

ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF
CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA.
FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION
FILE USA-CDA-2002-1904-03

DECISION OF THE PANEL ON THE FOURTH REMAND DETERMINATION

October 5, 2005

Mr. Daniel A. Pinkus, Chair
Mr. William E. Code
Mr. Germain Denis
Judge Milton Milkes
Professor Daniel G. Partan*

* The Panelists wish to express their appreciation for the support received from Panel Clerk Idalia Mestey-Borges.

Appearances:

M. Jean Anderson, Gregory Husician, John M. Ryan, Melanie A. Frank, Timothy J. Hruby, Jahna M. Hartwig, Alicia Cate, Weil, Gotshal & Manges, LLP on behalf of the Government of Canada and the Governments of the Northwest Territories and the Yukon Territory.

Michele D. Lynch, Elizabeth C. Seastrum, Marguerite E. Trossevin, Peter G. Kirchgaber, Mark A. Barnett, William J. Kovatch, Scott D. McBride, Barbara J. Tsai, John D. McInerney, Philip J. Curtin, Christine J. Sohar on behalf of the United States Department of Commerce.

John A. Ragosta, Harry L. Clark, John W. Bohn, Navin Joneja, Nathaniel Friends, David A. Yocis, Brent L. Bartlett, Economist, Dewey Ballantine LLP on behalf of the Coalition for Fair Lumber Imports Executive Committee.

Claire E. Reade, Lawrence A. Schneider, Michele T. Dunlop, Arnold & Porter on behalf of the Government of the Province of Alberta.

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Spencer S. Griffith, Karen Bland Toliver, Bernd G. Janzen, Thea D. Rozman, Akin, Gump, Strauss, Hauer & Feld, LLP on behalf of the Government of the Province of British Columbia.

Michele Sherman Davenport, Dennis James, Jr., Cameron & Hornbostel LLP, on behalf of the Governments of the Province of Manitoba and the Province of Saskatchewan.

Mark S. McConell, Lynn G. Kamarck, Christopher S. Stokes, Deen Kaplan, Ajay Kuntamukkala, Behnaz Kibria, Johnathan T. Stoel, Hogan & Hartson, LLP on behalf of the Government of the Province of Ontario.

Matthew J. Clark, Keith R. Marino, F. Alexander Amrein, Christina Benson, Nancy A. Noonan, Arent, Fox, Kintner, Plotkin, & Kahn on behalf of the Gouvernement du Québec.

W. George Grandison, John R. Labovitz, Anthony C. Epstein, Mark A. Moran, Matthew S. Yeo, Mary T. Mitchell, Arson R. Hutman, Steptoe & Johnson; Brian R. Canfield, Farris, Vaughn, Wills & Murphy on behalf of the British Columbia Lumber Trade Council and its Constituent Associations: The Cariboo Lumber Manufacturers' Association, the Coast Forest & Lumber Association, the Interior Lumber Manufacturers' Association, and the Northern Forest Products Association.

Elliot J. Feldman, John J. Burke, Arland M. DiGirolamo, Michael S. Snarr, Baker & Hostetler LLP on behalf of Tembec Inc., the Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association.

Robert C. Cassidy, Jr., Wilmer Cutler & Pickering on behalf of the Québec Lumber Manufacturers Association and Bowater Incorporated.

Michael A. Hertzberg, Howrey Simon Arnold & White LLP, on behalf of the Maritime Lumber Bureau, the Governments of the Canadian Provinces of New Brunswick, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island.

John E. Corette, III, William D. Kramer, Piper Rudnick LLP, on behalf of The Maritime Lumber Bureau, The Governments of the Canadian Provinces of New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, and J.D. Irving, Ltd.

Stephen S. Spraitzar, Law Offices of George R. Tuttle, on behalf of Anderson Wholesale, Inc.

Julie C. Mendoza, Donald B. Cameron, Kaye Scholer LLP on behalf of Canfor Corporation.

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Charles Owen Verrill, Wiley Rein & Fielding LLP, on behalf of Doman Industries and Enyeart Cedar Products, LLC.

