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November 26, 2014

BY ELECTRONIC MAIL to webmaster_support@trade.gov

The Honorable Penny Pritzker
Secretary of Commerce
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Softwood Lumber Subsidies Semi-Annual Report

Dear Secretary Pritzker:

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 in the period from January 1, 2014 through June 30, 2014.²

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*, 79 Fed. Reg. 63,985 (Dep’t Commerce Oct. 27, 2014).

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

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'AK', with a long, sweeping horizontal line extending to the right.

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SUBSIDIES TO SOFTWOOD LUMBER PRODUCTION

Comments of the U.S. Lumber Coalition

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

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November 26, 2014

SUBSIDIES TO SOFTWOOD LUMBER PRODUCTION

Submission of the U.S. Lumber Coalition to the Department of Commerce

Pursuant to Section 805 of the Softwood Lumber Act of 2008

November 26, 2014

The following comments are provided in response to the request by the Department of Commerce (“Department”) to identify subsidies provided by Canada to the production or export of softwood lumber products to the United States during the period January 1, 2014 through July 31, 2014.

1. CANADA

A. Provision of Standing Timber for Less Than Adequate Remuneration

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 that is set at a level demonstrably well below market prices;
- low minimum or “reservation” prices, ensuring that higher volumes of timber are harvested in poor markets when a profit-maximizing landowner would otherwise 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 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.³ However, bidders must agree to process the timber in BC, so the potential highest bid is therefore excluded from the auction if the highest possible value of the timber is for an export market. The province also limits the number of open contracts any individual bidder may have at any one time. Under these constraints, the majority of auction participants are logging contractors that harvest auctioned timber and sell the logs to BC producing mills; these same contractors generally also are employed by those same mills to harvest Crown timber sold directly by the government to the BC producing mills at prices set by regulation. Thus, the ultimate price that bidders are willing to pay is limited, at the margin, by the availability of Crown timber to BC lumber mills at administered prices.

Most of the Crown timber is sold through long-term contracts directly to producers 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 this deeply flawed auction system.⁴ But if the auction prices do not actually reflect market value, neither

¹ The Court of Appeals for the Federal Circuit has 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).

² The World Trade Organization (WTO) Appellate Body has confirmed that, consistent with the WTO agreements, the Department may rely 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 In the period identified in the Department’s request – January through June 2014 – about 12 percent of harvested timber on the BC Coast (1,184,584 m³ out of 9,802,294 m³) was harvested from auction stands, and less than 15 percent of harvested timber in the BC Interior (3,396,414 m³ out of 22,793,526 m³) was harvested from auction stands, according to data accessed through the BC Harvest Billing System, <https://www15.for.gov.bc.ca/hbs/>.

⁴ The most recent modeling exercises are set forth in the Information Papers of the BC Ministry of Forests, Lands, and Natural Resources Operations Timber Pricing Branch. See “Coast Market Pricing System Update – 2014,” Jan. 1, 2014; “Interior Market Pricing System

would the prices resulting even from a statistically valid translation of the auction prices to these long-term “tenure” sales. And, as the Coalition has demonstrated at length in prior submissions to the Department, the translation procedures used by BC are far from statistically valid.

That the BC “market pricing system” fails to systematically price BC Crown timber at market levels is clear by comparing the results of the system to actual observed market prices for similar timber sold in the United States. For example, the weighted-average price for BC Douglas fir logs sold domestically on the BC Coast during the January-June 2014 period was C\$83.34/m³,⁵ or 21 percent less than in July-December 2013. Prices for U.S. domestic sawlog grades of Douglas fir during the same period averaged C\$136.45/m³,⁶ or 12 percent more than in July-December 2013. As a result, while U.S. prices for comparable logs were 16 percent higher than BC Coast prices in July-December 2013, U.S. prices were 64 percent higher in January-June 2014.

With respect to the BC Interior, BC sawmills paid an average of C\$59.18/m³ for spruce-pine-fir (SPF) logs purchased from third parties in January-June 2014.⁷ This figure is 4 percent higher than that reported for July-December 2013. During the same period, U.S. sawmills paid an equivalent of C\$86.23/m³ for logs of the same species, or more than 10 percent more than in July-December 2013.⁸ Thus, while the market price in the United States for these logs was more than 37 percent higher than the log price reported for the BC Interior in July-December 2013, it was 46 percent higher in January-June 2014.

