UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
OFFICE OF THE CHIEF COUNSEL FOR IMPORT ADMINISTRATION
Washington, D.C. 20230

January 24, 2005

PUBLIC DOCUMENT

Ms. Caratina Alston
Secretary, United States Section
NAFTA Secretariat
Room 2061, Department of Commerce
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230

RE: In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination: Secretariat File No. USA-CDA-2002-1904-03
Third Remand Determination

Dear Ms. Alston:

On behalf of the investigating authority, in accordance with Rule 73(1) of the Article 1904 Rules of Procedure for Binational Panel Review and the Panel's December 1, 2004 decision, enclosed for filing please find the original plus eight copies of the Third Remand Determination. The Third Remand Determination is a public document.

The index and administrative record of this third remand proceeding will be filed in accordance with Rule 73(2)(a).

Please contact me if you have any questions concerning the enclosures at (202) 482-2879.

Respectfully submitted,

Michelle D. Lynch

Michele D. Lynch
Senior Attorney
Office of the Chief Counsel
for Import Administration

cc: Parties to the proceeding

COPY OF ORIGINAL

THIRD REMAND DETERMINATION

In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review

SUMMARY

In accordance with the Panel's December 1, 2004, decision in the above-referenced case,[1] the Department of Commerce (the Department) provides this third remand determination with regard to certain calculation issues. These issues are discussed in detail below. After addressing each issue, the Department has recalculated the aggregate subsidy rate applicable to all producers and exporters of certain softwood lumber products from Canada, except for those companies excluded from the order. Additionally, relying on the stumpage subsidy rates determined in this third remand determination, the Department determined it is not necessary to reconsider its analysis in the Second Remand Determination with respect to Bois Omega, Ltee.

As we stated in our Original Remand Determination and the Second Remand Determination, we continue to disagree with the Panel's conclusion that there was not substantial evidence to support the Department's original benefit calculation in the final determination. Additionally, with the exception of the issues for which we specifically requested a remand, we disagree with the Panel's December 1, 2004 decision with respect to the remanded issues and continue to find that those calculations were supported by record evidence and were otherwise in accordance with law. Our reconsideration of our Second Remand Determination is set forth

[1] Decision of the Panel on Second Remand, In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, December 1, 2004 (Panel Decision on Second Remand).

below.

We received comments from various parties with proposed methodologies for implementing the Panel's remand.[2] Where appropriate, we have attempted to address concerns raised by the parties.

ANALYSIS AND DETERMINATION

I. Provincial Stumpage

Alberta

The Panel remanded one issue specific to Alberta that affects the calculation of the stumpage benefit: reinstatement of the C$3.46 profit figure in computing the log-seller profit in Alberta.

Profit

In the Panel's June 7, 2004, decision, the Panel directed the Department to reconsider the adjustment for profit for all of the provinces, including Alberta.[3] Specifically for Alberta, the

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[2] Comments and Calculations of the Gouvernement du Quebec concerning the *Decision of the Panel on Second Remand* (December 1, 2004)(Case No. C-122-839), Arent Fox on behalf of the Gouvernement du Quebec (GOQ), December 23, 2004; Ontario Comments for the Department's Third Remand Determination in Response to the NAFTA CVD Panel's December 1, 2004 Decision, Hogan & Hartson on behalf of the Government of Ontario (GOO), January 7, 2005; Comments for Third Remand Determination, Kaye Scholer on behalf of Canadian Forest Products, Ltd., Lakeland Mills, Ltd., and The Pas Lumber Company, Ltd., January 10, 2005; Comments for Third Remand Determination, Kaye Scholer on behalf of Terminal Forest Products Ltd., January 10, 2005; Comments for the Third Remand Determination, Weil, Gotshal & Manges on behalf of the Government of Canada, the Governments of Alberta, British Columbia, Manitoba, Ontario, and Saskatchewan, and the Gouvernement du Quebec, the British Columbia Lumber Trade Council and its constituent associations (the Coast Forest & Lumber Association and the Council of Forest Industries), the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, and the Quebec Lumber Manufacturers Association (the Canadian parties), January 14, 2005; Comments on Respondents' Submission Regarding Remand Methodology, Dewey Ballantine on behalf of the Coalition for Fair Lumber Imports Executive Committee (Coalition), January 18, 2005; and Comments Regarding Ontario Benefit Calculations in Third Remand Determination, Baker & Hostetler LLP, on behalf of the Ontario Lumber Manufacturers Association, January 21, 2005.

[3] Decision of the Panel, In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, June 7, 2004, at 34 (Panel Decision on Original Remand).

Panel directed that if the Department, upon reconsidering the method used to estimate profit in Alberta, could not determine a better estimate of the amount for profit than that used in the Original Remand Determination,[4] the Department was not authorized to change the amount.

In the Second Remand Determination, the Department explained the basic flaw in the Alberta profit calculation (*i.e.*, that it uses Crown stumpage prices and harvesting costs incurred by Crown tenure holders, not private stumpage or private costs) and noted that even Alberta was not claiming the entire C$3.46 as profit. Rather, Alberta was claiming that the C$3.46 included *some* amount for profit. See Government of Alberta's (GOA's) Supplemental Questionnaire response dated November 19, 2003, at 12. Given these facts, in the Second Remand Determination, the Department determined that a better estimate for profit was to allocate this figure equally between the independent harvester and the land owner. See Second Remand Determination at 5 - 6. There is record evidence to support the Department's conclusion that Alberta reported harvesting costs from integrated lumber producers who pay independent contractors to harvest for them, and thus the harvesting costs are based, at least in part, on fees for harvesting services inclusive of profit. The Panel, however, has concluded that there is no credible record evidence which shows that any of the C$3.46 is attributable to independent harvesters' profit. See Panel Decision on Second Remand at 13. Therefore, the Panel determined that the Department had not come up with "a better estimate" of log-seller profit in Alberta. As such, the Panel determined that the profit amount from the Original Remand Determination was the best estimate and the Panel directed the Department to reinstate the

[4] Remand Determination, In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, January 12, 2004 (Original Remand Determination).

C$3.46 as a deduction for profit in Alberta. See Panel Decision on Second Remand at 13 and 25.

In light of the evidence on the record, we continue to disagree with the Panel that the entire C$3.46 represents the best estimate of log-seller profit in Alberta or, for that matter, that any adjustment for profit is appropriate. Nevertheless, in light of the Panel's instructions, we have reinstated the entire amount as profit for Alberta.

