the Government,  
7 both Provincial and Federal, are aware of the  
8 practice of blockmailing and bad-faith offers. So,  
9 element number one, that there is bad faith, is  
10 known by the Government.

11 Element number two, the second sentence,  
12 that Merrill & Ring has been subject to special  
13 targeting and that its logs are often blocked when  
14 offers are not made on similar logs on the same  
15 Bi-Weekly List. So, the Government knows that the  
16 offer is in bad faith, and then that offers are not  
17 made on similar logs in the Bi-Weekly List to block  
18 Merrill & Ring. That's reading from your statement.

19 Now, my question is this: Is there a  
20 contradiction between 62 and 71? It might be--I  
21 don't pre-judge that the Government does not know  
22 the specific terms.

16:49:14 1           THE WITNESS:  Sir, I'm having a difficult  
2 time hearing at this particular time, sorry.

3           PRESIDENT ORREGO VICUÑA:  Let me finish.  
4 My question is whether there is a contradiction  
5 between 62 and 71.  It might be true--I do not judge  
6 the issue that the Government might not know the  
7 specific terms because they are in private  
8 contracts, fine.  But yet, it does know that the  
9 offer is unfair and that there is what I think  
10 Mr. Schaaf described as "extortion" in the sense  
11 that you will be blocked if an offer is not made in  
12 the Bi-Weekly List.

13           How do you read these two sentences?  Do  
14 you contradict your view, or am I not getting it  
15 quite right?

16           THE WITNESS:  I'm not really quite  
17 understanding.  I have--there is some ringing in my  
18 ears, and I'm not too sure if I heard you correctly,  
19 sir.

20           PRESIDENT ORREGO VICUÑA:  Okay.  I will  
21 repeat it again.

22           THE WITNESS:  I apologize.

16:50:38 1           PRESIDENT ORREGO VICUÑA: Look, did you  
2 understand the first part of the question, what you  
3 say in 62 and what you say in 71?

4           THE WITNESS: In 62 and 71.

5           PRESIDENT ORREGO VICUÑA: Did you  
6 understand that?

7           THE WITNESS: Yes.

8           PRESIDENT ORREGO VICUÑA: Right.

9           Well, now the question is this: Is there a  
10 contradiction between what you say in 62 and what  
11 you say in 71? Because, in 62, you say that the  
12 Government does not usually know the specific terms,  
13 but under 71 it knows enough as to say, as you do  
14 say, that the Government knows that the offers are  
15 made in bad faith, point number one; and point  
16 number two is that your logs are often blocked when  
17 no offers are not made on similar logs. So, that's  
18 the question.

19           Do you understand it now?

20           THE WITNESS: Unfortunately, no, I don't.

21           PRESIDENT ORREGO VICUÑA: You don't. Well,  
22 why don't you explain, then, what you said in 62 and

16:51:58 1 71.

2 THE WITNESS: Okay. If I could read both  
3 things and then I can--

4 PRESIDENT ORREGO VICUÑA: Maybe you could  
5 have done that already.

6 THE WITNESS: Sorry, sir.  
7 (Witness reviews document.)

8 PRESIDENT ORREGO VICUÑA: It's the two  
9 first sentences of 71. You don't need to go beyond.

10 THE WITNESS: Just two sentences of 71?

11 PRESIDENT ORREGO VICUÑA: The two firsts.

12 THE WITNESS: Okay, I'm sorry, could we go  
13 back to the question one more time? I apologize.  
14 It sounds like I need to get this one right, so I  
15 want to make sure I get it right.

16 PRESIDENT ORREGO VICUÑA: Yes, I hope so,  
17 too.

18 Let me rephrase the request to make it  
19 simpler: Does the fact that the Government knows,  
20 in your view, under Paragraph 71 that the offer is  
21 in bad faith enough as to say, as to contradict what  
22 you state in 62 that the Government does not know



16:53:59 1 the specific terms?

2 THE WITNESS: The specific terms I'm  
3 talking about there are the deal. They do not  
4 understand that--what has gone on in the deal.  
5 They're not aware that a deal was concocted between  
6 the party that offered and me, so they have no idea  
7 what it took to do that deal.

8 PRESIDENT ORREGO VICUÑA: But now it's I  
9 that don't understand very well.

10 If the Government knows, 71, that it's in  
11 bad faith--right?

12 THE WITNESS: Yeah, they know that these  
13 occurrences are going on.

14 PRESIDENT ORREGO VICUÑA: Yes, correct.

15 --but then it will know which was the deal  
16 because that will be the price for which the offer  
17 is made; right?

18 THE WITNESS: That's correct. So, the  
19 scenario that I think I'm trying to point here is  
20 that the Government, in 62--what I'm saying is that  
21 we were compelled to make these deals. Sometimes  
22 these deals are done and no offers are made, so the

16:55:17 1 Government does not know what it took me in order to  
2 get through the system to make sure that these logs  
3 did not get into the TEAC system.

4           The company did not have to put an offer  
5 in. That's what I'm saying in 62. The Government  
6 is not aware of the deals that have to be done in  
7 order to get the logs free and clear.

8           PRESIDENT ORREGO VICUÑA: Okay.

9           THE WITNESS: And then let's go to the 71.  
10 The Governments are both very, very familiar that  
11 this is going on. They know about it. There is  
12 lots of documentation that they know about it, and  
13 Merrill & Ring has approached them on it. Many  
14 other companies have approached them on it. So,  
15 it's the system that's in place--the Regime that's  
16 in place allows this to go on. We have to do the  
17 side deals in order to get our logs out of the  
18 system or out of the country.