Livingston Wernecke, Betts, Patterson & Mines, P.S. on behalf of Fred Tebb Sons, Inc.

Mark R. Sandstrom, Law Office of Mark R. Sandstrom, on behalf of Goodfellow Inc.

C. Charles Lumbert on behalf of Moose River Lumber Company.

Charles M. Gastle, Shibley Righton LLP on behalf of NorSask Forest Products, Inc., and the Meadow Lake Tribal Council.

Richard Bennett on behalf of Shearer Lumber Products.

Charles Thomas on behalf of Shuqualak Lumber Company.

Thomas Peele III, Baker & McKenzie on behalf of Slocan Forest Products, Ltd.

W.J. Rusty Wood on behalf of Tolleson Lumber Company, Inc.

Gracia Berg, Lisa A. Murray, Gibson, Dunn & Crutcher, LLP on behalf of West Fraser Mills, Ltd.

Matthew M. Nolan, Miller & Chevalier Chartered on behalf of Weyerhaeuser Company.

I. INTRODUCTION

This is the fourth time this Panel, which was constituted under the North American Free Trade Agreement (“NAFTA”) is called upon to review a determination of the Department of Commerce (“The Department”, “Commerce”, or “The Investigating Authority”) in the countervailing duty determination for Softwood Lumber from Canada.¹

In its Final Determination, the Investigating Authority determined that provincial stumpage programs under which Canadian provinces confer rights to harvest timber from Crown forests conferred subsidies which are countervailable under United States Law. In our first decision this Panel ruled that the Department had not properly measured the amount of the subsidy. Commerce had determined the adequacy of remuneration to the provincial governments by comparing Crown stumpage fees to prices for timber harvested from forestlands in the United States.²

As a consequence, the matter was remanded to the Investigating Authority, and in its First Remand Determination dated January 12, 2004, the Department concluded that benchmark prices could be derived from sales of logs which were traded in Canada without the involvement of the provincial governments. Basically, the Department started with the price of the log and subtracted the elements necessary to get “back to the stump” in order to compare the result with Crown stumpage fees.

Commerce’s subsequent determinations, and this Panel’s decisions in response to challenges to those determinations, have dealt with the proper starting point for these calculations and the elements to be deducted.

The Panel will not review all of the issues which were raised in the several challenges, but will address the issues arising from the remand orders in our third and most recent Remand Decision dated May 23, 2005.

II. STANDARD OF REVIEW

Reference is made to the first three decisions of this Panel for a thorough discussion on the standard of review required to be applied by a binational panel created pursuant to Chapter 19 of the North American Free Trade Agreement. Suffice it to say at this time that the Panel is required by Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, to “hold unlawful any determination, finding, or conclusion found... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law...”

¹ *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination*, 67 Fed. Reg. 15545 (Apr. 2, 2002).

² See 19 U.S.C. 771(5)(E).

In applying the standard of review to this case, the Panel will not re-weigh the evidence leading to the Department's findings of fact where the Department has faithfully followed its stated methodology, but will give due deference to those findings.

III. THE REMAND ORDERS

As summarized by the Department in its Fourth Remand Determination, the Panel orders concerned (1) Québec syndicates' missing pricing information; (2) profit earned by private log sellers in Québec; (3) profit earned by log sellers in Ontario; (4) exclusion of sales by Ontario companies for which the "input source" was unsubsidized; (5) matching the numerators to the denominators of the countervailing duty rate calculations; and (6) revision of the surrogate benchmarks for Manitoba and Saskatchewan to reflect the results of the recalculation of the benchmarks for Québec and Ontario.

The first order was to allow the reopening of the record to allow Canada to add to the record certain pricing information if Canada was able to provide it. Since Canada advised the Department that the information was not available, the record was not reopened, and there is no challenge to this result.

The second order concerns the calculation of profit to log-sellers in Québec. As Canada has challenged the Department's determination on this point, the issue is discussed in the next section of this decision. As the calculation of profit in Ontario (third order), Manitoba and Saskatchewan (sixth order) turns on Québec, the following section will deal with these three Provinces.