British Columbia

The Panel remanded two issues specific to British Columbia (B.C.) that affect the calculation of the stumpage benefit: (1) recalculation of the benchmark taking into account actual market conditions, including performance of separate benefit calculations for the Coast and for the Interior using data available for each region, and (2) application of recalculated profit figures for Alberta and Quebec in calculating B.C. stumpage benefits. We address each, in turn.

Actual Market Conditions

In its Panel Decision on Second Remand, the Panel noted that, in its decision on the first remand, it concluded that while "species-specific pricing may well be an appropriate method for valuing stumpage and for constructing benchmark prices under tier three . . . [th]e Panel believes the statutory language directs the Department to determine third tier benchmarks in accordance with the market conditions that apply to the sale of the particular good at issue, which here is the authority to harvest standing timber which B.C. sells by the stand. . ." See Panel Decision on Second Remand at 21. Despite the Department's objections and arguments by other parties, the Panel concluded that the Department must offset any positive species-specific benefits with any negative species-specific benefits because, as argued by the GBC, it sells stumpage on a stand-by-stand basis as opposed to on a species-specific basis. The Panel did not accept the

Department's choice of methodology in the Second Remand Determination, in light of the absence of data related to stand-by-stand sales, to measure any benefit by treating the entire B.C. harvest as one stand. Despite the fact that the GBC had argued that it sells timber on a stand-by-stand basis, the Panel determined that, historically, the Department has treated the Coast and Interior British Columbia as separate markets and, by effectively creating one benchmark, created an artificial value for Coastal and Interior species. See Id. at 21-22. Therefore, in the Panel Decision on Second Remand, the Panel directed the Department to recalculate the B.C. benchmark taking into account actual market conditions in that province by performing separate benefit calculations for the Coast and for the Interior using the data available for each.[5] Although we continue to maintain that the methodology applied by the Department in the Second Remand Determination fully addressed the Panel's concerns, we have recalculated the B.C. benchmark for the Coast and for the Interior using data available for each region.

Profit

Without discussion, the Panel remanded the application of recalculated profit figures for Alberta and Quebec in calculating B.C. stumpage benefits. In the Second Remand Determination, we used as our profit surrogate the average of the profit values calculated for Alberta and Quebec, the two provinces for which we calculated individual profit values. Consistent with the Panel's remand, we have relied on the Alberta and Quebec profit figures determined in this third remand determination. Specifically, we have used as our profit surrogate

[5] As noted above, we continue to maintain that the Department's methodology in the Final Determination accounted for prevailing market conditions in British Columbia. Consistent with the statute, the log-based benchmark methodology applied in the subsequent remand determinations accounts for prevailing market conditions.

the average of the profit values calculated for these two provinces.

Manitoba and Saskatchewan

The Panel remanded one issue specific to both Manitoba and Saskatchewan that affects the calculation of the stumpage benefit for each province: recalculation of the benchmark log price for Manitoba and for Saskatchewan eliminating certain import data in the surrogate benchmark. See Panel Decision on Second Remand at 25-26. The Panel also noted that any revisions in the calculations for the provinces forming the surrogate benchmarks will necessarily address the issue of profit.

Benchmark Log Prices

In the Second Remand Determination, the Department developed surrogate benchmarks for Manitoba and Saskatchewan using import and domestic log data from the Boreal provinces, *i.e.*, Quebec, Ontario, Manitoba, Saskatchewan and Alberta. See Second Remand Determination at 7. The Panel has now directed the Department to recalculate the benchmark log prices for Manitoba and Saskatchewan by eliminating the import data in the surrogate benchmarks "which the Panel had instructed Commerce not to use," noting that it determined that there was no substantial evidence to support their use. See Panel Decision on Second Remand, at 24-25.

As discussed below, although we disagree with the Panel's instructions, the Department interprets the Panel's current instructions as precluding the use of import data from Manitoba, Saskatchewan and Alberta. Specifically, in its Panel Decision on Original Remand, after noting that there were only four import transactions into Manitoba during the POI, only one of which was of any appreciable value, the Panel stated that where there is a significant data base, prices will average out, and it is reasonable to assume that such an average is reasonably informative of

the mix of the whole. With respect to Manitoba, however, because the import data consisted of only a single significant data point, the Panel found that it was not reasonable to use the imports in the benefit calculations. See Panel Decision on Original Remand at 22. Similarly, with respect to Saskatchewan, the Panel noted that there was only one import transaction. As a result, the Panel stated that there is no substantial evidence to base a benchmark log price on this one shipment. See Id. at 23. The Panel concluded that the import data for Alberta suffered from the same infirmity and therefore directed the Department to recalculate the benchmark log price for Alberta without the use of the import data. See Id. at 24. Despite these data deficiencies, the Panel, however, generally affirmed the Department's use of imports in creating its log benchmarks; thus, import prices are included in the benchmarks for Quebec and Ontario. Id. at 13-14.

We continue to interpret the Panel's instruction and rationale in the Panel Decision on Original Remand as precluding a benchmark based *solely* on the limited import data available in Manitoba, Saskatchewan and Alberta. By aggregating the import and domestic data for all of the Boreal provinces, as we did in the Second Remand Determination, we no longer relied solely on the thin import data, but ensured that the data base was reasonably informative of the mix of the whole and, in fact, included actual transaction data for Manitoba and Saskatchewan. This calculation was consistent with the Panel's finding that with respect to imports generally "there is no evidence on the record of which the Panel is aware, which suggest that the statistics do not fairly represent prices for sawlogs, and the Investigating Authority was reasonable in reaching this conclusion where there exists a sufficiently large volume of lower and higher value imports to balance the mix." See Id. at 14. As such, we disagree with the Panel's decision on remand

that these import prices should be excluded from the calculations. By expanding the data base used for the Manitoba and Saskatchewan calculations, it was entirely appropriate to include the import prices at issue in the mix of other prices because the import prices no longer served as the sole basis for determining the adequacy of remuneration but rather were part of a sufficiently large volume of lower and higher value imports, thus balancing the mix. Nonetheless, in light of the Panel's instructions, as a surrogate for Manitoba and Saskatchewan log prices, we based our recalculations for both Manitoba and Saskatchewan on a weighted-average of the import and domestic log price data on the record from all of the Boreal provinces, excluding the imports into Alberta, Manitoba, and Saskatchewan.

