PICARD KENTZ & ROWE

Picard Kentz & Rowe LLP
1750 K Street, NW
Suite 1200
Washington, DC 20006

tel +1 202 331 5042
fax +1 202 331 4011
dyocis@pkrllp.com

May 23, 2012

BY ELECTRONIC MAIL to webmaster_support@trade.gov

The Honorable Rebecca Blank
Acting Secretary of Commerce
U.S. Department of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230

Re: Softwood Lumber Subsidies Semi-Annual Report

Dear Acting Secretary Blank:

On behalf of the U.S. Lumber Coalition (the "Coalition"),[1] we hereby submit these comments in response to the request by the Department of Commerce (the "Department") for comments on subsidies provided by certain countries exporting softwood lumber to the United States.[2]

[1] The Coalition is an association of domestic entities interested in promoting fair trade in softwood lumber products. Members of the Coalition have been petitioners in several antidumping and countervailing duty proceedings involving softwood lumber products from Canada.

[2] Subsidy Programs Provided by Countries Exporting Softwood Lumber and Softwood Lumber Products to the United States; Request for Comment, 78 Fed. Reg. 24,724 (Dep't Commerce Apr. 26, 2013).

Please do not hesitate to contact any of the undersigned should you have any questions concerning this submission.

Respectfully submitted,

Andrew W. Kentz
David A. Yocis
Nathan W. Cunningham

PICARD KENTZ & ROWE LLP
1750 K Street, N.W.
Suite 1200
Washington, D.C. 20006

Counsel to the U.S. Lumber Coalition

SUBSIDIES TO SOFTWOOD LUMBER PRODUCTION

Comments of the U.S. Lumber Coalition

Submitted Pursuant to Section 805 of the Softwood Lumber Act of 2008

Andrew W. Kentz
David A. Yocis
Nathan W. Cunningham
PICARD KENTZ & ROWE LLP
1750 K Street, N.W., Suite 1200
Washington, D.C. 20006
(202) 331-4040

Counsel to the U.S. Lumber Coalition

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Submission of the U.S. Lumber Coalition to the Department of Commerce
Pursuant to Section 805 of the Softwood Lumber Act of 2008
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I. CANADA

A. Provincial Stumpage Programs

The large majority of timber used in the production of softwood lumber in Canada is harvested from "Crown lands" owned and managed by the several Canadian provincial governments. This timber is provided by the provincial governments to lumber producers (or, less often, to logging contractors who in turn sell the harvested logs to lumber producers) under a variety of contractual arrangements. While the details vary from one province to another, these provincial systems share some common features, including:

- an administered price for most, if not all, Crown timber at levels that are demonstrably well below market prices;
- low minimum or "reservation" prices, ensuring higher volumes of timber are harvested in poor markets when a profit-maximizing landowner would withhold timber from the market until prices improve; and
- domestic processing requirements, to ensure that the benefit of this below-market timber is provided exclusively to softwood lumber producers in Canada.

Further, the provincial systems generally account for such a large share of the timber available to lumber producers that the government's administered price for Crown timber suppresses market pricing mechanisms for private timber (and any small share of Crown timber that may be sold competitively in some provinces).

As the Department has previously established, the provision of Crown timber by provincial governments constitutes the government provision of goods and therefore a financial contribution within the meaning of Section 771(5)(D) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677(5)(D) (2006)) (the "Act"). Further, the Department has repeatedly found that because the number of industries making use of Crown timber is limited, the provision of timber is specific within the meaning of Section 771(5A)(D)(iii) of the Act. Therefore, the provision of Crown timber to softwood lumber producers is a countervailable subsidy if it confers a benefit – that is, if the provision is made for "less than adequate remuneration" as set forth in Section 771(5)(E)(iv) of the Act and the Department's implementing regulations.