The fourth order required the exclusion from the countervailing duty order of Ontario companies which sourced its logs from unsubsidized lumber. The Investigating Authority's determination in this regard has also been challenged, and will be discussed, *infra*.

The fifth order required the Department to match the numerators with the denominators of the countervailing duty rate calculations. No challenge has been made to Commerce's treatment of this issue, and the Panel accepts its calculations.

IV. PROFIT IN QUÉBEC.

In its First Remand Determination, as noted, Commerce reasoned that benchmark prices (by species and province) for logs originating on other than Crown lands could be developed from information in the record. In order to be able to compare these prices with Crown stumpage, it recognized that certain adjustments had to be made. These adjustments were indicated to be harvesting and hauling costs, forest planning costs, and, where available, profits.³ The issue here concerns the amounts to be deducted for profit, namely the profit earned by the log seller, *i.e.* the amount by which the sale price exceeds his costs.

³ First Remand Determination at 14 (Jan. 12, 2004).

In constructing its benchmark prices for Québec, Commerce reasoned that the benchmark prices should include not only logs sourced from Québec forests, but imported logs (mainly from Maine), since imported logs are part of the trade in that province. Over the strenuous objection of the Canadian parties (imported logs are materially higher in price), the Panel upheld the inclusion of Maine imports. And, in subsequent decisions, we have insisted that the imports be treated in all respects the same as the domestic logs for purposes of the deductions identified in the preceding paragraph.

Therefore, in our Third Remand Decision, we ordered the Department to recalculate the profit earned by log sellers in Québec starting with a blended price combining both Québec sourced and imported logs from Maine. In its Third Remand Determination Commerce had calculated a (negative) profit on the sales of Québec sourced logs only, and then applied that figure to the blended log price, resulting in a zero profit finding for log sellers during the POI.

In its Fourth Remand Determination, while continuing to strongly object to the requirement that it calculate the profit based upon all sales of all private logs, Commerce nonetheless calculated the profit as ordered by the Panel in this respect. Thus, the formula applied was, to subtract from the blended log price (C\$63.74) the private harvest and haul costs (C\$39.66) and private stumpage (C\$19.74) to arrive at a profit of C\$4.38.⁴ This is generally in line with the methodology accepted by the Department and the Canadian parties in previous determinations and briefs. However, Commerce went one step further, and reduced the profit (which it denominated “Overall Profit”) by apportioning part of this profit to “Profit on Log Sale”. Commerce did this by dividing the harvest and haul costs by the blended price and multiplying the result (.6218) by the “overall profit” of C\$4.38, yielding the figure of C\$2.72.

The Investigating Authority’s rationale for this apportionment appears to be that where a timber owner chooses to sell logs, rather than standing timber, his profit is attributable to both timber and log sales. Therefore, it finds it necessary to separate out the amounts attributable to each. The Department states:

As we understand the Panel, a landowner who chooses to sell logs as opposed to timber, does so in part to earn an additional amount of profit over and above what he could earn on the sale of timber. Therefore, we have measured, and deducted, only that incremental amount of profit associated with the sale of the log. Absent specific information on the record as to the amount of profit associated with each option, we have reasonably allocated the entire amount of “profit” derived from the methodology the Panel directed we use. Because the overall amount of profit we are able to calculate stems from both the landowner’s land ownership and forest management costs and the additional costs of hiring harvesters and haulers, we have apportioned the overall “profit” in proportion to

⁴ In fact, the resulting figure is C\$ 4.34, not C\$ 4.38.

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the costs associated with the sale of timber and the sale of logs.⁵ We allocated, as a percentage of the log price, the costs associated with the timber sale phase and costs associated with the log sale phase.

[Fourth Remand Determination at 18-19 (Jul. 7, 2005)].

In addition, the Department observes that it is persuaded by the Petitioner's argument that it is logical to assume that a higher benchmark price is consistent with the conclusion that the provincial stumpage programs result in a depressed price for lumber, and that during the POI many log sellers sold logs at a loss due to declining prices.