Profit

As noted by the Panel, in the Second Remand Determination, the Department constructed surrogate benchmarks from data in the other Boreal provinces. See Panel Decision on Second Remand at 24. For purposes of this third remand determination, the Department has again constructed surrogate benchmarks using data from the other Boreal provinces. Our reliance upon the revised data from Alberta, Ontario, and Quebec, which include the profit values determined in this third remand determination, therefore, addresses the issue of profit for Manitoba and Saskatchewan.

Ontario

The Panel remanded four issues specific to Ontario that affect the calculation of the stumpage benefit: (1) inclusion of Balsam Fir and Larch in the Ontario SPF benchmark; (2) correction of the clerical error in the import statistics for Ontario which grossly inflated the benchmark; (3) examination of the log-seller profit in Ontario and determination of whether it is

appropriate to use a surrogate profit figure from another province and, if so, provision of an explanation; and (4) redetermination of the net benefit for Ontario. We address each, in turn.

SPF Benchmark

In the Original Remand Determination we calculated per unit stumpage benefits according to the five species groups reported by the Government of Ontario (GOO): Pine, Spruce, Red Pine, White Pine, and Other Conifer.[6] In its Panel Decision on Original Remand, the Panel agreed with the GOO that information on the record indicates that the GOO sells timber according to three species categories: (1) SPF; (2) Red and White Pine, and (3) Hemlock and Cedar. As a result, the Panel directed the Department to recalculate the benchmark price in Ontario taking into account the actual market conditions that govern the sale of timber by the harvesting authority in that province. See Panel Decision on Original Remand at 19 and 33. Therefore, pursuant to the Panel's instruction, in the Second Remand Determination, we recalculated the per unit benefits using market benchmarks for those three categories. See Second Remand Determination at 19.

In its December 1, 2004, decision, the Panel agreed with the Department's request for a remand to correct the clerical error the Department made by inadvertently including Balsam Fir and Larch in the Other Conifer category as opposed to what it intended, which was to include them in the SPF category. See Panel Decision on Second Remand at 19. For this third remand determination we have recalculated the benefit by including Balsam Fir and Larch in the SPF category to determine both the benchmark and the stumpage prices.

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[6] Memorandum for the File, From James Terpstra, Program Manager, RE: Calculations for the Province of Ontario, Attachment 6, January 12, 2004.

Import Statistics

In its decision of December 1, 2004, the Panel agreed to the Department's remand request to adjust the Ontario benchmark calculation by deleting what appeared to be an obvious clerical error in the import statistics. See Panel Decision on Second Remand at 19 and 26. Specifically, the import statistics on which the Department relied included an entry of 20 cubic meters of other coniferous logs from China valued at C$293,175. The same value was reported directly below in the import statistics for a significantly greater volume. Because of the apparent clerical error in the import statistics, we have removed from our calculation of the weighted-average import value, and thus from the benchmark, the volume and value associated with this particular import listing.

Profit

In the Panel Decision on Original Remand, the Panel remanded the "question of the proper adjustment for profit. . . to the Department for further consideration with respect to the benchmarks for all provinces." See Panel Decision on Original Remand at 27. In the Second Remand Determination, consistent with the Panel's instruction, the Department reconsidered the issue of profit with respect to Ontario and determined that it was neither necessary nor appropriate to add an additional amount for profit to the harvesting costs reported by Ontario. See Second Remand Determination at 4.

In its December 1, 2004, decision, the Panel stated that it had directed the Department to examine the profit issue with respect to Ontario, but the Department had refused to "make such allowance." See Panel Decision on Second Remand at 19. In light of the Department's specific reconsideration of the Ontario profit issue, the only conclusion to be drawn from this recent

statement by the Panel is that it is now suggesting that it directed the Department to make a profit adjustment for Ontario. As set forth above, in its Panel Decision on Original Remand the Panel did not direct the Department to *make an adjustment* for profit for Ontario; it remanded to the Department "the question of the proper adjustment for profit . . . for further consideration." See Panel Decision on Original Remand at 27, 34.

Despite the fact that the Panel has determined that prevailing market conditions in Canada are represented by land owners that contract for harvesting services and then sell the logs themselves to sawmills, see Panel Decision on Second Remand at 11, and that the profits of the independent harvester are included in the amount it charges for harvesting, see Id. at 10, the Panel has now concluded that an additional adjustment for private land owners' profit is necessary to calculate a market-based benchmark. We disagree with the Panel that an adjustment is necessary for any profit earned by the private land owner. As the Department stated in its First Remand Determination, to determine whether the provincial governments received adequate remuneration for their stumpage, we compared Crown stumpage prices to market-determined stumpage prices, which were derived by deducting harvesting costs from market-determined benchmark log prices. See First Remand Determination at 9-14. The Department did not determine market-based stumpage prices without accounting fully for profit. In the case of benchmark prices derived from sales of logs from private land owners that hire an independent harvesting contractor to harvest the logs, the private market-determined stumpage prices are determined by deducting from the log prices only the costs and profit associated with the independent harvester. The remaining value represents the market-based stumpage prices that the private land owner receives inclusive of profit.

The Department, consistent with the statute and regulations, was seeking a benchmark stumpage price that is based on market principles. It is entirely consistent with market principles to derive such a benchmark by accounting for the profit associated with services provided by the independent harvester. It is not, however, consistent with market principles to make an additional *adjustment* to also account for any profit associated with the private land owner because the result would be a price for private stumpage sales less any profit earned on such sales.

Therefore, in this third remand determination we once again determine that, based on our analysis of the evidence on the record with respect to Ontario, no additional adjustment is necessary to reported harvesting costs to take into account profit earned by either independent harvesters or, for that matter, land owners.

Finally, with regard to the Panel's comments concerning use of Quebec as a surrogate for the Ontario profit amount, in the Second Remand Determination, the Department neither relied upon the Quebec profit figure as a surrogate for Ontario, nor claimed to have relied on such a figure. See Second Remand Determination at 4-5. The Department made clear its determination that no additional adjustment was necessary to account for profit in Ontario because profit is already built into the reported harvesting costs. See Second Remand Determination at 4-5.

The quote referenced by the Panel at page 20 of the Panel Decision on Second Remand is not taken from the Second Remand Determination. Rather it is taken from the Department's September 17, 2004, Rule 73(2) Response Brief. In that brief, the Department, responding to arguments by the GOO, stated that nothing in the record supports the GOO's contention that it is entitled to an *additional* profit adjustment. The Department did not need to justify using

Quebec's profit figure as a surrogate, because it did not use Quebec's profit figure. Because the Department continues to determine based upon record evidence that profit is accounted for in Ontario's reported harvesting costs and that no additional adjustment is necessary, the Department has not used a surrogate to determine Ontario's profit in this third remand determination.