In sum, prices for wood fiber provided by the BC government have failed to keep up with the increasing market price for fiber that U.S. sawmills must pay. As a result, the subsidy benefit being provided to BC sawmills is increasing.

While traded logs in BC may not be fully representative of the full provincial Crown harvest, these comparisons illustrate the significant price differential between prices generated by the BC “market pricing system” and actual market prices for similar logs, harvested from similar

Update – 2014,” July 1, 2014; <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,” last revised Aug. 15, 2014, <http://www.for.gov.bc.ca/hva/manuals/coast.htm>, and the “Interior Appraisal Manual,” last revised Nov. 1, 2014, <http://www.for.gov.bc.ca/hva/manuals/interior.htm>.

⁵ BC Log Market Reports for the three-month periods ending March 31, 2014 and June 30, 2014, available at http://www.for.gov.bc.ca/hva/logreports_coast.htm?2014.

⁶ RISI *Log Lines*, issues dated Feb. 2014 through July 2014, simple average of monthly #2, #3, and #4 sawlog prices in Regions 1, 2, and 3, converted using monthly Federal Reserve exchange rates and a conversion factor of 5.66 m³/MBF.

⁷ BC Log Market Reports for the three-month periods ending March 31, 2014 and June 30, 2014, available at http://www.for.gov.bc.ca/hva/logreports_interior.htm?2014.

⁸ RISI *Log Lines*, issues dated Feb. 2014 through Aug. 2014, simple average of quarterly lodgepole pine and Engelmann spruce prices in Region 4, converted using monthly Federal Reserve exchange rates and a conversion factor of 4.81 m³/MBF.

forests, by U.S. and Canadian producers making a commodity product to be sold into the same markets. Although these large (and growing) differentials are not sufficient to calculate a subsidy benefit with precision, they nonetheless indicate that the timber provided to BC lumber producers by the BC government is sold for considerably less than adequate remuneration.

Quebec. Pursuant to the Sustainable Forest Development Act, enacted in 2010, Quebec significantly modified its Crown timber sales program as of April 1, 2013. Prior to that date, Quebec sawmills accessed Crown timber under “Timber Supply and Forest Management Agreements,” which allowed mills to harvest Crown timber exclusively for use in the processing mill designated in the license. As of April 2013, these licenses were withdrawn and replaced with “Timber Supply Guarantees.” A new “Bureau de mise en marché des bois” (Timber Sales Office) began to sell timber at auction in 2011, and these Crown timber auction prices now serve as the starting point of the methodology for calculating the timber price for each zone. Thus, in effect, the new Quebec pricing system closely resembles the BC “market pricing system.” And it has many of the same flaws, including a prohibition on access to Quebec Crown timber by processing facilities outside the province (even within Canada).

According to the Timber Sales Office web site:

Pursuant to the Sustainable Forest Development Act, the Timber Sales Office has the function of evaluating the Market Value *{sic}* of Standing Timber (MVST) that beneficiaries of a Supply Agreement must pay for each cubic meter of harvested wood. This value is established by the parity technique, which is applied to the market value of standing timber sold on the free market *{sic}* for Crown timber.

The MVST is determined with reference to the characteristics of the timber in each of 187 pricing zones that make up the public forest. It is then indexed quarterly to take account of the evolution of the market prices for finished products (lumber, panels, pulp and paper, etc.) over the course of the year.⁹

⁹ Quebec Timber Sales Office (*Bureau de mise en marché des bois*), <https://bmb.gouv.qc.ca/publications-et-reglements/tarification-forestiere/> (last visited May 29, 2014), original French text as follows:

En vertu de la Loi sur l'aménagement durable du territoire forestier, le Bureau de mise en marché des bois a pour fonction d'évaluer la valeur marchande des bois sur pied (VMBS) que doivent acquitter les bénéficiaires d'une garantie d'approvisionnement pour chaque mètre cube de bois récolté. Cette valeur est établie par la technique de parité, laquelle s'appuie sur la valeur marchande des bois sur pied vendus sur le marché libre des forêts de l'État.

La VMBS est établie en fonction des caractéristiques des bois pour chacune des 187 zones de tarification que compte la forêt publique. Elle est, par la suite, indexée à chaque trimestre pour tenir compte de l'évolution des prix en cours d'année sur les marchés des produits finis (bois d'oeuvre, panneaux, pâtes et papiers, etc.).

