

Ottawa, Monday, June 3, 1991

Appeal No. 2977-14

IN THE MATTER OF an appeal heard on January 15, 16 and 17, 1991, pursuant to sections 81.19 and 81.21 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF three notices of determination dated October 21, 1987.

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. 2977-14

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal pursuant to sections 51.19 and 51.21 (now 81.19 and 81.21) of the Excise Tax Act from three Notices of Determination (MTL 24306, MTL 24307 and MTL 24308) dated October 21, 1987.

The appellant is requesting that the Tribunal set aside the three notices of determination and declare that the appellant is entitled to a fuel tax rebate of the federal sales tax paid by it in the amount set out in the applications for rebate, which are the subject of the appeal, and to a levy offset in respect of petroleum compensation charges paid by it in the amount set out in these applications for rebate, in accordance with the Primary Industries Levy Offset Program Regulations.

The appellant argues that the respondent erred in fact and in law in disallowing the rebates in the amount set out in the applications for rebate.

HELD: *The appeal is not allowed. The Tribunal finds that coal is at a stage equivalent to the prime metal stage, within the meaning of that expression as it is found in subsection 49.01(1) of the Excise Tax Act, when it is crushed to size and washed and dried at the washery at the coal mine.*

The Tribunal further finds that the transportation of woodchips by the appellant does not fall within the meaning of the definition of the word "logging" as contained in subsection 49.01(1) of the Excise Tax Act.

*Place of Hearing: Ottawa, Ontario
Dates of Hearing: January 15, 16 and 17, 1991
Date of Decision: June 3, 1991*

*Tribunal Members: Arthur B. Trudeau, Presiding Member
Kathleen E. Macmillan, Member
Sidney A. Fraleigh, Member*

Counsel of the Tribunal: Jean Bellemare

Clerk of the Tribunal: Joseph LaRose

*Appearances: Michael Kaylor, for the appellant
Michael Ciavaglia, for the respondent*

Cases Cited:

Denison Mines Limited v. The Minister of National Revenue, Tariff Board Appeal Nos. 2972 and 2973, December 9, 1988; Ouellette v. C.P.R. [1925], 2 W.W.R. 494; R. v. Yolles, 30 C.R. 93; Marquis Camden v. Inland Revenue Commrs. [1914], 1 K.B. 641 cited Re McIntyre Porcupine Mines Ltd. and Morgan (1921), 49 O.L.R. 214; The Dentists' Supply Company of New York v. D.M.N.R. (Customs and Excise) [1956-1960], Ex. C.R. 540.

Ottawa, Monday, June 3, 1991

Appeal No. 2938-17

IN THE MATTER OF an appeal heard on January 15, 16 and 17, 1991, pursuant to section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF a decision by the Minister of National Revenue, dated October 22, 1987, with respect to a notice of objection filed on August 27, 1987, pursuant to section 81.17 of the *Excise Tax Act*.

BETWEEN

CANADIAN PACIFIC LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. 2938-17

CANADIAN PACIFIC LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal pursuant to section 51.19 (now 81.19) from a decision by the Minister of National Revenue, dated October 22, 1987, with respect to a notice of objection filed on August 27, 1987, pursuant to section 51.17 (now 81.17) of the Excise Tax Act.

The appellant is requesting that the Tribunal set aside the decision of the Minister and declare that the appellant is entitled to a fuel tax rebate of the federal sales tax paid by it in the amount set out in the application for rebate, which is the subject of the appeal, and to a levy offset in respect of petroleum compensation charges paid by it in the amount set out in these applications for rebate, in accordance with the Primary Industries Levy Offset Program Regulations.

The appellant argues that the respondent erred in fact and in law in disallowing the rebates in the amount set out in the application for rebate.

HELD: *The appeal is not allowed. The Tribunal finds that coal is at a stage equivalent to the prime metal stage, within the meaning of that expression as it is found in subsection 49.01(1) of the Excise Tax Act, when it is crushed to size and washed and dried at the washery at the coal mine.*

Place of Hearing: Ottawa, Ontario
Dates of Hearing: January 15, 16 and 17, 1991
Date of Decision: June 3, 1991

Tribunal Members: Arthur B. Trudeau, Presiding Member
Kathleen E. Macmillan, Member
Sidney A. Fraleigh, Member

Counsel of the Tribunal: Jean Bellemare

Clerk of the Tribunal: Joseph LaRose

Appearances: Michael Kaylor, for the appellant
Michael Ciavaglia, for the respondent

Cases Cited: *Denison Mines Limited v. The Minister of National Revenue, Tariff Board Appeal Nos. 2972 and 2973, December 9, 1988; Ouellette v. C.P.R. [1925], 2 W.W.R. 494; R. v. Yolles, 30 C.R. 93; Marquis Camden v. Inland Revenue Commrs. [1914], 1 K.B. 641 cited Re McIntyre Porcupine Mines Ltd. and Morgan (1921), 49 O.L.R. 214; The Dentists' Supply Company of New York v. D.M.N.R. (Customs and Excise) [1956-1960], Ex. C.R. 540.*

Appeal No. 2977-14

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Appeal No. 2938-17

CANADIAN PACIFIC LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
KATHLEEN E. MACMILLAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

Appeal No. 2977-14 is an appeal by Canadian National Railway Company (CN), pursuant to sections 51.19 and 51.21 (now 81.19 and 81.21) of the *Excise Tax Act*¹ (the Act), from three Notices of Determination (MTL 24306, MTL 24307 and MTL 24308) dated October 21, 1987.