Net Benefit

The Panel has requested that the Department redetermine the "net benefit, if any, accruing to all of the species" in Ontario. See Panel Decision on Second Remand at 20, 26. In making its request, which would cause the Department to act in a manner inconsistent with Section 771(6) of the Tariff Act of 1930, as amended, the Panel apparently misunderstands the record facts and the application of the statute to those facts. Characterizing its request as a request that the Department account for "prevailing market conditions" in Ontario, the Ontario Lumber Manufacturing Association (OLMA)[7] requested that the Department offset the positive benefit calculated with respect to two of the three species categories in Ontario with the "negative" benefit calculated with respect to the third species category.[8] Despite the fact that record

[7] The Government of Ontario (GOO) did not make this argument.

[8] As noted in the Panel Decision on Second Remand at page 20, the OLMA supports it claim by reference to a WTO decision, Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, August 11, 2004. This Appellate Body decision is not relevant legally or factually. See November 15, 2002 Rule 57(2) Brief of the Investigating Authority, Vol. II, A-11 - A-16 (reports of WTO panels and the Appellate Body do not speak with the force of law). Decisions of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), however, are binding upon Article 1904 Binational Panels. NAFTA, Article 1904(2)-(3). In its recent decision Corus Staal BV v. Department of Commerce, Slip. Op. 04-1107 at 5 (January 21, 2005) ("Corus"), the Federal Circuit affirmed the Department's methodology with respect to non-dumped sales stating that "Because zeroing is in fact permissible in administrative investigations and because Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law, Corus' arguments fail." In any event, the application of the Department's calculation methodology with respect to non-dumped sales in an antidumping context is not relevant in the context of this countervailing duty determination. Even if it were relevant, the Corus decision would control.

evidence demonstrates that the OLMA's request is contrary to the manner in which Ontario administers its stumpage program, the Panel concluded that the prevailing market conditions in Ontario "call for the harvesting of all of the trees in a particular stand, so that the adequacy of remuneration must be determined with respect to the entire harvest." Panel Decision on Second Remand at 20.

In reaching its conclusion, the Panel relies upon its analysis and decision with respect to British Columbia's stumpage program, a program pursuant to which B.C. prices stumpage on a stand-by-stand basis and not by species. Having previously instructed the Department in its analysis of British Columbia to account for these prevailing market conditions which are specific to British Columbia, the Panel has concluded that Ontario is entitled to similar treatment. The Panel dismissed the Department's argument that the OLMA was requesting nothing more than a prohibited offset and noted that just as with its decision regarding British Columbia, addressing prevailing market conditions in Ontario does not entail the application of an offset, but rather, complies with the statue's requirement to value the "good" provided in accordance with the "market conditions" under which that good is provided. See Panel Decision on Second Remand at 20 and Panel Decision on Original Remand at 18.

With all due respect, the Panel's conclusion is not supported by the record facts or the express language of the statute. Notwithstanding the argument of the OLMA and the conclusion of the Panel, the record demonstrates unequivocally that Ontario does not price stumpage in a manner similar to British Columbia and that the OLMA's proposed methodology is contrary to the manner in which Ontario prices stumpage. In its Panel Decision on Original Remand , the Panel stated that the issue before the Panel was whether "it was reasonable for the Department to

apply its individual species benchmark method to stumpage pricing in B.C. despite the B.C. practice of collecting its stumpage fees stand-by-stand." See Panel Decision on Original Remand at 18. The Government of British Columbia (GBC) had argued that the "prevailing market conditions" refers to the "conditions of sale," and because it collects stumpage fees for the relevant wood lot or "stand" as a whole, rather than for each individual species, the Department must examine the stumpage program as it is administered. See Panel Decision on Original Remand at 18. The Panel agreed and directed the Department to recalculate the benchmark price for B.C. taking into account the actual market conditions that govern the sale of timber in B.C., including the fact that Crown fees are charged for stands rather than for individual species. See Panel Decision on Original Remand at 19. Thus, "valuation of the 'good' that B.C. provides," id. at 18, requires an analysis of the price paid for the entire stand, not individual species.

Although the OLMA argued that it is entitled to similar treatment, the differences in the manner in which the stumpage programs in B.C. and Ontario are administered are significant; thus, the prevailing market conditions in the two provinces are different. Unlike the GBC, the GOO did not claim that it charged one price for all species or similarly sold stumpage on a stand basis. Rather, the GOO limited its argument to the fact that "all SPF timber is sold at the same price" and that SPF timber is the good being provided. See Panel Decision on Original Remand at 19, citing to Canada Brief at C-49. In response to these arguments, the Panel stated that, in Ontario the prevailing market condition is for the sale of stumpage of all SPF species at the same price, not stumpage priced separately for each of the component species. In fact, the Panel concluded that Ontario calculates separate prices for *three* groups of species. See Panel Decision on Original Remand at 19. Based on that finding, the Panel instructed the Department to group

the species in Ontario into those three species categories. Id. at 19. Thus, using the Panel's analysis, the valuation of the good that Ontario provides requires an analysis of the stumpage prices for those species categories, not the aggregate price paid for all stumpage in the Province. As recognized by the Panel, with the exception of the inadvertent exclusion of Balsam Fir and Larch from the SPF calculations (discussed above), the Department followed the Panel's instructions. See Panel Decision on Second Remand at 19.

In its comments, the OLMA did not dispute the fact that the GOO sells stumpage at different prices depending upon three species categories. Rather, the OLMA argued that, in its Second Remand Determination, the Department unreasonably determined a subsidy for Ontario based on positive benefit calculations for two of the three stumpage categories (constituting no more than seven percent of the Ontario Crown harvest). That there is a positive benefit with respect to two of the species is not in dispute. Rather, the OLMA argued that one important "condition of purchase" under Ontario's stumpage program is that stumpage is granted for entire stands of trees, or for multiple species in a stand and that tenure holders must harvest all trees in a licensed area. See OLMA August 24, 2004, Rule 73(2)(b) Brief, at 88-11.. As a result, the OLMA argued that the Department must add the positive benefits to the "negative" benefit to determine the net benefit.