Under these laws and regulations, the Department would determine whether timber is being sold for less than adequate remuneration by reference, where possible, to a market-determined benchmark price.[1] Because Crown timber sales account for the vast majority of

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[1] The Court of Appeals for the Federal Circuit recently upheld the Department's application of its standard regulatory framework for selecting benchmark prices, including the use of prices outside the subsidizing country when appropriate, for purposes of the less-than-adequate-remuneration inquiry. Essar Steel, Ltd. v. United States, 678 F.3d 1268, 1273-74 (Fed. Cir. 2012).

timber sold in most Canadian provinces, internal Canadian timber prices will generally not be viable benchmarks for this purpose.[2] Under any reasonable application of these established principles, Canadian provinces plainly provide a benefit with respect to most of the softwood lumber produced in Canada from Crown timber. A brief survey of the most important lumber-producing provinces shows this to be the case.

British Columbia (BC). The BC government provides Crown timber under a wide variety of arrangements. The province sells a small portion of this timber in auctions, but participation in these auctions is limited, and the ultimate price that bidders are willing to pay is determined by the virtually unlimited amounts of timber available to BC lumber mills at administered prices. Most of the Crown timber is sold at prices set on the basis of a complex statistical modeling exercise deemed to produce the "estimated winning bid" for a given timber stand, had the stand been sold under the auction system.[3]

Average timber prices are one-third or less of the market price for identical species just south of the BC border, where all timber is sold competitively. For example, according to the most recent BC government data, logs harvested from BC Interior "SPF" (spruce-pine-fir) timber were selling in BC for C$49.85/$m^3$ in the three months ending February 2013.[4] By contrast, U.S. mills were paying an average of US$322/MBF to US$325/MBF, or C$67.53/$m^3$ to C$68.16/$m^3$ for similar logs.[5] This pricing gap, when translated back to prices for standing timber, is enormous.

The pricing model used on the BC Coast was updated as of July 1, 2012 for the first time in nearly three and one-half years. In updating the model, BC introduced several new variables, at least one of which does not relate to timber quality or harvesting costs at all. Rather, this variable concerns the data source used for one of the factors used in the tenure pricing formula. Because prices paid for auctioned timber are based solely on the results of the auctions, not the

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[2] The World Trade Organization (WTO) Appellate Body recently upheld the Department's reliance on the size of the government's market share as potentially conclusive evidence that internal prices cannot be used as a reliable market benchmark. Report of the Appellate Body, United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted Mar. 25, 2011, paras. 446, 458.

[3] The results of the most recent modeling exercises are set forth in Information Papers of the BC Ministry of Forests, Lands, and Natural Resource Operations Timber Pricing Branch. See "Coast Market Pricing System Update – 2012," July 1, 2012; "Interior Market Pricing System Update – 2012," July 1, 2012, http://www.for.gov.bc.ca/hva/infopaper.htm. The application of these models to Crown timber pricing is detailed in the "Coast Appraisal Manual," revised Apr. 15, 2013, http://www.for.gov.bc.ca/hva/manuals/coast.htm, and the "Interior Appraisal Manual," revised May 1, 2013, http://www.for.gov.bc.ca/hva/manuals/interior.htm.

[4] BC Interior Log Market Report (Feb. 28, 2013), *available at* http://www.for.gov.bc.ca/ftp/hva/external/!publish/web/logreports/interior/2013/3m_Feb13.pdf.

[5] RISI, Log Lines (May 2013) at 6 (first quarter 2013). Using the Department's Interior conversion factor of 4.81 m^3/MBF and a January-March exchange rate of C$1.00872/US$.

pricing formula (which applies excusively to non-auctioned timber), the identity of the data source that would have been used under the pricing formula would not be expected to have any effect whatsoever on auction bids. The introduction of this variable into the formula appears to have the effect of reducing prices for comparable tenure-based timber. Moreover, since July 2012 BC has twice amended the provisions of the Coast Appraisal Manual governing the choice of this precise data source and defining the application of the variable. Yet the underlying modeling equation has not been updated. BC has not disclosed the rationale for these changes in the pricing model, nor made publicly available any data that could be used to evaluate the appropriateness or the impact of these changes. Nonetheless, BC's long delay in implementing updates to the pricing formula, as well as the unexplained anomalies in the update when it finally appeared on July 1 of last year, make a mockery of the term "market pricing system" that BC gives to its timber pricing formulas. If the government can adjust the formulas at its convenience and without explaining the introduction of variables with no apparent relationship to timber value but large (downward) effects on timber pricing, such formulas hardly evidence a "system" that could possibly mimic "market" pricing.

