

Business

B.C. log export restrictions the big change in softwood lumber dispute

By **Brenda Swick**



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(March 15, 2018, 8:52 AM EDT) -- The softwood lumber dispute is one of the longest trade disputes between the United States and Canada.

On Jan. 2, 2018, the U.S. Department of Commerce (DOC) published the final order imposing antidumping and countervailing duties (CVDs) on imports of softwood lumber from Canada (with the exclusion of certain softwood lumber products first produced in Newfoundland and Labrador, Nova Scotia or Prince Edward Island from logs harvested in these three provinces). The DOC imposed dumping margins ranging from 3.2 to 7.28 per cent and subsidy rates of between 3.34 and 17.99 per cent. The orders come one month following after the U.S. International Trade Commission unanimously ruled that the dumping and subsidizing is causing injury to the U.S. softwood lumber industry.

The government of Canada has challenged the U.S. duties at both the World Trade Organization and pursuant to Chapter 19 of the North American Free Trade Agreement.

Not only does the dispute continue to focus on the alleged subsidization of Canadian lumber producers through what is known as "stumpage" (i.e. the provision of provincially owned government timber to producers for less than the market value of the timber), it now also embraces log export restrictions (LERs) in British Columbia *including those restrictions applicable to timber harvested off federally regulated private land*, which the DOC has found confer a countervailable subsidy to Canadian producers.

Under federal legislation, the export of logs is prohibited unless an export permit is issued by the minister of Foreign Affairs and International Trade (the minister). This permit requirement is set out in the *Export and Import Permits Act*, R.S.C. 1985, c. E-19. As a result, logs are listed as Item 5101 on Canada's *Export Control List*, S.O.R./89-202.

In B.C., the vast majority of the harvestable land base is provincial Crown land, with a small percentage being federally regulated private land. Federal Notice No. 102 (Notice 102) is a policy adopted by the federal government with regard to the regulation of federally regulated private land in B.C.

Notice 102 applies a "Surplus Test" to proposed log exports harvested from private lands in B.C. This means that logs cannot be exported from B.C. private lands unless they are "surplus" to the needs of domestic processors. The Surplus Test requires the log harvester to first offer logs to a local processor before an export permit can be issued.

The DOC determined that the B.C. LER regime, and particularly the Surplus Test, allows domestic processors to “block” exports by objecting to the granting of export licences for B.C. logs. A domestic processor need merely make an offer on an export application to halt the export process of a log. As a result, timber harvesters in B.C. are often forced to negotiate informal supply arrangements at discounted prices with certain domestic processors in exchange for the processor’s agreement not to block the harvester’s exports. Therefore, LERs lower the price of logs below the levels that timber harvesters could obtain on the international market by exporting the logs.

The B.C. LER regime is a contentious point for American industry, who alleged in their petition that LERs suppress domestic log prices by up to 66 per cent. In reaching its conclusion, the DOC made a number of significant findings, including that B.C.’s LERs result in a financial contribution by means of entrustment or direction of private entities in that official governmental action compels suppliers of B.C. logs to supply to B.C. consumers, including mill operators.

More recently Canada’s efforts to defend its controversial restrictions on the export of logs from British Columbia took a recent blow, as a WTO panel affirmed the DOC methodology in calculating the CVDs on coated paper from Indonesia on account of Indonesia’s log export ban. As indicated earlier, DOC has historically and consistently treated export restrictions on inputs as financial contributions that confer a benefit to the end product.

In its decision to impose CVDs on Indonesia paper, the DOC found that (a) through Indonesia’s prohibition on log exports, it directed its harvesting companies to provide logs to pulp and paper companies at low or suppressed domestic prices (i.e. a financial contribution), and (b) to measure the benefit conferred by the export ban, it compared the domestic price paid by the paper company for logs to a benchmark price based on world prices. Although the issue of financial contribution was not before the WTO, its panel found no error with the U.S. methodology for calculating the benefit attributable to Indonesia’s log export restrictions. There was no appeal.

As of late, the legality of Canadian LERs has become somewhat of a cause célèbre in the world of subsidies, with the DOC targeting Canadian LERs in its high-profile softwood lumber dispute, but also in respect of Canadian exports of uncoated groundwood paper and supercalendered paper. As expected, Canada reacted to this onslaught by appealing the individual CVD determinations, and many of these determination are now before panels established under Chapter 19 of the NAFTA and/or the WTO.

In January 2018, Canada also filed an “as such” systemic WTO challenge of how the U.S. administers its trade remedy laws — including its practice of treating export restrictions as a countervailable subsidy. At the moment, the WTO has a severe shortage of appellate body members and a growing backlog of cases. Therefore, as it relates specifically to Canadian LERs, further WTO/NAFTA jurisprudence on this issue will most certainly be decided sooner under the NAFTA with the Chapter 19 panel in the current softwood lumber CVD challenge scheduled to hear the matter and render a decision later this year ... that is, as long as there is a NAFTA.

Painful CVDs will continue to be in effect pending the most likely outcome of the dispute: the eventual negotiation of another bilateral agreement. The ultimate agreement could very well include far-reaching changes to provincial forest regimes, including the elimination of LERs on private lands in B.C. by the Canadian federal government.

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