Appeal No. 2938-17 is an appeal by Canadian Pacific Limited (CP), pursuant to section 51.19 (now 81.19) of the Act, from a decision by the Minister of National Revenue (the Minister), dated October 22, 1987, with respect to a notice of objection filed on August 27, 1987, pursuant to section 51.17 (now 81.17) of the Act.

As Appeal Nos. 2938-17 and 2977-14 relate to the transportation of goods by rail and raise generally the same issue of interpretation of section 49.01 (now 45) of the Act, it was agreed that both appeals would be heard together.

The issues in these appeals are whether coal, as transported by CN or by CP, and woodchips, as transported by CN, fall respectively within the definition of the words "mining" and "logging" as set out in subsection 49.01(1) of the Act.

If so, the appellants are entitled to a rebate on the fuel tax and the petroleum compensation charge paid in respect of the diesel fuel consumed by their locomotives during the transportation of coal or woodchips.

1. R.S.C., 1985, c. E-15, as amended.

The relevant provisions of the Act, as they read at the relevant time, are as follows:

49.01(1) In this section,

...

"logging" means the felling, limbing, bucking and marking of trees, construction of logging roads, off-highway transportation of logs to a mill pond or mill yard, log salvaging and reforestation, but does not include any production activity on logs after transportation to a mill pond or mill yard;

"mineral resource" means

- (a) a base metal or precious metal deposit,
- (b) a coal deposit, or
- (c) a mineral deposit in respect of which

- (i) the Minister of Energy, Mines and Resources has certified that the principal mineral extracted is an industrial mineral contained in a non-bedded deposit,
- (ii) the principal mineral extracted is sylvite, halite or gypsum, or
- (iii) the principal mineral extracted is silica that is extracted from sandstone or quartzite;

"mining" means the extracting of minerals from a mineral resource, the processing of ore, other than iron ore, from a mineral resource to the prime metal stage or its equivalent, the processing of iron ore from a mineral resource to the pellet stage or its equivalent and the restoration of strip-mined land to a useable condition, but does not include activities related to the exploration for or development of a mineral resource;

...

(6) Where gasoline or diesel fuel has been sold to or imported by

...

- (e) a person for use in logging, or
- (f) a person for use in mining,

for the sole use of the purchaser or importer and not for resale, and the tax imposed by Part V has been paid or is payable in respect of the gasoline or fuel and, in the case of a sale, the amount charged therefor has not been reduced in accordance with subsection (3) or (5), the Minister may, on application by the purchaser or importer in such form and manner as the Minister prescribes, made to the Minister within four years from the time the gasoline or fuel was purchased or imported, pay to the purchaser or importer a fuel tax rebate in an amount calculated in accordance with subsection (8).

(7) Subsections (2), (4) and (6) do not apply in respect of gasoline or diesel fuel

- (a) that is used to propel a vehicle on a public highway;
- (b) that is to be used other than for a commercial purpose; or
- (c) that is sold or imported on or after January 1, 1987. (Emphasis added)

FACTS

Under section 49.01 of the Act and the *Primary Industries Levy Offset Program Regulations* made pursuant to section 75 of the *Energy Administration Act*,² certain persons, during the period relevant to this appeal, were entitled to a fuel tax rebate and to a petroleum compensation charge provided that they qualified and satisfied the requirements set out in that section and in these regulations.

During the period relevant to this appeal, CN transported, amongst other goods, coal and pulpwood chips, and CP transported, amongst other goods, coal, from various shippers to various locations in Canada, in the course of which the appellants' locomotives consumed diesel fuel in respect of which sales tax and petroleum compensation charges were paid in accordance with the Act and the *Energy Administration Act*, respectively.

On February 18, 1986, January 13, 1987, and July 29, 1987, respectively, an application for Rebate of Fuel Tax on Gasoline or Diesel Fuel was filed by CN: Claim No. 80451 covering the period from October 1, 1985, to January 31, 1986; Claim No. 80147 covering the period from February 1, 1986, to December 31, 1986, and Claim No. 80409 covering the period January 1, 1987, to June 30, 1987.

On October 21, 1987, Notices of Determination MTL 24306, MTL 24307 and MTL 24308 were issued by the respondent rejecting Claim Nos. 80451, 80147 and 80409 insofar as these claims related to the transportation of coal or woodchips.

On January 8, 1988, CN sent three notices of objection pursuant to section 81.17 of the Act. By letter dated March 21, 1988, the respondent agreed to allow the notice of determination in respect of each claim to be appealed directly to the Tariff Board. On April 21, 1988, an appeal in respect of each notice of determination was made to the Tariff Board by the appellant.

On May 13, 1987, an application for Rebate of Fuel Tax on Gasoline or Diesel Fuel, covering the period December 1, 1984, to December 31, 1986, was filed by CP.

By notice of determination dated June 22, 1987, the respondent disallowed the claim insofar as it related to transportation activities of coal from the mine to the commercial end users.

On August 27, 1987, CP sent a notice of objection pursuant to section 81.17 of the Act. By notice of decision dated October 22, 1987, the Minister confirmed the notice of determination on the grounds that "coal is at the prime metal stage equivalency when the cleaned coal is at the wash plant and is ready for shipment to customers." On January 13, 1988, an appeal in respect of the decision by the Minister was made to the Tariff Board by the appellant.

Appeal Nos. 2938-17 and 2977-14 were taken up and continued by the Canadian International Trade Tribunal (the Tribunal) pursuant to section 60 of the *Canadian International Trade Tribunal Act*.³ Notices of appeal were published in Part I of the December 8, 1990, issue of the Canada Gazette and the appeals were heard together on January 15, 16 and 17, 1991, in Ottawa.