In the Interior, the pricing model has been distorted since 2007 by a massive increase in the share of the harvest that has been classified as "lumber reject" and sold for C\$0.25/m^3 instead of the sawlog price resulting from the Interior pricing model. Although BC claims that the increase was caused by a mountain pine beetle epidemic, there has been no significant increase in the amount of timber not being used for lumber or in the amount of "low-grade" lumber (#3 and economy) being produced in the BC Interior, which are the only legitimate reasons within the BC system for timber to be sold at "lumber reject" prices. This misgrading, and resulting mispricing, of BC Interior timber was the subject of arbitration under the Softwood Lumber Agreement 2006 (SLA). Although the arbitral tribunal found that it could not tie such misgrading and mispricing directly to BC government actions implemented after July 1, 2006, the record of the arbitration nonetheless established that timber was being misgraded and mispriced, which increased the benefit of timber sales to BC timber producers.

Alberta, Saskatchewan, Manitoba, Ontario, Quebec. In these provinces, with the partial exception of Quebec, virtually all Crown timber is provided to softwood lumber producers at fixed rates.

In Alberta, regulations prescribe that holders of Forest Management Agreement (FMA) and Coniferous Timber Quota licenses pay a flat fee of C\$1.90/m^3 for all softwood timber harvested, regardless of species, end use, or almost all market conditions, and just C\$0.95/m^3 for certain low-quality timber.[6] However, Alberta's disclosures under the SLA suggest that *average* timber prices were actually well below C\$1.90/m^3 – and sometimes even below C\$0.95/m^3 – for several recent years.[7] The reason for these apparently very low actual stumpage prices is unknown. In addition, testimony before Canada's Senate Committee on Agriculture and Forestry in November 2010 indicated that in Alberta "large companies are purchasing wood for

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[6] Alberta Timber Management Regulation §§ 80-81, *available at* http://www.canlii.org.

[7] Disclosures under Article XV(17) of the Softwood Lumber Agreement 2006.

54 cents a cubic metre."[8] In recent quarters, Alberta stumpage has moved closer to the flat C$1.90/$m^3$ rate. Regardless of the rate, the mere fact that Alberta charges the same price for logs that can be used to make lumber as it does for logs only fit to be chipped for pulp demonstrates that its sawlog prices are below those that would prevail in a market.

In Ontario, sawmills currently pay C$4.74/$m^3$ to harvest most Crown softwood timber.[9] The forest industry succeeded in amending the Ontario Forest Tenure Modernization Act, which was enacted on June 1, 2011,[10] to ensure that sawmills will continue to have guaranteed access to Crown timber (at administered price levels) for at least the first five years of the new law. As industry representatives explained in testimony on this legislation, guaranteed timber access plays an essential role in the lumber industry's access to investment. For example, EACOM Timber Corp. stated that it recently invested in six Ontario lumber mills "based in large measure on secure, predictable, and affordable supplies of committed crown timber. That was the basis of the offer and the transaction."[11] The legislation allows the creation of local forest management corporations, which will manage a region's Crown forests and provide sawmills with access to Crown timber. These corporations hold forest licenses and are responsible for providing "predictable" access to Crown timber.[12] For the first five years, there will be only two such corporations established.

In Quebec, until the current quarter, Crown timber prices were set by district using a complex modeling methodology. The most recent data available to the Coalition, from the third quarter of 2012, suggest that the provincial average Crown softwood timber price in Quebec was C$8.03/$m^3$.[13] In April 2010, Quebec enacted a new Sustainable Forest Development Act, under which existing tenures were to be withdrawn and replaced with new "timber supply guarantees" as of April 2013. In January 2011, a new "Bureau de mise en marché des bois" (Timber Sales Office) announced a "Programme d'implementation d'un marché libre des bois"

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[8] Hearing Before the Standing Senate Committee on Agriculture and Forestry, Nov. 2, 2010 (testimony of Bob Austman, First Vice-President, Canadian Federation of Woodlot Owners), *at* http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/agri-e/48419-e.htm?Language=E&Parl=40&Ses=3&comm_id=2.

[9] *At* http://forest.lrc.gov.on.ca/itrees/stumpage/stumpage/stumpage_1213_2.html.