Thus, on April 1, 2014, the first new annual standing timber prices derived from a full year of Crown auctions under the new system should have gone into effect. However, no price guide was published until May. A “draft” timber price schedule for the period April 1, 2014 through March 31, 2015, dated May 7, 2014, was posted to the Timber Sales Office web site, along with the following notice:

Consultation on the standard rates for the market value of standing timber in Crown forests for the year 2014-2015.

The new reference rate chart for the market value of standing timber for the year 2014-2015 is currently subject to a consultation period. Anyone having comments on the draft chart is requested to make them known to Mr. Jean-Pierre Adam, director general of the Timber Sales Office, by e-mail to the following address: serviceclientele@bmb.gouv.qc.ca, or by mail to 5700, 4e Avenue Ouest, local A-204, Québec (Québec) G1H 6R1. The consultation period ends May 27, 2014.¹⁰

Ultimately, the final timber prices for the April-June 2014 period were not posted until June, and the actual prices were generally lower – in some cases, significantly lower – than in the “draft” schedule. Accordingly, it is safe to assume that the new Quebec timber pricing system is, at the very least, still a work in progress.

In any event, it appears that timber prices in Quebec remain well below market levels, notwithstanding the introduction of the new pricing system. The most recently published data for the province as a whole states that the average price of spruce, pine, fir, and larch (SPF-L) timber of sawlog grade (grade B) was C\$11.97/m³ in the year from April 2012 to March 2013.¹¹ The simple average of the four quarterly grade B SPF-L price for the 187 pricing zones during that same period was C\$10.29/m³, or 86 percent of the actual reported average price. During the period of interest to the Department – January through June 2014 – the simple average of the two

¹⁰ Id., original French text as follows:

Consultation sur les taux unitaires de la valeur marchande des bois sur pied des forêts du domaine de l'État pour l'année 2014-2015

La nouvelle grille de taux de référence de la valeur marchande des bois sur pied pour l'année 2014-2015 fait présentement l'objet d'une période de consultation. Toute personne ayant des commentaires à formuler sur le projet de grille est priée de les faire parvenir à M. Jean-Pierre Adam, directeur général du Bureau de mise en marché des bois, par courriel à l'adresse suivante : serviceclientele@bmb.gouv.qc.ca ou par la poste au 5700, 4e Avenue Ouest, local A-204, Québec (Québec) G1H 6R1. La période de consultation se termine le 27 mai 2014.

¹¹ Quebec Ministry of Natural Resources, *Ressources et industries forestières: Portrait statistique édition 2013*, at 38, <http://www.mffp.gouv.qc.ca/forets/connaissances/connaissances-statistiques.jsp>.

quarterly grade B SPF-L prices for the 187 pricing zones was C\$16.67/m³, so if the same relationships held as in the 2012-13 period, this would translate to an average Crown timber SPF-L price of C\$15.90/m³ during the January-June 2014 period.

Press reports in 2013 attributed to Quebec forest executives the claim that Quebec wood fiber costs have increased 25 percent since 2011, which would be roughly consistent with this calculation.¹² Of course, the prices received for lumber produced by Quebec mills has increased by considerably more than that. According to *Random Lengths*, Eastern SPF 2x4 lumber (delivered to Boston) was \$297/MBF in the week to May 13, 2011, but had increased to \$503/MBF in the week ending April 12, 2013. One would expect that, in such a pricing environment, the market value of timber to have increased by at least 25 percent.

These Quebec stumpage rates include the value of silviculture. In addition, as the Government of Canada confirmed in an LCIA dispute settlement proceeding, several of the in-kind payments made by Quebec lumber producers for which the Department made adjustments in prior countervailing duty reviews (such as the Forestry Fund, fire protection, and insect protection) are now also included in the Quebec stumpage rate.¹³ As a result, only C\$3.43/m³ of the upward adjustment that the Department made to Quebec stumpage rates in its most recent countervailing duty review of Quebec stumpage pricing would still be applicable today. Accordingly, under any reasonable calculation, Quebec stumpage rates are far below those for comparable timber in Maine, where the most recent available data (for 2013) found that SPF sawtimber prices averaged C\$24.35/m³.¹⁴

Even still, the Quebec industry is urgently demanding that the Quebec government provide relief from these increases. According to a recent press report:

“How can an industry survive and thrive in this environment?” asks a simmering James (Jim) Lopez, president and CEO of Tembec Inc.