CN called nine witnesses, CP called one witness and the Minister called one witness.

2. R.S.C., 1985, c. E-6, as amended.

3. S.C. 1988, c. 56.

THE ISSUE OF COAL

Evidence of CN

Dr. R. L. Harris, Associate Professor, Department of Mining and Metallurgical Engineering, McGill University, provided evidence with respect to the processes followed from the mining of an ore body containing valuable minerals to the production of non-ferrous metals. In addition, he gave his opinion on the meaning of "prime metal stage" as it applies to copper, zinc and aluminum and its equivalent as it applies to coal.

The first step in the recovery of metal in a mining operation involves drilling, blasting, loading onto trucks and haulage, and stockpiling of rock that is removed from an ore body in the ground. The rock is then fed into mineral processing operations that crush the rock to break the valuable minerals from the non-valuable minerals. From this operation is obtained concentrate and gangue, a waste material. The concentrate still contains some gangue because the mineral processing is not complete. The next step is smelting and refining where various reactants are used, as well as the application of heat, to separate and obtain the sought after product. By-products of value, as well as waste or impurities, are also obtained. It is only after the completion of these processes that the prime metal stage is reached.

Dr. Harris stated: "This is the point ... where the metal has first reached its concentrated stage in a useful form for operations which might follow the mining operations...."⁴

Several documents explaining in detail the steps followed in the production of copper and concerning non-ferrous extractive metallurgy were filed as exhibits.

The production of copper from copper ores requires the following steps:

- Mining and transportation - extraction of the ore from the earth's crust in the form of rock of about minus 6 in.
- Mineral Processing - separation of valuable minerals from waste by crushing, grinding and flotation are necessary. The resulting product is copper concentrate (20 to 30 wt. % Cu).
- Smelting - to separate the copper atoms from the non-copper atoms in the concentrate. The product of smelting is copper matte, a liquid mixture comprising predominantly copper sulphide and iron sulphide.
- Converting - to convert copper matte into copper blister (98.5 wt. % Cu) by using a converter.
- Fire-refining - to partially purify the blister copper to obtain copper anode (99.5 wt. % Cu).
- Electrorefining - to fully purify the copper anode to obtain copper cathode (99.9 wt. % Cu).

4. Transcript of Proceedings, Vol. 1A, p. 23.

Dr. Harris indicated that all the steps or stages of processing noted above are necessary to produce a piece of metallic copper that is either sold as such or used to fabricate copper products. In his view, the copper cathode is a prime product, in other words, a material that is basic to further fabrication. The copper cathode is the prime metal stage of copper ores.

Dr. Harris agreed that the term "prime metal stage" has no specific industry or technical meaning, except to note that the trade name "Prime Western Grade" is used to refer to zinc of a certain purity, and such zinc would be at the prime metal stage.

Mr. H. G. Rushton, B.Sc. (Hons.) Geology, Vice-President, Development, Crows Nest Resources Limited, is responsible for all aspects of coal development (land, exploration, mining design, preparation plant design, environmental, regulatory and construction). As well, he conducts technical matters with coal clients.

Several documents prepared by Mr. Rushton were filed as exhibits and discussed in detail. These are: Coal Classification, Coal Analysis & Testing, Coal Preparation at the Mine Site, Coal for Transportation, Preparation by Users and Analogy to Smelting of Ores.

Mr. Rushton explained that coal, essentially, is a rock composed of mixtures of minerals, such as quartz or feldspar, and the fossilized remains of vegetable matter that through time and pressure has been subjected to coalification, a process whereby volatile matters are released and high-fixed carbon content coal is formed.

Coals in North America, including Canada, are classified in accordance with American Society for the Testing of Materials (ASTM) Standard D-388 "Standard Classification of Coal by Rank."

The four classes or ranks of coals are: Anthracite, Bituminous, Subbituminous and Lignitic.

Standards for the upper and lower limits for fixed carbon and volatile matter content in percentage in the coal and its calorific value are established as well as are agglomerating characteristics.

Mr. Rushton explained that the rank of the coal is important for its use. For example, although all coking coals (which must be agglomerating or free flowing) fall within the bituminous class, not all coal in this class are necessarily coking coals. All coals, however, can be used as fuel regardless of class, but the high-ranking coals have higher calorific value than the low-ranking coals.

Coal testing and analysis are generally conducted under ASTM standards. Various tests were described and explained.

Coal is purchased from the mine according to the customer's specifications that are covered by the terms of the supply contract.

Specifications normally include maximum size of coal particles, moisture content limits, ash content limits, volatile matter limits and calorific value, sulphur content limits and free swelling index minimum (coking coals).

Normally, the coal as mined does not conform to the sales specifications. It is therefore necessary for the coal producer to prepare the coal. This is done in the washery at the mine. The washery performs the following operations:

1. Reduction (in a breaker) of lumps of coal or rock to pre-set maximum size and rejection of larger pieces of rock.
2. Crushing and screening of coal to size specifications.
3. Separation of coal and ash by passing coal through a heavy-liquid medium or other process.
4. Drying coal to contract specifications.

At the coal mine, several very important factors for safety in transportation and convenience of handling by the customer are taken into consideration. These relate to sizing, moisture content and spontaneous combustion. It would not be safe, for example, to ship coal in dry powder form, as it could explode, or to ship by rail coal in very fine particles, as it would be blown out of the rail car during the voyage and cause environmental damage. For these reasons, coal is shipped in a certain size and with a certain moisture content even though such size and moisture content might not be appropriate for the use for which the coal is intended. As a result, it is essential that the coal be prepared by the users at destination.