[10] An Act to enact the Ontario Forest Tenure Modernization Act, 2011 and to amend the Crown Forest Sustainability Act, 1994, *available at* http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2454&detailPage=bills_detail_the_bill&Intranet= [hereinafter 2011 Ontario Tenure Act]. .

[11] Official Report of Debates (Hansard), Standing Committee on General Government, at G-303, Apr. 13, 2011, at (testimony of Brian Nicks, director of forestry for Ontario, EACOM Timber Corp.).

[12] 2011 Ontario Tenure Act § 5(4).

[13] Disclosures under Article XV(17) of the Softwood Lumber Agreement 2006.

(Implementation Program for an Open Timber Market).[14] Under this program, the BMMB announced an initial auction of twelve timber stands on April 27, 2011. According to David Paterson, former CEO of AbitibiBowater (now known as Resolute Forest Products), a major Quebec lumber producer, "there will be more of a free market component to wood in Quebec under the governmental plan."[15] However, it remains to be seen whether these steps will reduce the level of the subsidy provided to Quebec softwood lumber producers.

Most of the softwood timber in these provinces is "SPF" timber, which is also found in the U.S.-Canada border regions of Minnesota and Maine, where it is always sold competitively. The most recently available data for Minnesota are for 2010, where sawtimber prices for SPF species were \$102.15/MBF (C\$21.87/m^3).[16] For Maine, the most recent data are for 2011, where Spruce and Fir sawlogs averaged \$120/MBF (C\$24.68/m^3).[17] These market-determined prices are many multiples of the administered stumpage rates charged in these provinces. The most recently available average private SPF sawtimber price in New Brunswick and Nova Scotia, for the period November 1, 2009 through October 31, 2010, was C\$21.75/m^3 – in a similar range to recent U.S. pricing.[18]

Although Crown timber harvesters often assume responsibilities for road construction and silviculture that are not reflected in typical market-determined prices for otherwise comparable timber in U.S. border regions, the costs incurred are generally a few dollars per cubic meter, leaving a large gap between the administered stumpage prices in these Canadian provinces and average market-based prices for comparable timber in jurisdictions where market forces are allowed to operate. Further, the provincial governments in Ontario and Quebec assumed many of the responsibilities previously borne by tenure holders, after the conclusion of the Department's most recent CVD proceedings on softwood lumber from Canada. Several of these programs were found to be subsidies that violate the terms of the SLA by a London Court of International Arbitration (LCIA) tribunal in January 2011.

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[14] *At* http://bmmb.gouv.qc.ca/pdf/programme-marche-libre.pdf.

[15] Hearing Before the House of Commons Standing Committee on Industry, Science and Technology, Sept. 10, 2010 (testimony of Mr. David Paterson, then President and CEO of AbitibiBowater, Inc.), *available at* http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4652345&Language=E&Mode=1&Parl=40&Ses=3.

[16] Minnesota Department of Natural Resources, "Minnesota's Forest Resources 2011," at 57, *at* http://files.dnr.state.mn.us/forestry/um/forestresourcesreport_11.pdf. Conversion based on the Department's conversion factor of 4.81 m^3/MBF and a 2010 exchange rate of US\$0.9709 = C\$1.

[17] Maine Forest Service, "2011 Stumpage Prices by Maine County," at http://www.maine.gov/doc/mfs/pubs/pdf/stumpage/11stump.pdf. Conversion based on the Department's conversion factor of 4.81 m^3/MBF and a 2011 exchange rate of US\$1.0110= C\$1.

[18] "Survey Results and Prices for Standing Timber Sales from Maritime Private Woodlots," summary report at 5, http://www.gov.ns.ca/pfpmb/StumpageReport10.pdf.

New Brunswick. Crown timber plays a much smaller role in New Brunswick than in the six Canadian provinces mentioned above, accounting for just over half of the harvest; the other half of the timber harvest is divided roughly equally between industrial freehold land owned by major lumber producers and private woodlots owned by thousands of small holders. Crown prices are derived from periodic surveys of timber prices obtained by small woodlot owners. However, many in New Brunswick – including the woodlot owners themselves – believe that the terms of access to Crown timber by lumber producers actually forces private timber prices to conform to the administered price of Crown timber, rather than the reverse.[19] A report by the provincial Auditor General concluded: "The fact that the [lumber] mills directly or indirectly control so much of the source of timber supply in New Brunswick means that the [timber] market is not truly an open market. In such a situation it is not possible to be confident that the prices paid in the market are in fact fair market value."[20] Accordingly, it is possible that the provision of Crown timber in New Brunswick is also made for less than adequate remuneration. However, given that recent private timber prices are relatively close to those prevailing for similar timber in Maine, it its also possible that New Brunswick timber is priced at market levels.