The Canadian Parties attack the Remand Determination on profit with several arguments. First, they argue, Commerce was not free to alter its methodology, since the Panel had remanded only to implement the residual value methodology which was found reasonable by the Panel in the Third Remand Decision. They also point to a number of instances in which this Panel has refused to reopen the case to address arguments previously dealt with.

They continue by indicating that an apportionment theory was specifically rejected by the Panel in its Second Remand Determination, in dealing with the profit calculation for the Province of Alberta, so that even if Commerce were free to alter its methodology, it could not do so on this issue.

Lastly, the Canadian Parties argue that the private stumpage price (one of the factors deducted in the residual value formula) includes all of the profit associated with the landowners' part of the transaction. Therefore, there is no substantial evidence to suggest that this profit should be added back to the log sellers' part of the transaction. In its separate brief, Québec surmises that the Department's "misunderstanding" that the C\$ 4.38 figure includes an amount for timber seller profit arises from its belief that the C\$ 19.74 private stumpage fee includes only his costs rather than the price which landowners charge when selling to independent harvesters.

Petitioner, the Coalition for Fair Lumber Imports, stresses two points. The first is that there is record evidence showing that during the POI timber sold for more than logs. Therefore, during this period, there was no additional profit earned by log sellers over and above that earned by timber sellers. Second, the Petitioner argues that the residual value methodology is tautological.

The Panel's discussion of these issues follows.

⁵ The Department's Remand Determination contains a reference to footnote 21 following the words "management costs" in this sentence. The text, however, contains no footnote. The Panel assumes that whatever reference was intended does not materially alter the meaning of the sentence.

1. The Department's change in methodology

There is no doubt that the Department, on remand, is limited to consideration only of matters for which a panel has ordered reconsideration. In this case, the Panel did not specifically indicate that the Department was precluded from modifying the residual value in any respect (other than as ordered by the Panel). In the abstract, the Panel is loathe to say that, owing to the "law of the case", the Department could not exercise its discretion to refine its methodology in any respect. However, in light of the following discussion, we determine that it is not necessary for the Panel to consider whether the "apportionment" theory was contrary to the "law of the case".

2. The Apportionment Theory

The Panel has difficulty understanding the logical basis for Commerce's "apportionment" of what it terms the "overall profit". Given the reliance upon the residual value methodology: benchmark log price minus (harvest and haul costs) minus (private stumpage) equals profit, it is illogical to go *beyond* "the stump", and consider the landowner's profit to be part of the "overall" profit. One of the elements of this formula is private stumpage. During the investigation the Government of Québec reported prices for private standing timber, *i.e.*, the prices received by private landowners for standing timber. The Department did not challenge the accuracy of these prices, and, indeed, used them in its calculations. Simply stated, there is no evidence that these prices do not include, as logically they should, any profit earned by the landowners. If that is the case, the application of the residual value method accounts for any profits earned by the landowner as the seller of stumpage, regardless of whether he sells the timber or sells logs from this timber. Therefore, we find that there is no substantial evidence to support the "apportionment" of the profit.

The Department, in its brief before this Panel states:

As a consequence of the depression of private timber prices in Québec, the profit embedded in the private standing timber figure does not sufficiently account for profit in an open market. Semantics aside, this fact is true whether the Department refers to the private timber stumpage prices as "cost" or as a "figure". (footnote omitted)

...The Department cannot ignore its determination that private stumpage in Québec is suppressed and that as a result of that suppression, absent some additional calculation, the resulting profit adjustment is excessive while the benefit is understated. Despite the Panel's affirmance of the Department's determination that private timber prices in Québec are suppressed, neither the GOC nor the QLMA address timber price suppression or how the Department should account for it.⁶

⁶ This Panel did not, in fact, conclude that prices in Québec were suppressed. In our decision of August 13, 2003, we found that there was conflicting evidence as to whether prices in Canada were suppressed and therefore the Department's benchmarks were inadequate for the purposes of the first regulatory tier. We

[Department of Commerce Rule 73(2)(c) brief at 21 (Aug. 22, 2005)].

Regardless of Commerce's view that prices for standing timber are suppressed,⁷ we see no basis in the record to arbitrarily assign part of the log seller profit to the seller of timber. The Department is directed to determine the amount of log seller profit to be C\$4.34.