A description of the steps followed by the coal users in the preparation of the coal before use was provided by Mr. Rushton. Coals may be blended to achieve proper mixtures, but all metallurgical coals must be crushed to size and either dried or moistened to achieve the proper moisture levels before it is charged into the coking ovens. In the case of thermal applications, after it is crushed, the coal must be further pulverized and dried before being blown into the boiler. None of the steps followed by the clients alter the basic characteristics of the carbon content of the coal, or macerals, until the coal is used to make coke or burnt in the boiler of the power utility to make steam. Blending different coals, crushing to size, or pulverising and drying, are processes that essentially consist of reducing the size and moisture content of coal particles before intended usage.

Mr. Rushton offered the view that metallurgical coal does not achieve its desired end until coke is formed and consumed in the blast furnace to produce pig iron and, in the case of thermal coal, when coal is injected into the boiler to produce heat. Mr. Rushton agreed that the term "prime metal stage or its equivalent" had no special meaning in his field of expertise or trade.

Three Ontario Hydro employees, Messrs. Salerno, Bond and Anthony, provided evidence in their field of expertise respecting the purchasing and handling of coal for use in thermal applications.

Various types of bituminous, subbituminous and lignitic coals are purchased by Ontario Hydro from several mines located in Western Canada and the United States. Coal is transported to Ontario Hydro's thermal power plants by rail or ship, depending on the site's unloading facilities.

In broad terms, coals are purchased to very stringent specifications that are designed to maximize boiler efficiency and design. The specifications for a US bituminous coal as shipped, for example, would be: moisture (maximum) 10 percent, ash (maximum) 10 percent, volatile content (minimum) 32 percent, fixed carbon 48 percent, sulphur 0.9 percent, heat content 30,200 kJ/kg, size 50 mm.

Different specifications apply to Western Canada bituminous and lignitic coals. The witnesses agreed that the size and moisture specifications were very important for transportation considerations

and that the carbon content and caloric value of the coal were important factors in arriving at a contract price.

Ontario Hydro blends bituminous coals from different sources to achieve the proper level of volatile content for burning. Coal is then crushed from about 50 mm to about 15 mm and, subsequently, pulverized down to 0.075 mm (the equivalent of talcum powder in particle size) and dried before blown into the furnace. In powder form, as burnt, a typical lignite coal, for example, would have zero moisture content, 12 percent ash, 39 percent volatile content, 49 percent fixed carbon and 0.9 percent sulphur. During the handling and processing stages at the utility and prior to burning, the coal has not been transformed other than in terms of particle size and moisture content. The inherent characteristics of coal have not changed.

These witnesses offered no opinion as to the meaning of the expression "prime metal stage or equivalent" as it applies to coal.

Mr. W. M. Hamilton, P. Eng., Superintendent - Coke Production/Dock and Yard, Dofasco Steel, provided detailed evidence concerning the purchasing, handling and processing of metallurgical coals for the production of coke.

The thrust of Mr. Hamilton's evidence is that metallurgical coal as received at the plant site is not suitable for use directly in coking operations. Because of technical requirements, coals with different specifications must first be blended to obtain the proper mix. Then coal has to be crushed to size and either dried or moistened to achieve the proper moisture levels before it is charged into the coking ovens. As a result of the coking operation, the physical characteristics of coal are changed and the ensuing product, coke, has a much higher fixed carbon content while volatile matters have been reduced. In the coking operation, coke oven gas, ammonia, light oil, breeze and tar are also separated. The coke production yield from coal is about 75 percent.

Coke is required in blast furnaces to supply a reducing atmosphere for the reduction of the iron oxide to molten iron and to support the layers of burden within the furnace shell. Coke, therefore, must have a high-fixed carbon content and be physically strong.

Mr. Hamilton stated that the coking process is analogous to the smelting and refining processes in the case of copper concentrates because: "... it is only when it enters the coke oven where you chemically alter it that it becomes unrecognizable as coal."⁵

Mr. M.J. Scoble, Professor of Mining Engineering and Director of Mining, Department of Mining & Metallurgical Engineering, McGill University, reviewed and described the steps followed in coal mining. He offered the opinion that the term "prime metal stage" applied to metals that had reached the highest level of purity.

In the case of the copper, cathode is the prime metal stage. In the case of coal, the witness was of the opinion that, at the mine, the coal ready for shipping was not at the prime metal stage equivalent because it had not yet reached the highest degree of purity nor was it ready for direct, immediate or efficient use. In his view, the equivalent of prime metal stage for metallurgical coal was coke and, in the case of thermal applications, the dry powder coal just before entering the boiler. Mr. Scoble, therefore, considered the handling and processing operations performed on coal by end users as part of the steps required to transform coal into the form that renders it equivalent to prime metal.

5. Transcript of Proceedings, Vol. 1A, p. 226.

Upon cross-examination, Mr. Scoble agreed, however, that in a mining sense, processing of coal stopped at the mine at the stage when the coal had reached the customers' specifications for shipping.