In advancing this argument, the OLMA completely ignores record evidence concerning the market conditions in Ontario. The evidence on the record demonstrates that not only does Ontario price stumpage based on three categories, but further, not all tenure holders harvest timber in all three categories, nor are they required to. For example, while Section 26 Sustainable Forest Licenses generally govern all of the area in a management unit (of which there

are 63 across Ontario), these licenses convey the *right* to harvest all species of trees found in a licensed area, not the *requirement* to harvest all trees in a licensed area. Contrary to OLMA's claim that tenure holders must harvest all trees in a licensed area, the GOO, the actual administrator of the stumpage programs, informed the Department that "where underutilized volume is available, and has been identified in a forest management plan (FMP), the Ministry of Natural Resources may provide access to timber volumes from the area covered to other firms for harvest." See June 28,2001, Ontario Questionnaire Response, Vol. 1, (GOO Response) at 45-46. Therefore, a Section 26 tenure holder need merely identify in its FMP that it would harvest only the SPF in the area covered by its tenure. The GOO would then, without penalty, assign the right to harvest the red and white pine to another interested harvester. For example, the GOO responded that Section 27 Forest Resource Licenses, frequently called overlapping tenures, "will provide the right to harvest *a particular species* and volume of wood...." See GOO Response at 49. The reason they are called overlapping tenures is because they cover some of the same area covered by Section 26 tenures. This is additional evidence that counters the assertions made by the OLMA and the conclusion reached by the Panel that one important "condition of purchase" under Ontario's stumpage program is that stumpage is granted for entire stands of trees, or for multiple species in a stand and that tenure holders must harvest all trees in a licensed area.

The record evidence submitted by the GOO demonstrates that the stumpage program in Ontario not only is not administered similarly to B.C.'s program, it is not administered in the manner claimed by the OLMA. The prevailing market condition in Ontario as recognized by the Panel is that Ontario prices its stumpage based on three species categories. This condition has been accounted for fully in the Department's methodology. Applying the law to the record facts,

the Department reasonably determined under tier three of the Department's regulations to account for the prevailing market conditions in Ontario by calculating per unit benefits using market benchmarks for the three species categories.

Because the net benefit calculation advocated by the OLMA is not related to the prevailing market conditions in Canada, making such an adjustment amounts to an impermissible offset under the statute. Although the Panel appears to disagree with the Department's determination, the statute is clear. The statute defines the "net countervailable subsidy" as the gross amount of the subsidy less three narrow offsets: (1) the deduction of application fees, deposits or similar payments to qualify for or receive a subsidy, (2) accounting for losses due to deferred receipt of the subsidy, and (3) the subtraction of export taxes, duties or other charges intended to offset the countervailable subsidy.[9] Both Congress and the courts have confirmed that these are the only permissible offsets the Department is allowed to make. S. Rep. No. 96-249, at 86 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 472 ("The list is narrowly drawn and is all inclusive."); Kajaria Iron Castings Pvt. Ltd. v. United States, 156 F.3d 1163, 1174 (Fed. Cir. 1998) ("{W}e agree that 19 U.S.C. § 1677(6) provides the exclusive list of permissible offsets . . . ."); Geneva Steel v. United States, 914 F. Supp. 563, 609 (CIT 1996) (explaining that Section 771(6) contains "an exclusive list of offsets that may be deducted from the amount of a gross subsidy"). Indeed, the Panel itself has acknowledged that the statute limits offsets to the three charges explicitly identified above.[10]

In light of the express language of the statute, the Department has consistently rejected

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[9] See Section 771(6) of the Act; 19 U.S.C. § 1677(6).

[10] Panel Decision on Original Remand at 18.

requests to reduce the benefit amount through offsets that are not expressly permitted by the statute. As the Department stated in the Preamble to its regulations:

> {I}f there is a financial contribution and a firm pays less for an input than it would otherwise pay in the absence of that financial contribution (or receives revenues beyond the amount it otherwise would earn), that is the end of the inquiry insofar as the benefit element is concerned.[11]

Thus, if the Department determines, taking into account prevailing market conditions in the province, that a province has sold timber for less than adequate remuneration, a benefit exists and the inquiry ends.

Paying more for an input, which is the essence of the OLMA's argument with respect to one of the three species categories, is *not* a permissible offset under the statute and would create absurd results. For example, where the Department compares the interest rate paid on government loans to a commercial benchmark interest rate, it does not offset the benefit calculated on the government loans that are below the market rate with any interest paid on government loans that are above the market rate, or for penalties paid on the subsidized government loans. Rather, the government loans that do not confer a benefit are simply not countervailed. See e.g., Oil Country Tubular Goods from Argentina, 56 Fed. Reg. 38116, 38117 (August 12, 1991) ("It is not the Department's practice to offset the less favorable terms of one loan as an offset to another, preferential loan."); Certain Iron Metal Castings from India, 63 Fed. Reg. 64050, 64056 (November 18, 1998) (penalty interest rates do not offset loans at subsidized

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[11] See Preamble, 63 Fed. Reg. at 65361.

rates).[12]

Consider also where in a company-specific investigation one company is found to have paid more than adequate remuneration for a government provided good while another company pays the government less than adequate remuneration for the same type of good. Under the OLMA's logic and the Panel's decision, if the first company's "negative" benefit exceeded the second company's "positive" benefit, exports from the country would not be found to have been subsidized, although the second company clearly received a subsidy. Again, this would amount to an impermissible offset rather than appropriately finding that the first company simply did not receive a subsidy.

Despite the express language of the statute and the Department's past practice as affirmed by the courts, and notwithstanding the lack of record evidence supporting the OLMA's position, the Panel effectively has instructed the Department to conduct an impermissible offset. We believe that the Panel has inadvertently misapplied the standard of review. Had the Panel properly applied the standard of review, its decision which does violence to the countervailing duty statute and the Department's administration of that statute could not have been reached. Because there is no record or statutory basis supporting the Panel's decision, with all due respect to the Panel, the Department continues to calculate the benefit for Ontario using the methodology applied in the Second Remand Determination (properly placing Balsam Fir and Larch into the

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[12] The Department also does not take into account any secondary economic effects of the subsidy. For example, the Department does not offset a countervailable equity infusion with dividends paid by the company to the government subsequent to the infusion. Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil, 64 Fed. Reg. 38742, 38750-51 (July 19, 1999); Rice from Thailand, 59 Fed. Reg. 8906, 8910 (February 24, 1994) (calculation of a "gross benefit" for interest-free government loans because receipt of the loans was contingent on payment of paddy for approximately ten percent above prevailing market prices was rejected as an impermissible offset under the Act).