The complaint has been heard so often it sounds like a broken record. And yet the industry has found a new way to approach the government for aid

. . . . But while the industry is courting the government once more, it is also threatening to invest elsewhere. Case in point: Tembec, which has to decide how it is going to allocate \$80-million in investments between its Ontario and Quebec sawmills.

¹² “Forestry’s Elusive Quest for Innovation,” *Globe and Mail* (Nov. 20, 2013).

¹³ Award of the Tribunal, *United States of America v. Canada*, LCIA No. 81010 (Jan. 20, 2011), para. 228 (fire and insect prevention); para. 233 (Forestry Fund).

¹⁴ Maine Forest Service, “2013 Stumpage Prices by Maine County,” at <http://www.maine.gov/dacf/mfs/publications/index.html>, converted using Federal Reserve exchange rates and a conversion factor of 4.81 m³/MBF.

“It is an unfortunate truth that if you are faced as an investor with the decision on where to put your money first, it will not be in Quebec – not with this business environment, not with this business environment, not with this fibre supply, not with the rapid rise in the cost of wood,” says Mr. Lopez.¹⁵

Perhaps as a result of these entreaties, or threats, the Quebec government announced a substantial aid package to the forest industry on November 21, 2013.¹⁶ In addition, the government announced a new task force dedicated to “improvements in the implementation of the [new] forest system” (*les améliorations à apporter à la mise en oeuvre du régime forestier*).¹⁷ Whether, as in BC, this task force develops ways to use the province’s discretion in carrying out the pricing system to respond to industry complaints remains to be seen.

Alberta, Saskatchewan, Manitoba, Ontario. In these provinces, virtually all Crown timber is provided to softwood lumber producers at fixed rates.

In Alberta, all “timber that is used or will be used to make lumber, pulp, or roundwood timber products” is charged an identical rate that is adjusted monthly to reflect lumber prices. 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 is sufficient to demonstrate that its sawlog prices are below those that would prevail in a market. During the period of interest to the Department, the standard monthly rate varied from C\$2.15/m³ to C\$3.15/m³ for first 107,296 m³ purchased by a licensee, and from C\$3.64/m³ to C\$4.76/m³ for higher volumes.¹⁸ These rates are considerably lower even than those charged in the BC Interior for a similar mix of species.

In Ontario, all SPF timber harvested by sawmills from January-March 2014 period was charged a fixed rate of C\$4.80/m³, increasing to C\$4.87/m³ in April-June 2014.¹⁹ Theoretically, this rate can (like Alberta’s) increase during periods of high lumber prices, but Ontario timber fees have not actually been higher than the minimum rate in any month since April 2005.

¹⁵ Id.

¹⁶ “Quebec Pledges \$430 Million to Struggling Forestry Sector,” *CTV News* (Nov. 22, 2013), <http://montreal.ctvnews.ca/quebec-pledges-430-million-to-struggling-forestry-sector-1.1554958>.

¹⁷ Press Release, Ministère des Ressources Naturelles, “Rendez-vous de la forêt québécoise – ‘Une vision d’avenir commune pour la filière bois’ – Martine Ouellet,” Nov. 22, 2013, <http://www.mrn.gouv.qc.ca/presse/communiqués-detail.jsp?id=10456>.

¹⁸ Monthly Alberta timber dues letters, available at <http://srd.alberta.ca/LandsForests/ForestManagement/TimberDuesCrownFees/MonthlyTimberDuesLetters.aspx>.

¹⁹ Monthly Ontario stumpage rate charts are available at http://www.lrcsde.lrc.gov.on.ca/itrees/stumpage/stumpage_rates.html.

The forest industry succeeded in amending the Ontario Forest Tenure Modernization Act, which was enacted on June 1, 2011,²⁰ to ensure that sawmills will continue to have guaranteed access to Crown timber (at administered price levels) for at least the next five years. 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."²¹ 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.²² For the first five years, there will be only two such corporations established.