Nova Scotia: Most timberland in Nova Scotia, unlike other provinces, is privately held, and most timber purchases are therefore market transactions between private parties. However, the provincial government recently purchased more than 500,000 acres of formerly commercial timberland, which will become Crown land on which companies could obtain harvesting rights.[21] Depending on the methodology for obtaining harvesting rights and assessing stumpage prices, it would be necessary to assess whether the sale of Crown timber in Nova Scotia was being made for adequate remuneration.

B. Federal and Provincial Log Export Restrictions

All Canadian provinces prohibit the export of unprocessed logs harvested from Crown timber. These prohibitions may take the form of direct restrictions on log exports or a domestic processing requirement imposed as a condition on harvesters of Crown timber. In either case, exceptions are granted rarely, usually as a result of exceptional conditions such as a large amount of timber damaged by fire or disease. The Canadian federal government also restricts exports of logs harvested from most private land in British Columbia, although the provincial government manages the procedures for seeking exemptions from these federal restrictions.

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[19] *See* Donald W. Floyd, Robert Ritchie & Tony Rotherham, *New Approaches for Private Woodlots — Reframing the Forest Policy Debate* (Jan. 2012), available at http://www2.gnb.ca/content/dam/gnb/Departments/nr-rn/pdf/en/CrownLandsForests/NewApproachesForPrivateWoodlots.pdf.

[20] Province of New Brunswick, "Report of the Auditor General 2008," para. 5.36.

[21] Chris Lambie, "Nova Scotia Chases Bowater Assets," The Chronicle Herald (Halifax), Nov. 13, 2012, *available at* thechronicleherald.ca/novascotia/171174-nova-scotia-chases-bowater-assets.

Section 127 of the BC Forest Act requires that timber harvested from the following sources must be either used or manufactured in British Columbia: (1) Crown land, (2) private land granted by the province after March 12, 1906, or (3) private land in a tree farm license area, regardless of the date granted. Section 128(3) of that Act provides that exemptions from this requirement may only be given if the province is satisfied that (a) the timber is surplus to the requirements of BC mills, (b) the timber cannot be processed economically in the vicinity of the harvest or elsewhere in BC, or (c) the exemption would prevent waste of or improve the utilization of Crown timber.

The BC Government relies on the Timber Export Advisory Committee's (TEAC) recommendations to determine whether a permit to export logs should be granted. This determination is largely based on whether any BC mills tender an offer equal to the BC domestic price, which is calculated by TEAC. As a practical matter, persons wishing to export logs in BC must first advertise the logs or the standing timber. Any BC processor wishing to bid for the logs may do so. If no bid is received, an export permit may be issued – but if a bid is received that the province deems to be an acceptable price (even if it is well below the export price that is otherwise available), the export permit will be denied. The timber or log owner then has the option of selling domestically or not harvesting the timber at all. On January 17, 2013, BC issued a series of "clarifications" of allegedly previously existing policy on how TEAC assesses and evaluates export-blocking offers.[22]

Logs exported from land under BC's jurisdiction, whether Crown land or private land, must pay a "fee in lieu of domestic manufacture." On January 17, 2013, BC issued a new schedule of fees in lieu that applies to timber whose export permit applications are received on or after March 1, 2013.[23] This new schedule increases these fees over their previously established level, based on the average price gap between domestic prices and export prices during the prior 3-month period. For the second quarter of 2013, the "fee in lieu" is expressed as a percentage of the domestic log price as follows:

- Douglas Fir: 18%,
- Saw-grade logs of other species: 12%, and
- Low-grade logs of other species: 6%.