SPF category).

Quebec

The Panel remanded three issues specific to Quebec that affect the calculation of the stumpage benefit: (1) inclusion of the volume of logs for which the Syndicate data does not include prices, or provision of an explanation of why the data should not or could not be included; (2) adjustment of the Quebec benchmark by deducting log-seller profit from both the import and Syndicate prices; and (3) consideration of the conversion factor to be used to convert Syndicate prices in Quebec to cubic meters. We address each, in turn.

Weighted-Average Log Prices

The Panel directed the Department to recalculate the benchmark log prices for Quebec by weight-averaging the import and Syndicate prices, inclusive of the Syndicate volume data that does not indicate prices, or to explain why it should not, or cannot do so. See Panel Decision on Second Remand at 16 and 25. In the Second Remand Determination, before weight-averaging the import and Syndicate prices, the Department weight-averaged the import prices and weight-averaged the Syndicate prices. However, in weight-averaging the Syndicate prices, the Department did not rely on Syndicate sales volumes for which there was no price data, stating that we would not be able to weight that data properly.[13] See Second Remand Determination at 23.

In its December 1, 2004, decision, the Panel questioned the Department's determination not to include, in its weight-averaged benchmark, Syndicate reported sales for which no price was reported. The Panel determined that it is reasonable to assume that the Department has the

[13] The Syndicate volume with no associated prices constitute approximately 1 million cubic meters.

ability to assign this additional volume the same benchmark prices developed for transactions which show both volume and price, or in some other manner take these sales into account, or to explain to the Panel why it should not include the volumes. See Panel Decision on Second Remand at 16.

Had record information been provided containing both the volume and associated price information, these sales would have been treated the same as those Syndicate sales for which both data points are available and would have been included in the Department's calculations. However, absent both pieces of information, the Department continues to determine not to include these sales volumes in its calculations. Although the Panel suggested that the Department has the "ability to assign this additional volume the same benchmark prices developed for the transactions which show both volume and price," the Department is required to base its determinations on record evidence. There is no evidence on the record to support assigning to this volume of sales the benchmark prices developed for other transactions. In fact, the evidence suggests that, if anything, the actual prices associated with the volume of sales for which no prices were reported are likely to be significantly higher than the weight-average price of sales for which prices were reported. Specifically, review of the Syndicate-provided database demonstrates that the vast majority of these sales (approximately 90 percent) were reported by the Estrie and Quebec Marketing Boards (452,648.4 and 366,276.3 cubic meters, respectively). These Marketing Boards not only did not report prices associated with the more than 900 thousand cubic meters, they did not report any prices associated with any volumes of sawlog sales to sawmills within Quebec. They did, however, report prices associated with sales to non-sawmills, such as sales to pulpmills. The unit value of those sales exceeded the total unit value

of all Marketing Boards (compare C$61.85 and C$58.44 to C$56.91). See November 19, 2003, Response of the GOQ, Exhibit QC-S-106, Table 3.

Based on this record evidence, the Department determines that it is not reasonable or appropriate to assign to these Syndicate volumes for which we lack prices the weighted-average price of the other Syndicate volumes. Rather, given the lack of actual pricing data and to avoid price distortion, the Department determines that it is not appropriate to include the Syndicate volumes that lack prices in the weight-averaged benchmark.

Profit

In its December 1, 2004, decision, the Panel stated that the Department offered no explanation for its failure to properly implement its own methodology with respect to Quebec profit and the Panel directed the Department to do so. See Panel Decision on Second Remand at 18. Specifically, the Panel stated that the Department failed to apply its own methodology, by failing to subtract from the weighted-average domestic log price the costs for harvest and haul, and then subtracting from that the price for private stumpage. See Panel Decision on Second Remand at 18. In reaching this conclusion, the Panel appears to have misread the Department's Second Remand Determination and underlying calculations and thus misunderstood the Department's methodology. When viewed properly, the Department applied in the Second Remand Determination the very methodology that the Panel now suggests that it adopt. As set forth below, having determined an amount for profit using the methodology proposed by Canada, the Department did, in fact, adjust the weighted-average benchmark price by harvest and haul costs inclusive of profit (albeit a zero profit). See Calculation Memorandum at Tab 2.

As the Panel noted, the Department indicated that it was adopting the methodology urged

by Canada in response to the Original Remand Determination. The specific calculation proposed by Canada after the original remand was to start with the average domestic private log price (C$69.46) and deduct average hauling and harvesting costs for Quebec's private forest (C$39.66) and average private stumpage costs for the private forest ($18.57) to arrive at a log seller profit of C$11.23. See footnote 83 of the Canadian Parties' Submission on February 9, 2004.[14] The average domestic log price used by Canada in its Quebec profit calculation was not the benchmark price (average of domestic and import prices) determined in the Original Remand Determination, although that price could have been proposed as a starting point by Canada. Rather it was the average price of domestic logs (Sawlog Journal and Syndicate prices).

Consistent with Canada's proposed methodology, in the Second Remand Determination the Department calculated Quebec's profit by starting with the weighted-average Syndicate log price for SPF, which was C$56.76[15] (not the C$39.66 that the Panel references on page 18 of the Panel Decision on Second Remand). From that weighted-average domestic price, we deducted the total harvesting costs for the private forest, which were C$39.66. The result, which we identified as the average private log price less harvest and haul costs, was C$17.10. After deducting the private stumpage price of C$19.74, the Department arrived at a negative value for profit.[16] See Second Remand Determination at 6 and Calculation Memorandum[17] at Tab 2,

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[14] Canada's original calculation proposal was, thus, C$69.46-C$39.66-C$18.57=C$11.23.

[15] Although Canada had proposed relying on the average domestic price of C$69.46, because the Panel rejected the use of Sawlog Journal pricing, the Department started with an average domestic price of C$56.76, based solely on the Syndicate log pricing data.

[16] The Department's calculation is C$56.76-C$39.66-C$19.74=-C$2.64.

[17] Memorandum for the File, From James Terpstra, Program Manager, RE: Calculation Memorandum, July 30, 2004 (Calculation Memorandum).

Attachment 4B.