Argument of CN

Counsel for the appellant submitted that the phrase "prime metal stage or its equivalent" as it is found in subsection 49.01(1) of the Act is a technical or scientific one whose meaning is to be determined by those persons who are familiar with it. According to counsel, coal transported by the appellant to its steel-making customers or to thermal customers has not yet reached the prime metal stage equivalent; such coal must be further processed before it can be used commercially by its customers and reaches its prime metal stage equivalent, in the case of "metallurgical coal," at the point in time just prior to its introduction, in a crushed, pulverized and blended state, into the cooking oven and, in the case of "thermal coal," at the point in time when, crushed, pulverized and dried, it is ready for insertion into the thermal boiler.

Counsel also submitted that the concept of the processing of ore from a mineral resource to the prime metal stage or its equivalent as found in the Act was derived from the *Income Tax Act*.⁶ Relying, as did counsel for CP, on the fact that the words "processing, to the prime metal stage or its equivalent" in subparagraph 125.1 (3)(b)(vi) of the *Income Tax Act* were amended in 1985 to "processing ... to any stage that is not beyond the prime metal stage or its equivalent" ("*la transformation... jusqu'à un stade qui ne dépasse pas celui du métal pur ou de son équivalent*", in the French version), counsel further submitted that, the word "to" being equated with the phrase "not beyond" and the word "*jusqu'au*" with the phrase "*ne dépasse pas*," each of the foregoing expressions includes the prime metal stage or its equivalent.

Counsel contended that, consequently, all transportation of coal while in the prime metal stage equivalent (i.e., as he stated, after being crushed, washed and screened at the mine site), up to and including the time the coal enters the cooking oven at the steel-making company or the furnace in the case of a thermal plant, qualified for the fuel tax rebate.

Counsel concluded his subsidiary argument by submitting that the coal, while being transported by the appellant, remained in the prime metal stage equivalent as the coal was not being altered during such transportation, that the transportation of coal as performed by the appellant constituted the transportation of coal while it was in the prime metal stage equivalent and that coal was no longer in the prime metal stage equivalent when it was converted into coke by the steel-making plant or combusted in the furnace by the thermal energy plant.

Evidence of CP

Mr. M.A. Khan, a research consultant and employee of The Algoma Steel Corporation Limited, who holds a B.Sc. in Geological Sciences, provided testimony respecting coal mining and coal processing at the customers' site for both metallurgical and thermal uses.

A report entitled Processing of Metallurgical and Thermal Coals prepared by Mr. Khan for this appeal was filed as an exhibit. He explained in detail the various processes to which coal, as received from the mine, had to be subjected before it could be used in metallurgical or thermal applications.

6. R.S., c. 148, as amended.

The thrust of Mr. Khan's evidence was that coal, after it is mined and processed in the washery at the mine, must still undergo various stages of beneficiation or upgrading before it can be used to make coke or as a fuel in the generation of heat. In Mr. Khan's view, the various stages of beneficiation or upgrading after the coal has left the mine are required to upgrade the carbon content of coal to the highest level required for its ultimate use. This evidence with respect to the processes utilized by metallurgical and thermal coal end users was consistent with that provided by other expert witnesses.

Mr. Khan also gave his opinion as to the meaning of "prime metal stage equivalent" as it applies to coal. Here, Mr. Khan's evidence differed from that provided by other expert witnesses. In his opinion, the equivalent of prime metal stage was achieved when coal was used for the purpose intended. In the case of thermal coal, it is after injection in dry powder form into the boiler for the generation of heat, and in the case of metallurgical coal, after the coke is consumed in the blast furnace and used to make molten pig iron. At those stages, coal reaches the ultimate degree of carbonization. In his opinion, this is comparable to the copper cathode stage.

Mr. Khan agreed also that the expression "prime metal stage" had no special meaning in the trade or relevant literature.

Argument of CP

Counsel for the appellant argued that the sales tax rebate was not recoverable only when the coal had been processed beyond its prime metal stage equivalency and that the coal transported by the appellant had not yet been processed beyond its prime metal stage equivalency. In support of his argument, counsel referred to the legislative history of subsection 125.1(3) of the *Income Tax Act* since 1973. The fact that the words "processing, to the prime metal stage or its equivalent" in subparagraph 125.1(3)(b)(vi) were amended in 1985 to "processing ... to any stage that is not beyond the prime metal stage or its equivalent" was a recognition by Parliament of the concepts of processing "to" or "beyond" the prime metal stage.

Relying on certain definitions of the words "prime" and "metal" in the Oxford Universal Dictionary (3rd Ed.), on the interpretation given to these words in income tax rulings, on court decisions bearing on the weight to be given to such administrative interpretation of the legislation and on the 1985 French version of subparagraph 125.1(3)(b)(vi) that uses the words "*métal pur*" for "prime metal," counsel also argued that coal reaches the equivalent of the prime metal stage only when it is processed to pure or virtually pure carbon and that the coal transported by the appellant had not yet reached its prime metal stage equivalency.

Counsel finally argued that, alternatively, coal reaches the equivalent of the prime metal stage only when it is processed to the condition in which it is ready for use for the purpose for which it is purchased. Counsel stated that the coal transported by the appellant is used in the processing of steel (metallurgical coal) or the production of heat for power utilities (thermal coal), that water, sulphur and ash contribute nothing to these commercial uses and that, therefore, metallurgical coal must be processed further by crushing, pulverizing, heating, carbonizing and blending, and thermal coal must be processed further by crushing, pulverizing and heating.

Evidence of the Minister

The respondent called one witness, Mr. J.W. Mossop, B. Eng., Mining Engineering, a consultant with some 30 years experience in the mining industry.