19           PRESIDENT ORREGO VICUÑA: Okay. Thank you,  
20 Mr. Kurucz.

21           ARBITRATOR ROWLEY: I'm sorry, the  
22 Chairman's line of questions has led me to be

16:56:45 1 interested in one thing you say in Paragraph 71 of  
2 your first statement, and that is that they know  
3 that Merrill & Ring has been the subject of special  
4 targeting. What do you mean by that?

5 THE WITNESS: Well, that one particular  
6 instance, sir, I brought up, we had 800 cubic meters  
7 blocked by a company, and on that particular agenda  
8 there was over--well over a hundred thousand,  
9 pushing 200,000 cubic meters on that particular  
10 biweekly advertisement. We were being forced to do  
11 a deal at that particular time, and I couldn't  
12 figure out why because the supply of logs in a  
13 system--there was lots--I just said, "Why are we  
14 getting hammered here?"

15 I even asked the company in question, "What  
16 are we being hammered? Why are you guys coming  
17 after us?" 800 cubic meters out of 200,000, it got  
18 blocked. I tried to do a deal with them. It was a  
19 no-deal situation. They wanted too much volume, and  
20 the price was too low that they wanted to block me  
21 out. No case deal.

22 I went to my bunch of log brokers that I

16:58:00 1 know that I had wood on that particular Bi-Weekly  
2 List; they weren't affected. Merrill & Ring went  
3 and did some research on some of the people, the  
4 contacts they have in the industry. We said, "Hey,  
5 it looks like we are the only guys going to be  
6 blocked here." Sure enough, we were. We were the  
7 only ones that this particular company hammered on.  
8 Why?

9           So, now it goes to TEAC. We argue it with  
10 John Cook, the judge. The TEAC members ruled that  
11 this offer is fair, all the offers are fair that  
12 were on the table at that particular time. And I  
13 go, "Okay, but what about the other situation?"

14           "Well, the offers are fair."

15           So, now TEAC, the jury, is deeming these  
16 logs nonsurplus, and why is not Mr. Cook stepping up  
17 to the plate at that particular time? Why do we  
18 have to go up the food chain to Ms. Korecky? And  
19 she is also, I understand, on a telephone conference  
20 call. You know, what's the situation here? Why do  
21 we have to spend a whole bunch of time and effort to  
22 prove to these people the situation? It was

16:59:08 1 blatant. Mr. Cook even called me myself (sic), and  
2 this is where I had a conversation with Mr. Cook  
3 that I believe there is special targeting going on  
4 here. These guys--and don't forget, this company  
5 that I'm talking about, what do they do to me when I  
6 had to--when I was in Theodosia, starting out, they  
7 asked me specifically to make the sort for them.  
8 You know, I was hammered. What happened? It went  
9 down the food chain. Turns out that they did not  
10 even process one log through their mill, not one  
11 specific log. They sell to another broker. They  
12 end up selling--we end up demanding that they sell  
13 the production back to us.

14           Like I said, to this day--and I knew I sold  
15 those logs at a cheap price to Interfor. Every raft  
16 that I sold to them I knew if I went to the  
17 marketplace I would be able to get a better price.  
18 Day in and day out, this happens all the time to us.  
19 And in this particular situation I'm talking about  
20 with Interfor, when they sold to A&A Trading  
21 specifically this one raft, I always wished I could  
22 find out what price they paid or what they sold to

17:00:20 1 Interfor because I know I sold that log to them to  
2 Interfor probably \$3--it was a 50-some-odd-dollar  
3 transaction. I knew at that time I sold it for  
4 about \$3 cheaper than what I could have got on the  
5 export market or, pardon me, on the domestic market.

6 ARBITRATOR ROWLEY: So, in Paragraph 71,  
7 the special targeting you're talking about concerns  
8 this particular advertisement that you put in?

9 THE WITNESS: That's correct.

10 ARBITRATOR ROWLEY: So, that's on one  
11 occasion that you're speaking about a special  
12 targeting in this paragraph.

13 THE WITNESS: On this particular--on this  
14 particular thing, it was special.

15 ARBITRATOR ROWLEY: And the reason it was a  
16 special targeting is that a potential purchaser put  
17 in an offer on your lot.

18 THE WITNESS: That's correct.

19 ARBITRATOR ROWLEY: And no other purchasers  
20 put in offers on your lot or any other lots?

21 THE WITNESS: That's correct.

22 ARBITRATOR ROWLEY: Thank you.

17:01:29 1           PRESIDENT ORREGO VICUÑA: Thank you,  
2 Mr. Kurucz. You are excused now. You have finished  
3 your duties as a witness.  
4           (Witness steps down.)  
5           PRESIDENT ORREGO VICUÑA: So, it's 5:00.  
6 We are going to break here, and we will resume  
7 tomorrow at 9:00 sharp so as to follow on with the  
8 rest of the witnesses.  
9           Are there any other points you may wish to  
10 raise at this stage? Everybody happy?  
11           MS. TABET: Or tired.  
12           PRESIDENT ORREGO VICUÑA: And tired, or  
13 both.  
14           Thank you very much, and--Eloise has a time  
15 count.  
16           (Pause.)  
17           THE SECRETARY: In terms of time, for the  
18 examination of witnesses, I have 2 hours and 23  
19 minutes for the Investor, and 47 minutes for Canada.  
20           (Whereupon, at 5:03 p.m., the hearing was  
21 adjourned until 9:00 a.m. the following day.)  
22

## CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

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DAVID A. KASDAN