Professor David Haley of the University of British Columbia describes the BC log export regime as amounting to "a transfer of wealth from timber owners, both the Crown and private sector, to forest products manufacturing companies. In other words, manufacturers receive a subsidy at the expense of timber growers."[24] The result, he explains, is that:

[22] "Conditions for Surplus Test Exemptions," Jan. 17, 2013, http://www.for.gov.bc.ca/ftp/HET/external/!publish/Web/exports/Conditions_for_Exemption_Jan_2013_signed.pdf.

[23] "Fee in Lieu of Manufactuing Rates, as of March 1, 2013," Jan. 17, 2013, http://www.for.gov.bc.ca/ftp/het/external/!publish/web/exports/Fee_in_Lieu_as_of_Mar_1_2013.pdf.

[24] David Haley, "Are Log Export Restrictions on Private Forestland Good Public Policy? An Analysis of the Situation in British Columbia" (2002), at 10. In response to a subsequent media inquiry about the applicability of his 2002 paper to the present situation of log exports

> By lowering domestic log prices, restrictions on log exports reduce the revenue flowing to British Columbians from stumpage sales on public forestland and also the returns to those who harvest timber on public land and sell their logs in domestic markets. . . . The benefits of log export restrictions on private land are reaped by the timber products processing sector, which enjoys lower raw material costs than it would experience in the absence of such restrictions.[25]

Other provincial government policies amount to at least a *de facto* restriction on the export of logs in other provinces as well. For example, there is a substantial amount of private forestland in Quebec along the U.S. border, and domestic log prices in Quebec are significantly lower than just across the border in Maine, New Hampshire, Vermont, and New York. This price differential would lead one to expect that, absent government restrictions, Quebec would export logs from private lands into the United States – but such exports do not actually occur. The sale of private logs in Quebec is governed by a number of regional marketing boards or "syndicates," which develop marketing plans that must be approved by a Quebec governmental agency. These marketing boards also facilitate the registration of private landowners in Quebec as "forestry producers" (*producteurs forestiers*), which gives private landowners access to four governmental subsidy programs: (1) the Private Forest Development Assistance Program (*Le programme d'aide à la mise en valeur des forêts privées*); (2) the Virginia Deer Damage Management Assistance Program (*Le programme d'aide à l'aménagement des ravages de cerfs de Virginie*); (3) the Property Tax Rebate Program (*Le programme de remboursement de taxes foncières*); and (4) the Forestry Finance Program (*Le programme de financement forestier*).[26] Thus, the marketing boards have the power to prevent, or at least to discourage, the export of logs from Quebec private lands.

These export restrictions and prohibitions are countervailable subsidies to Canadian softwood lumber producers, as the Department has found in prior lumber CVD investigations as well as in other CVD determinations.[27] Through these policies, the provincial and federal governments either directly provide timber, or entrust or direct harvesting companies to provide timber, to domestic producers, thus providing a financial contribution. Because this timber is provided to domestic processors at below-market prices, a benefit is conferred. And because this

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from BC Crown land, Professor Haley stated: "The arguments used in 2002 are equally applicable today and while this paper focuses on private land most of the arguments are equally applicable to public lands." Ian MacNeill, "Log Export," Truck Logger BC, Fall 2010, at 16, 19.

[25] Haley, *supra* note 24, at 15.

[26] Syndicat des Producteurs de Bois de l'Estrie, "Frequently Asked Questions," *at* http://www.spbestrie.qc.ca/fr/faq/ (last visited Dec. 5, 2012).

[27] *E.g.*, Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia, 75 Fed. Reg. 59,209 (Dep't Commerce Sept. 27, 2010) (final affirmative CVD determ.), Issues & Decision Memorandum at 12-14.

timber is provided only to domestic processing industries, the log export restrictions are *de jure* specific.[28]

C. Other Subsidy Programs

Additional subsidy programs also provide benefits to softwood lumber producers in Canada.

1. Preferential Tax Schemes

In past softwood lumber CVD proceedings, the Department found that the British Columbia Private Forest Property Tax Program provided countervailable subsidies. British Columbia currently refers to this program as the Managed Forest Program. Under this program, BC imposes lower tax rates on land classified as Class 7, "managed forest land." To qualify for the lower Class 7 rates, land must be "used for the production and harvesting of timber."