The Panel concluded that the Department's calculation in the Second Remand Determination yielded a negative figure because instead of starting with a benchmark price of C$39.66, the Department started with a private log price of C$17.10. See Panel Decision on Second Remand at 18. As noted above, the Panel's conclusion is based on a misstatement of fact. The Department, as it intended, applied the methodology proposed by Canada and started its calculations with the C$56.76 domestic log price reported by Canada. The C$39.66 erroneously referred to by the Panel as the benchmark price actually refers to the total harvesting costs for the private forests. As explained above, this figure was not the starting point for the Department's calculation. The result of performing the calculation proposed by Canada using the domestic log price as the starting point and deducting the harvesting costs and private stumpage figure reported by Canada is a negative "profit" amount for the period of investigation.

Perhaps based upon its apparent misunderstanding of the figures used in the calculations, the Panel asserts that had the Department properly applied its methodology it was necessary to take the "benchmark domestic log prices and deduct from that point, not to adjust only the Syndicate prices for profit." In the first instance, as demonstrated in our calculations of the other provinces for which we calculated a profit adjustment, had we determined that there was a "positive" profit adjustment that was required for Quebec, that adjustment would have been applied to the weighted-average benchmark price, i.e., the weighted- average domestic and import log price.

Second, the Department's methodology properly implemented its intent to measure an amount of profit, if any, based on prices paid by Quebec sawmills for logs harvested from private

lands in Quebec, using Quebec-related costs. To perform this calculation, in the Second Remand Determination, the Department specified that "From the weighted-average domestic price for SPF, we subtracted the harvesting costs incurred by the independent harvester and then subtracted the average price for stumpage from the private forest." (Footnote omitted.) See Second Remand Determination at 6. In calculating the profit adjustment, we intended to rely on the weighted-average Syndicate price, not the derived benchmark which includes import prices. The use of import prices as adjusted by Quebec stumpage and cost components tells us nothing about a Quebec harvester's and/or land owner's profit. In light of arguments made by the parties with respect to the Department's original use of a cross-border benchmark, we would not anticipate anyone suggesting that Quebec stumpage and cost components reflect stumpage and cost components in the United States. Therefore, despite the Panel's concern that the Department did not properly implement its intended methodology, there should be no doubt that the Department determined, as it intended, to calculate profit based on the weighted average Syndicate price and not the benchmark price.

Finally, while the Panel may think that it would be counterintuitive that log sellers would sell for a loss, the Department's starting price in the calculation is not the explanation. The Department properly implemented its methodology and, using the figures reported by Canada, calculated a "negative" profit. Although it may be counterintuitive for the Panel that some sellers sold their goods at a loss during the POI, such a determination is not unusual in the antidumping/countervailing duty context.

Conversion Factor

As the Department explained in its September 17, 2004, Rule 73(2) Response Brief, despite its stated intent to use the conversion factors provided by the Syndicates to convert Syndicate prices to cubic meters, the database submitted by the GOQ incorrectly converted all of the softwood species. Specifically, the electronic database incorrectly used 5.7, when 5.5 should have been used as the factor to convert units reported in "mpmp" to m^3. Therefore, the Department requested a remand to conform its conversion factors to the factors provided by the Syndicates to the GOQ. Consistent with the Department's request, the Panel has instructed the Department to consider the conversion factor to be used to convert Syndicate prices in Quebec to cubic meters where the data is reported in other forms. See Panel Decision on Second Remand at 19 and 26. For this third remand determination we have relied on the conversion factors provided by the Syndicates in Exhibit 121 of the GOQ's December 3, 2003, submission. See Attachment 2I of the Quebec Calculation Memo dated January 24, 2005.

II. Calculation of Benefit

To determine the benefit conferred by the provincial stumpage programs, we first calculated a weighted-average market-based price for logs. From the market-based price for logs, we subtracted harvest and haul costs, including where appropriate, an adjustment for the profit to derive a market-based stumpage price. We then compared the derived market stumpage price with fees charged for Crown stumpage. We concluded that where, fees charged to acquire Crown stumpage were less than the derived market stumpage price, a benefit existed. Detailed calculations for each province can be found in the appropriate section of Calculation Memo for

each province.[18]

III. Bois Omega, Ltee.

Pursuant to the requests of Bois Omega and the Department, the Panel directed that, in the event of a higher benefit calculation for Quebec and/or Ontario, the Department is to exclude additional sales that might erroneously be attributed to Bois Omega. Because the recalculations requested by the Panel did not result in a higher benefit calculation for Quebec and/or Ontario, no action was necessary with respect to this issue. Therefore, the Department confirms Bois Omega's status as a company potentially eligible for exclusion from the order if the Panel affirms these determinations.[19]

CONCLUSION

In accordance with the remand order, we have reconsidered certain calculation issues as described above. As a result, we have recalculated the *ad valorem* subsidy rate for certain softwood lumber products from Canada for the period April 1, 2000, through March 31, 2001.

[18] See Memorandum from the Team, through James Terpstra to the File, RE: Third NAFTA Panel Remand: Countervailing Duty Order on Certain Softwood Lumber Products from Canada, NAFTA Panel 3rd Remand: Calculation of Country-wide rate and Individual Provincial Benefits (January 24, 2005).

[19] In the Original Remand Determination, we determined that Produits Forestiers Dube and Scierie West Brome are eligible for exclusion from the order. See Original Remand Determination at 45-46. In the Second Remand Determination, we determined that Bois Daaquam Inc., Bois Omega, Ltee., J.A. Fontaine et, fills, Maibec Industries, and Scierie Nord-Sud Inc. as well as the St. Pamphill mill of Materiaux Blanchet Inc., are eligible for exclusion from the countervailing duty order. See Second Remand Determination at 24 - 26.

The revised rate is 1.88 percent *ad valorem*. In addition, because the benchmark calculations did not result in a higher benefit for Quebec or Ontario, we have not reconsidered our calculations with respect to Bois Omega, Ltee.

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

1-24-05
Date

CERTIFICATE OF SERVICE

CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA
DEPARTMENT OF COMMERCE FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION

Secretariat File No. USA-CDA-2002-1904-03

I, Michele D. Lynch, hereby certify that I caused copies of the attached Third Remand Determination to be served on the parties listed below by **overnight delivery - Federal Express** this 24th day of January, 2005.

