

Global Arbitration Review

News

Canada prefers lump sum payment over duty

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Canada has opted to pay the US a lump sum of US\$37 million for breaching the Softwood Lumber Agreement rather than impose extra charges on provincial lumber manufacturers, in a choice that has proved controversial.

An LCIA tribunal last month gave Canada the option of paying damages or imposing a 10 per cent surcharge on lumber exports from Ontario, Quebec, Manitoba and Saskatchewan to compensate the US for the provinces' exceeding their shipment quotas for six months in 2007. The provinces already pay a 5 per cent duty on lumber shipped south.

Last week Canada's Trade Minister Stockwell Day said that Canada's decision is linked to the recession. "At this difficult time for the industry, Canada chose this payment alternative instead of imposing an additional export charge, which would result in further mill closures and job losses in communities," he said in a written statement.

The state itself calculated the damages that it owed, but Day said it will pay more if the LCIA tribunal rules the payment is insufficient.

Sources in the US have responded sceptically. Influential Maine Senator **Olympia Snowe** and the Coalition for Fair Lumber Exports each called for Canada to impose the duty until it collects US\$54.8 million, as the LCIA directed.

"Canada's attempt to pay off the US government to make this problem go away constitutes another, especially insidious, gambit to subsidise its lumber industry," said Snowe, who is on the senate committee that oversees trade relations.

Steve Swanson of the Coalition for Fair Lumber Imports, meanwhile, accused the Canadian government of "playing games of smoke and mirrors and trying to cover its contempt for the final LCIA award in a cloak of alleged conformity". Swanson says the payment won't crimp Canada's exports.

The US and Canada fought for decades about whether Canada improperly subsidises its lumber producers, before signing a seven year deal in 2006 to settle the battle.

The deal required Canada to impose taxes and volume caps on exports to the US when prices drop below certain levels.

In 2007, the US accused Canada of breaching the deal and filed for the first of two LCIA arbitrations. Last year, a tribunal chaired by **Karl-Heinz Bockstiegel** cleared British Columbia and Alberta, Canada's two biggest lumber-exporting provinces, of miscalculating quotas.

Canada continues to deny breaches of the agreement by any province.

Lumber producers in both the US and Canada have been struggling because of the collapse of the US housing construction market. Canada supplies about 30 per cent of the lumber used in the industry.

A second LCIA arbitration is still pending over subsidies allegedly paid to Canadian lumber producers by provincial governments. The US instigated proceedings last January. An award is expected before the end of the year.

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Arbitral panel

Karl-Heinz Bockstiegel, chair (Germany)

V V Veeder QC (UK)

Bernard Hanotiau (Belgium)

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United States Trade Representative

General counsel **Warren Maruyama** in Washington, DC

United States Department of State

Principal deputy legal adviser **Joan Donoghe** in Washington, DC

United States Department of Justice, Commercial Litigation branch

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