In addition, a new Quebec Capital Tax Credit Program provides tax credits of 15 percent of eligible expenses related to the acquisition of capital equipment used in the processing of forest products and acquired before January 1, 2013. The Quebec provincial government estimated that the program would reduce the taxes paid by Quebec forest products producers by C$120 million over four years. A recent report by the Quebec Auditor General found that another Quebec tax subsidy, the Quebec Road Tax Credit Program, was poorly administered and that funds were disbursed even to companies that had failed to prove eligibility.[29] This program was also found to be a subsidy in breach of the SLA by an LCIA tribunal in January 2011.

Moreover, the Quebec government offers tax credits for forest companies' job and French language training expenses, for the construction of public access roads and bridges in forest areas, and for the purchase of shares in Caisses Desjardins, a savings and credit cooperative based in Quebec. The Quebec government also refunds any fuel taxes for fuel used while traveling on a forest road.

Other tax programs that appear to provide subsidies have been identified in prior Coalition submissions to the Department, incorporated herein by reference.

2. Unearned Compensation for Tenure Rights

The principal form of Crown timber harvesting rights in most Canadian provinces involves some type of long-term arrangement. Guaranteed long-term access to timber assists lumber producers in obtaining financing for capital investments to improve efficiencies, as

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[28] *Id.*, Issues & Decision Memorandum at 12.

[29] Rapport du Vérificateur général du Québec à l'Assemblée nationale pour l'année 2010-2011, tome II, ch. 5 (2011), *available at* http://www.vgq.gouv.qc.ca/fr/fr_publications/fr_rapport-annuel/fr_2010-2011-T2/fr_Rapport2010-2011-T2-Chap05.pdf.

industry observers have long recognized.[30] In recent years when provinces have withdrawn these rights prior to the expiration of the tenure arrangement, significant compensation has been paid to the tenure holder. Such payments provide substantial benefits to the former tenure holders, who paid little or nothing to obtain the long-term harvesting rights in the first place. The payments also demonstrate the high value of the tenure rights that continue to be enjoyed by the vast majority of tenure holders whose rights have not been taken back by the governments.

In British Columbia, the Department has previously found countervailable compensation paid for tenure takebacks under the Protected Areas Forest Compensation Act and the Forest Revitalization Act. Both pieces of legislation remain in effect and compensation continues to be paid under the Protected Areas Forest Compensation Act, although details are usually not made public.

In Newfoundland and Labrador, the provincial expropriation of a pulp and paper mill, together with its associated tenure rights, was the subject of a claim under Chapter 11 of the North American Free Trade Agreement. In August 2010, the federal Canadian government agreed to settle these claims for C$130 million, one of the largest payments ever made in a Chapter 11 dispute.

In Alberta, holders of major tenures (Forest Management Agreement or FMA) are routinely compensated when timber on land associated with the tenure is removed as a result of activities by energy and mining companies. This is because FMA holders receive property rights against third parties (but not the Crown) in standing timber on their tenures – property rights that they do not pay for, but nonetheless receive as part of their tenure. This amounts to ongoing compensation for lost harvesting rights on a continuous basis – essentially, compensation for tenure takebacks in another form.

To the extent that tenure reform being planned in Quebec and under consideration in Ontario lead to modifications of existing long-term tenure arrangements in those provinces, it is possible that any compensation paid by those provinces will constitute further tenure compensation subsidies to their softwood lumber producers.

3. <u>Grants, Loans, and Loan Guarantees</u>

Prior submissions by the Coalition address a number of programs by which the federal and provincial Canadian governments provide grants, loans, loan guarantees, and other support, directly and indirectly, to Canadian softwood lumber producers. These submissions are incorporated herein by reference.

As detailed in those submissions, the Department has found a number of these programs to be countervailable in prior softwood lumber proceedings. Further, the Ontario Forest Sector Prosperity Fund, the Ontario Forest Sector Loan Guarantee Program, and the Quebec Forest

[30] *E.g.*, Halifax Global, Inc., "Newfoundland Forest Sector Strategy," Nov. 2008, at 13 n.2 (report commissioned by the Newfoundland & Labrador Department of Natural Resources).

Industry Support Program provided benefits that were the subject of arbitration between the United States and Canada under the Softwood Lumber Agreement 2006.