On Behalf of the Government of Canada

Hugh Cheetham, Esq.
Department of Foreign Affairs and International Trade
3rd Floor, Tower "C"
125 Sussex Drive
Ottawa, Ontario
Canada, K1A OG2
(613)943-2803
(613) 944-3212 (f)

Paul R. Bailey
Counselor
Canadian Embassy
501 Pennsylvania Ave., N.W.
Washington, D.C. 20001
(202)-682-1740
(202) 682-7795 (f)

On Behalf of the United States of America

Daniel Mullaney, Esq.
Associate General Counsel
Office of the United States Trade Representative
600 17th Street, N.W., Room 222A
Washington, D.C. 20506
(202) 395-7310
(202) 395-3640 (f)

Coalition for Fair Lumber Imports

Executive Committee

John A. Ragosta
Harry L. Clark
Dewey Ballantine LLP
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4605
(202) 862-1000
(202) 862-1093 (f)

Government of Canada, et. al.

M. Jean Anderson
Weil, Gotshal & Manges LLP
1501 K Street, N.W., Suite 100
Washington, D.C. 20005
(202) 682-7000
(202) 857-0940 (f)

British Columbia Trade Council: The Cariboo Lumber Manufacturers' Association, The Coast Forest & Lumber Association, The Interior Lumber Manufacturers' Association, The Northern Forest Products Association

W. George Grandison
Steptoe & Johnson LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

(202) 429-3902 (f)

Province of Manitoba
Province of Saskatchewan

Dennis James, Jr.
Michelle Sherman Davenport
Cameron & Hornbostel LLP
818 Connecticut Ave., N.W.
Washington, D.C. 20006-2722
(202) 293-4690/(202) 293-1877 (f)

Province of British Columbia

Spencer S. Griffith
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
Robert S. Strauss Building
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
(202) 887-4288 (f)

Government of Alberta

Claire E. Reade
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 200041206
(202) 942-5566
(202) 942-5999 (f)

Province of Ontario

Mark S. McConnell
Hogan & Hartson L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600
(202) 637-5910 (f)

Gouvernement du Quebec

Matthew J. Clark
Arent Fox Kintner Plotkin & Kahn, PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6000
(202) 857-6395 (f)

Governments of the Provinces of New Brunswick, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island, and
Maritime Lumber Bureau

Michael A. Hertzberg
Howry Simon Arnold & White LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2402
(202) 783-0800
(202) 383-6610 (f)

John E. Corrette, III
Piper Marbury Rudnick & Wolfe LLP
1200 - 19th Street, N.W.
Washington, D.C. 20036-2412
(202) 861-6444
(202) 223-2085 (f)

Canfor Corporation

Donald B. Cameron
Kaye Scholer LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 682-3500
(202) 682-3580 (f)

Doman Industries, Ltd. and Evyeart Cedar Products LLC

Charles Owen Verrill, Jr.
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

(202) 719-7049 (f)

Quebec Lumber Manufacturers Association

Robert C. Cassidy, Jr.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
(202) 663-6363 (f)

Weyerhauser Company

Matthew M. Nolan
Miller & Chevalier Chartered
655 15th Street, N.W.
Washington, D.C. 20005
(202) 626-5800
(202) 628-0858 (f)

Fred Tebb & Sons, Inc.

Livingston Wernecke
Betts, Patterson & Mines
One Convention Place
701 Pike Street, Ste. 1400
Seattle, WA 98101-3927
(206)292-9988
(206) 343-7053 (f)

Tembec, Inc. and the OFIA and the Ontario Lumber Manufacturers' Association

Elliott J. Feldman
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5304
(202) 861-1500
(202) 861-1783 (f)

Norask Forest Products Inc. and Meadow Lake Tribal Council of Northern Saskatchewan

Charles M. Gastle
Shibley Righton LLP
250 University Avenue, Suite 700
Toronto, Ontario
Canada M5H 3E5
(416) 214-5200
(416) 214-5400 (f)

Abitibi-Consolidated, Inc. (its affiliates, Abitibi-Consolidated Company of Canada, Produits Forestiers Petit Paris Inc., Produits Forestiers La Tuque Inc., and Societe en Commandite Scierie Opitciwan) and Scieres Saguenay Ltee.

Michael T. Shor
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
(202) 942-5732
(202) 942-5999 (f)

West Frazier Mills, Ltd.

Gracia M. Berg
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5306
(202) 955-8500
(202) 467-0539 (f)

Anderson Wholesale, Inc.

Stephen S. Spraitzar
Law Offices of George R. Tuttle
3 Embarcadero Center, Suite 1160
San Francisco, CA 94111
(415) 986-8780
(415) 986-0908 (f)

Bowater Incorporated

Veronique Lanthier
O'Melveny & Myers LLP
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 383-5385
(202) 383-5414 (f)

Canadian Lumber Remanufacturer's Alliance

Jamie M. Wilks
McMillan Binch
Suite 3800, South Tower
Royal Bank Plaza
Toronto, Ontario
Canada M5J 2J7
(416)865-7804
(416) 865-7048 (f)

Domtar, Inc. and Domtar Industries, Inc.

Harvey M. Applebaum
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-5626

(202) 778-5626 (f)

Idaho Timber Corporation

Robert B. Luce
General Counsel
Idaho Timber Corporation
5401 Kendall Street
P.O. Box 67
Boise, Idaho 83706
(208) 377-3000
(208) 375-5674 (f)

J.D. Irving Ltd.

William D. Kramer
Piper Rudnick LLP
1200 Nineteenth Street, N.W.
Washington, D.C. 20036-2414
(202) 861-3900
(202) 223-2085 (f)

Lindal Cedar Homes

Kenneth G. Weigel
Alston & Bird
601 - Pennsylvania Ave., NW
10th Floor
Washington, DC 20004
(202) 756-3300
(202) 756-3333 (f)

Natural Resources Defense Council

Susan Casey-Lefkowitz
Natural Resources Defense Council
1200 New York Avenue, N.W.
Washington, D.C. 20005
(202) 289-2366
(202) 289-1060 (f)

U.S. Red Cedar Manufacturers Association

Sam Kalen
Van Ness Feldman
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20007-2416

(202) 298-1826
(202) 338-2416 (f)

Slocan Forest Products Ltd.

Thomas Peele
Baker & Mackenzie
815 Connecticut Ave., N.W.
Suite 900
Washington, D.C. 20006-4078
(202) 452-7000
(202) 452-7072 (f)

Tolko Industries Ltd.
West Fraser Mills, Ltd.

Lisa A. Murray
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5306
(202) 955-8500
(202) 467-0539 (f)

Weldwood of Canada Limited

William Silverman
Hunton & Williams
1900 K Street, N.W.
Washington, D.C. 20006-1109
(202) 719-2013
(202) 778-2201 (f)

Michele D. Lynch
Senior Attorney