New Brunswick. Crown timber plays a much smaller role in New Brunswick than in the six Canadian provinces mentioned above, historically 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.²³ 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."²⁴

In 2014, New Brunswick increased the amount of Crown timber available for harvest by about 10 percent, making the additional fiber available to producers that promised to invest in

²⁰ 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]. .

²¹ 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.).

²² 2011 Ontario Tenure Act at §5(4).

²³ 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>.

²⁴ Province of New Brunswick, "Report of the Auditor General 2008," para. 5.36.

increased production capacity in the province.²⁵ With the increase, the softwood Crown harvest will reach 3.9 million cubic meters a year, presumably bringing the share of the total softwood harvest derived from Crown lands clearly over its historic level of 50 percent. It remains to be seen whether the increase in the Crown harvest will have a negative impact on private timber pricing in the province.

Accordingly, it is possible that the provision of Crown timber in New Brunswick is also made for less than adequate remuneration. However, recent price levels for private timber sales in New Brunswick and Nova Scotia are relatively close to those prevailing for similar timber in Maine, and these combined private timber rates are used to set Crown prices in New Brunswick. The most recently available average private SPF sawtimber price in New Brunswick and Nova Scotia, for the period November 1, 2011 through October 31, 2012, was C\$22.69/m³.²⁶ This was slightly below contemporaneous Maine SPF sawtimber prices, which (as noted above) averaged C\$24.10/m³ in 2012.

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 has become Crown land on which companies could obtain harvesting rights.²⁷ Some temporary licenses for this land were granted to sawmills in 2014.²⁸

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 BC, although the provincial government manages the procedures for seeking exemptions from these federal restrictions.

Section 127 of the BC Forest Act requires that timber harvested from the following sources must be either used or manufactured in BC: (1) Crown land; (2) private land granted by

²⁵ See Government of New Brunswick, *Putting Our Resources to Work: A Strategy for Crown Lands Forest Management*, Mar. 12, 2014, <http://www2.gnb.ca/content/dam/gnb/Departments/nr-rn/pdf/en/ForestsCrownLands/AStrategyForCrownLandsForestManagement.pdf>.

²⁶ “Survey Results and Prices for Standing Timber Sales from Maritime Private Woodlots,” summary report at 7, <https://novascotia.ca/pfpmb/StumpageReport11.pdf>.

²⁷ 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.

²⁸ Department of Natural Resources (Nova Scotia), *Western Crown Land Planning Process* web page, <http://novascotia.ca/natr/land/western-land/> (last visited Nov. 25, 2014).

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.²⁹

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, 2013.³⁰ 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. The increase was 20 percent from March through June of 2013 and 30 percent since July 2013. For the period of interest to the Department, therefore, the “fee in lieu” was expressed as a percentage of the domestic log price as follows:

- Douglas Fir, 19.5%;
- Saw-grade logs of other species, 13%; and
- Low-grade logs of other species, 6.5%.

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.”³¹ The result, he explains, is that:

²⁹ “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.

³⁰ “Fee in Lieu of Manufacturing 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.

³¹ 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.³²

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 rarely 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*).³³ Indeed, in its November 2013 of increased aid to the forest industry, Quebec announced additional funding to increase the subsidies offered through the property tax rebate program.³⁴ 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.³⁵ Through these policies, the provincial and federal

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.

³² Haley, *supra* note 23, at 15.

³³ Syndicat des Producteurs de Bois de l’Estrie, “Frequently Asked Questions,” at <http://www.spbestrie.qc.ca/fr/faq/> (last visited May 29, 2014).

³⁴ “Quebec Pledges \$430 Million to Struggling Forestry Sector,” *CTV News* (Nov. 22, 2013), <http://montreal.ctvnews.ca/quebec-pledges-430-million-to-struggling-forestry-sector-1.1554958>.

³⁵ *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.

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 timber is provided only to domestic processing industries, the log export restrictions are *de jure* specific.³⁶

C. Other Subsidy Programs

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

1. Energy Subsidies

Sawmills produce both lumber and co-products, and revenue from co-products is an important part of the economics of lumber production. Declining demand for paper – a key industry that purchases sawmill coproducts – has therefore adversely impacted many sawmills in both Canada and the United States. The Canadian federal and provincial governments have encouraged the development of energy from biomass, including wood chips, as a potential new market for lumber coproducts. In addition to providing an additional market for lumber coproducts, these programs benefit lumber producers in two other ways that may constitute countervailable subsidies. First, government support – through the federal Pulp and Paper Green Transformation Program and other support programs – may fund some or all of the capital costs in creating biomass facilities. Second, agreements between government-owned power companies such as BC Hydro and Hydro Quebec and lumber companies to purchase excess power generated from biomass facilities may constitute the government purchase of goods for more than adequate remuneration.