With respect to new programs, it is not always clear from publicly available information whether programs that provide benefits to the "forest industry" or the "forest products industry" necessarily provide benefits to softwood lumber producers. The prohibitions in the SLA on new subsidy programs benefitting softwood lumber producers appear to have restrained somewhat, but certainly not eliminated, the provision of benefits to softwood lumber producers under these programs. In addition to those previously identified programs, the Coalition notes the following additional information regarding programs that may be providing benefits to softwood lumber producers.

Export Development Canada. EDC reports that it has done, on average, C$15.1 billion in business annually with Canada's forestry sector during the period 2009 through 2012.[31] This includes "financing (including guarantees), political risk insurance to lenders, and equity transactions."[32] One of the largest benefits EDC provides Canadian enterprises is providing financing at a below market rate or when financing is otherwise unavailable. As the owner of an Ontario-based fencing company concisely stated to a Canadian industry newsletter: "I don't borrow money. Export Development Canada guarantees my payments."[33]

Pulp and Paper Green Transformation Program. Nearly C$1 billion in grants have been made available under this program for capital investments in pulp and paper mills to promote energy efficiency. Many of these mills are affiliated with, or co-located with, softwood lumber producers. Several of these companies, including West Fraser and Canfor, have publicly announced major capital investment programs aimed almost completely at softwood lumber production, since the large grants received to fund pulp and paper investment under this program have freed up funds otherwise unavailable.

AbitibiBowater Restructuring. The governments of Quebec and Ontario provided extraordinary support during the 2009-2011 restructuring of AbitibiBowater, now known as Resolute Forest Products, a major lumber producer in those provinces. These included an emergency loan guarantee of C$100 million from Investissement Québec announced by Quebec's Minister of Finance on April 17, 2009, the day AbitibiBowater filed for bankruptcy.[34] Clearly no commercial lender would have provided financing to the company on this basis. In

[31] Canadian Industry Sub-Sector, Export Development Canada for years 2009 through December 31, 2012, available at http://www.edc.ca/EN/About-Us/Disclosure/Reporting-on-Transactions/Pages/industry-sub-sector-2012.aspx.

[32] D.2 Individual Transaction Reporting, available at www19.edc.ca/English/disclosure_9237.htm.

[33] Madison's Timber Preview, June 15, 2012 at 1.

[34] "AbitibiBowater: The Quebec Government Reiterates Its Support-Ministers Raymond Bachand and Claude Bechard Announce Emergency Assistance," Investissement Quebec, Apr. 17, 2009.

2010, both Quebec and Ontario issued special regulations that relieved the company of around C$200 million in pension obligations over a period of 5-10 years, while continuing government support and guarantees for the company's pension plans. In return, the company pledged to invest in production facilities in those provinces. As then-CEO David Paterson summarized: "AbitibiBowater has worked closely with regulators and elected officials in Quebec and Ontario on a number of relief measures …. We appreciate the support and collaborative spirit demonstrated by governments …."[35] In addition, through a debt-for-equity swap, provincial and local government entities took an equity stake in the company as it emerged from bankruptcy.

Buchanan Stumpage Forgiveness. It has been widely reported that Buchanan Forest Products, a major Ontario lumber producer, received stumpage deferrals and forgiveness from the government of Ontario over a long period. In February 2009, a member of Ontario's Parliament explained: "For the longest time, people were not aware of what we have done for the sawmill. … We [deferred] their stumpage costs to help them stay viable. Their industry has no market, so we have been deferring for some time so they can have cash and maintain operations."[36] In September 2010, the company signed an agreement with Ontario acknowledging that it owed C$33.61 million to the province and made commitments to repay some of these arrears in return for additional government loans and grants under the Forest Sector Prosperity Fund program.[37]

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[35] "AbitibiBowater Could Be Reborn in Weeks after Finalizing Pension Deals," Canadian Press, Nov. 19, 2010.

[36] "Buchanan Forest Products Is Behind in Stumpage Payments," ForestTalk, Feb. 20, 2009 (quoting William Mauro, Member of Provincial Parliament for Thunder Bay-Atikokan).

[37] Stumpage Repayment Agreement, Sept. 15, 2010.