Mr. Mossop explained the steps involved in uranium mining and processing up to the production of yellow cake. He gave the opinion that it is only when uranium bearing ores are concentrated to the point of yellow cake, which is the commodity purchased by Ontario Hydro to make fuel rods for nuclear reactors, that the product has reached the prime metal stage. In comparing coal mining with uranium, Mr. Mossop gave the view that clean coal, as it comes out of the coal preparation plant, is dried and ready for shipment and is in the prime metal stage equivalent. The fact that such commodities have recognizable values and conform to the customers' specifications for subsequent use were important factors in arriving at this conclusion. Mr. Mossop agreed with other witnesses that in the case of copper, the processing of copper bearing ores only ended after the smelting and refining processes were completed and the copper cathode stage was reached.

Argument of the Minister

Counsel for the respondent submitted that, on the basis of *Denison Mines Limited v. The Minister of National Revenue*,⁷ the definition of the word "mining" must, in general, be construed in a narrow manner and that any transportation of coal performed after it has reached the prime metal stage equivalent does not fall within the definition of the word "mining."

Counsel also submitted that with respect to metallurgical coal or thermal coal, the prime metal stage means the stage where the coal has been cleaned and washed and is ready for shipment to a steel mill or electrical generating plant; and that the coal transported by the appellants was at, or past, the prime metal stage or its equivalent.

Relying on the definition of the word "to" in The Oxford English Dictionary (2nd Edition), Webster's Third New International Dictionary and jurisprudence, counsel further submitted that the expression "processing to the prime metal stage or its equivalent" did not include the prime metal stage or its equivalent. He added that the use of the word "*jusqu'au*" in the French version of the definition of the word "mining" in subsection 49.01(1) of the Act supported the respondent position.

With respect to the appellant's subsidiary argument, counsel submitted that one cannot compare section 125.1 of the *Income Tax Act* with section 49.01 of the Act as these acts are not *in pari materia*.

CONSIDERATION OF THE EVIDENCE AND ARGUMENTS

Subsection 49.01(1) of the Act does not explicitly provide for a rebate of fuel tax in respect of the transportation of ore. However, the respondent has long interpreted the transportation of ore, from a mineral resource, for the purpose of processing that mineral ore to the prime metal stage or its equivalent, as an activity that is part of "the processing of ore, from a mineral resource, to the prime metal stage or its equivalent."

In support of the view that the transportation of coal from a mine to a steel-making plant or a thermal electricity plant is part of "the processing of ore, from a mineral resource, to the prime metal stage or its equivalent," the appellants' main argument was that coal, while being transported, was not at the prime metal stage. Counsel for CN further submitted that the transportation of coal from a mine to a steel-making plant or a thermal electricity plant (while coal is at a stage that is at, but not beyond,

7. Tariff Board Appeal Nos. 2972 and 2973, December 9, 1988.

the prime metal stage), is an activity that is part of "the processing of ore, from a mineral resource, to the prime metal stage or its equivalent."

It was the contention of counsel for the appellants that the words "to" and "prime" in the phrase "the processing of ore, from a mineral resource, to the prime metal stage or its equivalent" as it is found in subsection 49.01(1) of the Act should be interpreted by reference to subsection 125.1(3) of the *Income Tax Act* as meaning respectively "not beyond" and "pur." Counsel for CN argued that the amendments made to subsection 125.1(3) of the *Income Tax Act*, whereby the words "does not include ... processing, to the prime metal stage or its equivalent" were replaced by the words "does not include ... processing ... to any stage that is not beyond the prime metal stage or its equivalent" and the word "*primaire*" was replaced by the word "*pur*," did not change the law as the purpose of these amendments was only to clarify the meaning of the words used in that provision. In support of his contention, counsel referred the Tribunal to the explanatory notes of Bill C-72. However, the Tribunal could find no reference to that effect in them.

While the *Interpretation Act*⁸ provides, as counsel for CN argued, that the amendment of a statutory provision does not declare a change in the law, the *Interpretation Act* also provides that the amendment of a statutory provision does not declare the previous state of the law. In other words, one must look at the meaning of words of a statutory provision prior to its amendment and at the meaning of the words of the amendment in order to determine the effect of an amendment.

It is also well established in jurisprudence that in interpreting a provision in a statute, reference to previous legislation is not required, there being no confusion or ambiguity to remove.⁹ There is no evidence that there is ambiguity as to the meaning of the words "that is not beyond the prime metal stage." The Tribunal is of the view, upon a summary review of the provision in the *Income Tax Act* prior to and after its amendment by Bill C-72, that subsection 125.1(3) of the *Income Tax Act*, by excluding the "processing of ore (other than iron ore or tar sands) from a mineral resource to any stage that is not beyond the prime metal stage," has excluded the "processing of ore (other than iron ore or tar sands) from a mineral resource to the prime metal stage" and any processing that is not beyond the prime metal stage.

Furthermore, according to rules of statutory interpretation, one may not interpret a provision in a statute by referring to a provision in another statute unless both statutes are *in pari materia*. According to the jurisprudence, "in determining whether two statutes are *in pari materia*, it is not enough that the statutes are similar; although they may be different in detail, they should be, in general substance and purpose, identical."¹⁰

Although the Act and the *Income Tax Act* may, as counsel argued, be summarily referred to as "taxing" statutes, a brief review of these statutes reveals that they, section 49.01 of the Act and section 125.1 of the *Income Tax Act*, or the definitions of the word "mining" and of the expression "manufacturing and processing," are not identical in general substance or purpose.