Describing two power generation projects undertaken by the company that were expected to come online in the second and third quarter of 2014 to potential investors, West Fraser emphasized that it had reached “[l]ong-term contracts to sell power to B.C. Hydro” and that the initiative was “[p]rojected to reduce costs and contribute to sawmill earnings when completed.”³⁷ In describing a project intended to result in “the installation of a new electrical turbine that will increase the Temiscaming facility’s electricity production capacity from its current 10 megawatts to 60 megawatts,” Tembec observes that “The Company has entered into a 25-year power purchase contract with Hydro-Quebec that will allow the Company to sell to Hydro-Quebec up to 50 megawatts of the incremental electricity generated by the new turbine at green energy rates of \$106 per MW/hour, indexed annually to the consumer price index.”³⁸ In its message to shareholders, Tembec highlighted the agreement with Hydro-Quebec: “The critical element of

³⁶ *Id.*, Issues & Decision Memorandum at 12.

³⁷ West Fraser, *CIBC Institutional Investor Conference: Investor Presentation*, Jan. 22-24, 2014, <http://www.westfraser.com/sites/default/files/presentations/pdfs/CIBC-Whistler-Institutional-Investor-Conference-January-24-2013.pdf>.

³⁸ Tembec Inc., 2013 Financial Report, at 84, <http://tembec.com/sites/tembec.com/files/pdf/tembec-financial-report-2013-en.pdf>.

the Temiscaming energy investment is a purchase power agreement with Hydro-Quebec that was signed in 2012.”³⁹

In addition to the agreement with Tembec, Hydro-Quebec reports eleven other contracts for energy production through biomass (residual forest supply) entered into between March 2012 and May 2014.⁴⁰ BC Hydro reports that 11 of its 92 current Electricity Purchase Agreements (EPAs) are for energy production through biomass, with another EPA for Western Forest Products’ hydroelectric generating plant in Squamish.⁴¹ Of the 32 EPAs reached by BC Hydro for projects in development, 6 are for energy production through biomass.⁴²

Agreements to purchase energy at guaranteed prices are not the only incentive for the development of biomass energy capacity. British Columbia also administers a “Load Displacement” incentive program through its Power Smart program wherein BC Hydro may provide “financial incentives to displace all or part of the customer’s site electrical load.”⁴³ Per BC Hydro, “[t]hese incentives will be modelled after our Project Incentives: Transmission or Project Incentives: Distribution (the \$500,000 max distribution incentive cap has been removed), depending on the customer’s rate class.”⁴⁴ Through the program, “BC Hydro

³⁹ *Id.* at 1.

⁴⁰ See <http://www.hydroquebec.com/distribution/fr/marchequbecois/pae-201101/index.html> (last visited Nov. 17, 2014).

⁴¹ See BC Hydro, “Independent Power Producers (IPPs) currently supplying power to BC Hydro,” <https://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/independent-power-producers-calls-for-power/independent-power-producers/independent-power-producers-currently-supplying-power-to-bc-hydro.pdf> (last visited Nov. 17, 2014).

⁴² See BC Hydro, “Independent Power Producers (IPPs) with projects currently in development,” <http://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/independent-power-producers-calls-for-power/independent-power-producers/independent-power-producers-with-projects-currently-in-development.pdf> (last visited Nov. 17, 2014).

⁴³ See BC Hydro, “Customer-Based Generation,” https://www.bchydro.com/energy-in-bc/customer-based_generation.html (last visited Nov. 17, 2014).