The first of Petitioner's two points concerning profit in Québec is that there is record evidence showing that during the POI timber sold for more than logs. Therefore, according to Petitioner, during this period there was no additional profit earned by log sellers over and above that earned by timber sellers. Second, the Petitioner argues that the residual value methodology is tautological.

Because it has already rejected both arguments, the Panel will not consider Petitioner's persistent arguments *for* consideration of *Sawlog Journal* and *Sawlog Bulletin* data, and *against* the inclusion of imported log prices in the blended price calculation. The record evidence purportedly showing that during the POI timber sold for more than logs is extracted from *Sawlog Journal* and *Sawlog Bulletin* advertisements. This Panel has already decided that there is no substantial evidence supporting the use of those advertisements. The record is devoid of evidence that any transactions took place at the advertised prices, or even as the result of these advertisements at any price.

Petitioner's insistent allegations that using inconsistent timber and log prices in the profit calculation results in a tautology also will not be reconsidered. The Panel has already decided that the profit calculation must start with the weight-averaged blended price of imported and private logs, and that Maine costs cannot be deducted from the blended price because they are not reflective of market conditions in Québec. That the blended price is deducted from the log price benchmark is a logical result of the mathematical formula used by the Department for the calculation of the benchmark.

V. PROFIT IN ONTARIO, MANITOBA, AND SASKATCHEWAN

To the extent that profit in Ontario, Manitoba, and Saskatchewan is derivative of the figure for Québec, the Department is ordered to adjust the profit figures for these three provinces.

noted that, based upon the evidence as to this Province, we might have reached a different conclusion. But we deferred to the Department for first regulatory tier purposes only. In addition, we noted that in a prior Lumber countervailing duty determination, "Lumber III", the Department itself (albeit under a different statutory scheme) found that Québec's private prices were not distorted.

⁷ The Department's view is based on Petitioner's assertion; there is no reference in the Final Determination to record evidence on price suppression. *See* Final Determination at 12.

VI. ONTARIO COMPANY EXCLUSIONS

In our Third Remand Decision, the Panel ordered the Investigating Authority to grant exclusions from the Countervailing Duty Order to Ontario companies which sourced their lumber in Ontario. This was a consequence of the finding by the Department in the Third Remand Determination that the net benefit was *de minimis*. We reasoned that if Ontario companies were not subsidized, the wood which they harvested in that province should not be subjected to the duty. On remand, the Department refused to consider the exclusion of any company, and the Ontario parties challenge that refusal.

Canada contends that, if the Department implements the Québec profit calculation in the manner which we have ordered in the present Decision, the countrywide rate will be *de minimis*. In that case, the Countervailing Duty Order will have to be revoked. Consequently, the Panel will take no action at this time with regard to the issue of company exclusions, as the issue would be moot.⁸

VII. REMAND ORDERS

1. The Department is directed to determine the amount of log seller profit to be C\$ 4.34, and to refrain from apportioning this amount.
2. The Department is directed to adjust the profit figures for Ontario, Manitoba, and Saskatchewan to the extent that their profit figures are derivative of the profit figure for Québec.

The Investigating Authority is ordered to complete its remand determination by the firm date of October 28, 2005.

⁸ The Panel also declines to rule on Petitioner's motion to exclude consideration of the recent ruling of the Extraordinary Challenge Committee, ECC-2004-1904-01USA. The issues raised by the Canadian parties with respect to the ECC ruling would be moot if the redetermination of profit results in a countrywide *de minimis* rate. The fundamental question of the legal basis for the countervailing duty order in light of the ECC decision affirming the International Trade Commission's negative threat or "no injury" determination pursuant to the order of the NAFTA injury panel would also be moot. See the ITC Remand Determination issued on Sept. 10, 2004. Accordingly that question will not be addressed by the Panel.

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SIGNED IN THE ORIGINAL BY:

Daniel A. Pinkus_____

Daniel A. Pinkus, Chair

William E. Code_____

William E. Code

Germain Deins_____

Germain Denis

Milton Milkes_____

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Daniel G. Partan_____

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