It was the contention of counsel for CN that the phrase "prime metal stage or its equivalent," as it is found in subsection 49.01(1) of the Act, is a technical or scientific one whose meaning is to be determined by those persons who are familiar with it. However, testimony by witnesses for both

8. R.S.C., 1985, c. I-21.

9. *Ouellette v. C.P.R.* [1925], 2 W.W.R. 494.

10. *R. v. Yolles*, 30 C.R. 93.

appellants has revealed that the expression "prime metal stage" has no specific industry or technical meaning.

In such circumstances, the jurisprudence clearly indicates that the statute must be construed according to the ordinary meaning of the words as applied to the subject matter, that the duty of the Tribunal "is to interpret and give full effect to the words used" by Parliament, that it is "not relevant to consider what a particular branch of the public may or may not understand to be the meaning of those words"¹¹ in the determination by the Tribunal of that meaning when words used in a statute have no specific industry or technical meaning, and that, "When it is sought to ascertain the ordinary meaning of a word resort is had to recognized dictionaries ... for it is in the dictionaries that the ordinary meaning of a word is to be found."¹²

The Oxford English Dictionary¹³ defines the word "prime" in its first sense as "first in order of time or occurrence." The word "*primaire*," used in the French version of the statute for the English word "prime" is defined in Le Grand Robert de la Langue française¹⁴ as "*qui vient en premier (dans un ordre temporel ou sériel)*" in its second sense.

The Tribunal notes that these dictionary definitions clearly afford a common meaning to both versions of the statute with respect to the words "prime" and "*primaire*." The Tribunal further notes that although the notion of highest degree of purity may be implied from the third sense of the word "prime" as it is defined in The Oxford English Dictionary, the word "*primaire*" in its various senses does not encompass such a notion. Had it been the intent of Parliament to provide for the processing of ore to the stage of pure metal, Parliament would have used the French word "*pur*," as was done in section 125.1 of the *Income Tax Act*, rather than the word "*primaire*."

A search in The Oxford English Dictionary reveals that the word "to" has many meanings and that its specific meaning depends on the context in which it is used. The Tribunal is of the view that the expression "the processing of ore from a mineral resource to the prime metal stage" cannot be construed as including the processing of prime metal. Indeed, the objective of processing ore to the prime metal stage is to obtain prime metal and when prime metal is obtained, any processing of prime metal cannot qualify as the processing of ore from a mineral resource to the prime metal stage.

The Tribunal finds that the only reasonable definition of prime metal stage within the context of this legislation, i.e., the processing of ore from a mineral resource to the prime metal stage, is one that would incorporate the notion that the mineral ores have been subjected to processing to the point when the first occurrence of metal is reached.

The Tribunal further finds that, in a practical context, prime metal is a homogeneous metal in a form appropriate for handling and transportation.

Even if the opinions of the witnesses were to be considered in determining the meaning of the words "prime metal stage or its equivalent," the expert witnesses appearing for CN and the expert

11. *Marquis Camden v. Inland Revenue Commrs.* [1914], 1 K.B. 641 cited *Re McIntyre Porcupine Mines Ltd. and Morgan* (1921), 49 O.L.R. 214.

12. *The Dentists' Supply Company of New York v. D.M.N.R. (Customs and Excise)* [1956-1960], Ex. C.R. 450.

13. Second Edition, Clarendon Press, Oxford, 1989.

14. *Deuxième édition, Le Robert*, Paris, 1988.

witness appearing for CP did not agree as to the prime metal stage equivalent of coal, and the witness for the respondent did not agree with any of the witnesses for the appellants. Moreover, the witnesses for the appellants and the respondent were of the opinion that the copper cathode was the prime metal stage of copper. The rationale for this opinion, as expressed by Dr. Harris, was that "copper cathodes are as pure as the available technology can produce copper cathode today on a tonnage scale." Dr. Harris was also of the opinion that prime western grade zinc was the prime metal stage of zinc. He testified that prime western zinc was carefully defined by the industry as being zinc that contains 1.2 percent lead and 0.2 percent iron and, in support of his assertion, Dr. Harris referred the Tribunal to page 235 of Nonferrous Extractive Metallurgy¹⁵ (Exhibit A-5).

Yet, A Dictionary of Mining, Mineral, and Related Terms¹⁶ defines prime western zinc as a "low grade of virgin zinc containing about 98 percent zinc, 1.60 percent lead, 0.08 percent iron, with no limitations on cadmium or aluminum." Furthermore, a review of Table 3.6, Grades and Chemical Composition of Slab Zinc, at page 231 of the book entitled Nonferrous Extractive Metallurgy, reveals that prime western is the lowest of the grades of zinc listed.

A thorough review of Extractive Metallurgy of Copper¹⁷ and of Nonferrous Extractive Metallurgy put forward by the appellants in Exhibits A-4 and A-5 established that the prime metal stage of metal bearing ores can occur at different stages, depending on the process being used. This is not only the case when one metal bearing ore is compared to another (i.e., zinc vs. copper), but where ores with different properties (i.e., copper oxide vs. copper sulphide) require different methods of processing.

The Tribunal is of the view that in order to determine the prime metal stage in the processing of ores, one must, in each case, consider the process used and ascertain when metal first occurs in such a process.

The Tribunal is of the view that in order to determine, in the case of ore from a coal deposit, the stage equivalent to the prime metal stage, one must first identify why ore from a mineral resource (a mine) is processed.

Considering that ore from a copper mine is processed to extract copper, one may conclude by analogy that ore from a coal mine is processed to extract coal.