⁴⁴ *Id.* More information regarding BC Hydro’s Power Smart Project Incentives: Transmission program is available here: <https://www.bchydro.com/powersmart/business/programs/project-incentives/transmission.html> (last visited Nov. 17, 2014) and more information regarding BC Hydro’s Power Smart Project Incentives: Distribution program is available here: <https://www.bchydro.com/powersmart/business/programs/project-incentives/distribution.html> (last visited Nov. 17, 2014).

provides funding for the development and installation of clean or renewable on-site generation that displaces electricity otherwise supplied by BC Hydro.”⁴⁵

One company participating in the Load Displacement program is Conifex Timber Inc. – one of the current 32 EPAs reached by BC Hydro for projects in development. In its 2013 Financial Statement, Conifex described substantial benefits under the program:

During 2013, the Company drew down \$3,312,500 of the Load Displacement Agreement (‘LDA’) incentive funds available under the BC Hydro LDA contract (2012 – \$3,312,500). The incentive funding will be recognized in profit or loss on a systematic basis over the 20 year term of the LDA upon commencement of delivery of electrical energy.⁴⁶

Another company participating in BC’s Load Displacement program is Canfor. In September, Canfor announced plans to produce two pellet plants in the province, “tied to a long term agreement with a power utility customer.” Canfor reported that “[t]he total investment of \$58 million will include electrical self-generation capacity of 3 megawatts supported through BC Hydro’s Power Smart Load Displacement Program.”⁴⁷

2. Preferential Tax Schemes

In past softwood lumber CVD proceedings, the Department found that the British Columbia Private Forest Property Tax Program provided countervailable subsidies. BC 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

⁴⁵ BC Hydro, *Energy-efficiency Investments to Reduce Costs for Pulp and Paper Producers*, July 24, 2014, http://www2.news.gov.bc.ca/news_releases_2013-2017/2014MEM0018-001057.htm.

⁴⁶ See Conifex Timber Inc., Consolidated Financial Statements: December 31, 2013 and 2012, at 25, <http://www.conifex.com/investor-relations/>.

⁴⁷ Canfor Corp., *Canfor to Construct Pellet Plants in Chetwynd, Fort St. John*, Sept. 24, 2014, http://www.canfor.com/docs/default-source/news-2014/nr20140924_media_advisory_chet_fsj_pellet.pdf?sfvrsn=2.

that funds were disbursed even to companies that had failed to prove eligibility.⁴⁸ This program was also found to be a subsidy in breach of the SLA by an LCIA tribunal in January 2011.

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

3. 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 industry observers have long recognized.⁴⁹ 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 BC, 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.

⁴⁸ 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.

⁴⁹ *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).

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

4. Grants, Loans, and Loan Guarantees

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 Industry Support Program provided benefits that were the subject of arbitration between the United States and Canada under the SLA.

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). Despite the name, EDC is not limited to financing export transactions, but since 2009 has also provided direct support to Canadian enterprises. EDC reports that it did C\$11,803,000,000 of business with Canada’s forestry sector in the year ending September 30, 2013.⁵⁰ This business includes “financing (including guarantees), political risk insurance to lenders, and equity transactions.”⁵¹ One of the largest benefits EDC provides Canadian enterprises is 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.”⁵²

⁵⁰ Canadian Industry Sub-Sector, Export Development Canada for the year ending September 30, 2013, available at <http://www.edc.ca/EN/About-Us/Disclosure/Reporting-on-Transactions/Pages/industry-sub-sector-2013.aspx>

⁵¹ D.2 Individual Transaction Reporting, available at www19.edc.ca/English/disclosure_9237.htm.

⁵² Madison’s Timber Preview, June 15, 2012 at 1.

Investments in Forest Industry Transformation Program. This program originally provided C\$100 million in federal grants between 2010 and 2014 to forest products companies to develop new products and technologies. The program was renewed in 2014 for an additional four years with C\$90 million in additional funding.⁵³ Although project funding was not allowed for products falling within the scope of the SLA, many lumber producers are reported to have received funding under the program, including Millar Western, Tolko, and West Fraser.⁵⁴

Pulp and Paper Green Transformation Program. Nearly C\$1 billion in grants were been made available under this program for capital investments in pulp and paper mills to promote energy efficiency.⁵⁵ 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.

⁵³ Natural Resources Canada, *Investments in Forest Industry Transformation*, web page at <http://www.nrcan.gc.ca/forests/federal-programs/13139> (last visited Nov. 25, 2014).

⁵⁴ *Id.*

⁵⁵ Natural Resources Canada, *Pulp and Paper Green Transformation Program: Mission Accomplished*, web page at <http://www.nrcan.gc.ca/forests/federal-programs/13141> (last visited Nov. 25, 2014).