It is true that section 49.01 of the Act provides, explicitly, that a coal deposit is a mineral resource and, implicitly, that what is extracted from a coal deposit is ore. However, ore from a coal deposit cannot be compared to copper ore. While the evidence has revealed that a copper deposit is composed of copper ores that rarely contain more than an average of more than 3 percent copper (Exhibit A-4, page 25), testimony has revealed that a coal deposit is composed of homogeneous coal located in seams and veins of a few inches to many feet in thickness and that these seams and veins are encased in rock and other matter.

Testimony has revealed that in mining coal, attempts are made to bring from the pit the least amount of rock or other matter, and that the purpose of the processing at the mine is to separate the rock and other matter from the coal, to crush the coal to size, to remove the coal dust by washing the coal and to remove the excess water and dry the coal by heating the coal.

15. C.B. Gill, Wiley-Interscience Publication.

16. Bureau of Mines, US Department of The Interior, 1968.

17. A.K. Biswas and W.G. Davenport, Pergamon Press.

Testimony has revealed that coals in North America are classified in accordance with Standard D-388 set down by the ASTM and entitled "Standard Classification of Coals by Rank."

Testimony has revealed that the material transported by the appellants was bought by the customers as coal, that it met the specifications of the customers and that it was in a form specifically determined by the industry for handling and transportation.

Considering that metal is at its prime metal stage when it is a homogeneous material in a form appropriate for handling and transportation, one may conclude by analogy that ore from a coal mine is at a stage equivalent to the prime metal stage when it is a homogeneous material in a form appropriate for handling and transportation.

The appellants have attempted to demonstrate that the grinding of coal to a dust and the drying by heat of coal to remove moisture from coal performed by the customers were simply a part of the processing of coal that could not be finished prior to transportation by the appellants, for safety and environmental considerations. Indeed, dry coal, in the presence of humidity, may self-ignite and explode, and coal dust sucked out of the railway cars by the speed of the train during transportation would constitute a significant loss and pollute the environment.

However, testimony has revealed that there are other reasons why these operations are not performed prior to transportation. As a matter of fact, transportation of coal dust would require, in order to prevent losses, sealed railway cars and would entail increased expenses to the customers. Also, coal used by steel-making plants has, during periods of dryness, to be moistened before it is used. Furthermore, coal dried below its inherent moisture level absorbs water from the atmosphere. Coal used by thermal electricity plant would have to be dried a second time to remove the water absorbed. Finally, customers stockpile coal in the form it is received in the open and grind it to a dust only when needed for the reason that coal dust with moisture would, in the words of a witness for the appellants, "become a very hard compacted sloppy sort of stuff that just would not handle well at all."¹⁸

The Tribunal finds that handling or processing of the coal by a customer, in the form of blending, crushing or pulverizing coal, adding or removing moisture, does not constitute processing ore, from a mineral resource, to the prime metal stage or equivalent. It is simply preparing coal for a specific use, intended by a specific customer, as either a fuel or a raw material for the production of something else that is not coal.

The Tribunal further finds that coal is at a stage equivalent to the prime metal stage, within the meaning of that expression as it is found in subsection 49.01(1) of the Act, when it is crushed to size and washed and dried at the washery at the coal mine.

The Tribunal finally finds that transportation, by the appellants, of coal that has reached the stage equivalent to the prime metal stage does not constitute processing ore, from a mineral resource to the prime metal stage or its equivalent under subsection 49.01(1) of the Act.

CONCLUSION

The appeals should be dismissed.

18. Transcript of Proceedings, Vol. 1A, p. 179.

THE ISSUE OF WOODCHIPS

Argument of CN

Relying on the fact that the English version of the definition of the word "logging" in subsection 49.01(1) of the Act refers to "log salvaging" while the French version refers to "*la récupération du bois*," counsel for the appellant submitted that the French version has a considerably broader meaning than the English version.

Counsel also submitted that the chipping of wood fell within the definition of the words "*la récupération du bois*."

Counsel further submitted that the transportation by the appellant of pulpwood chips from the forest (where residual or leftover waste of the logging operation is salvaged) or the saw mills (where wood from the sawing operation is salvaged and chipped) to a mill yard at the pulp and paper mills for further manufacture entitled the appellant to the fuel tax rebate, as the transportation occurred prior to the arrival of the pulpwood chips at the mill yard.

Argument of the Minister

Counsel for the respondent submitted that even if there was an inconsistency between the French and English versions of the definition of the word "logging" in subsection 49.01(1) of the Act, neither version permitted the transportation of woodchips.

Counsel also submitted that the transportation of woodchips did not fall within the definition of the word "logging."

Counsel further submitted that the chipping of wood was a manufacturing operation and, therefore, an activity that was outside the definition of the word "logging."

CONSIDERATION OF THE EVIDENCE AND ARGUMENTS

No evidence was presented to the Tribunal by CN in respect of this issue. The argument of counsel for the appellant rested entirely on the French version of the expression "log salvaging" in the definition of the word "logging" as contained in subsection 49.01(1) of the Act.

Whether the French version is broader than the expression "log salvaging," it is not relevant to the determination of the issue as Parliament has specifically provided for "off highway transportation of logs to a mill pond or mill yard" in the definition of the word "logging" and used in the French version the words "*le transport de billes hors des grandes routes jusqu'au bassin de réserve ou à la cour du moulin*." One may not argue that woodchips (*copeaux de bois*) are logs (*billes*).

The Tribunal finds that the transportation of woodchips by the appellant does not fall within the meaning of the words "*le transport de billes*" (transportation of logs) as contained in subsection 49.01(1) of the Act.

CONCLUSION

The appeal should be dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member