

Ottawa, Friday, July 19, 1991

Appeal No. 3071

IN THE MATTER OF an appeal heard on April 10, 1991, under section 18 of the *Softwood Lumber Products Export Charge Act*, R.S.C., 1985, c. 12 (3rd Supp.) and section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF three decisions of the Minister of National Revenue dated July 22, 1988, with respect to three notices of objections filed under section 51.15 of the *Excise Tax Act*.

BETWEEN

NOVA LUMBER CO. LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Sidney A. Fraleigh

Sidney A. Fraleigh

Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan

Member

Arthur B. Trudeau

Arthur B. Trudeau

Member

Michel P. Granger

Michel P. Granger

Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. 3071

NOVA LUMBER CO. LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 18 of the Softwood Lumber Products Export Charge Act and section 81.19 of the Excise Tax Act by Nova Lumber Co. Ltd. from three decisions of the Minister of National Revenue disallowing objections and confirming the assessments. The first Notice of Assessment, dated September 21, 1987, was for the period commencing July 1, 1987, and ending July 31, 1987, resulting in an amount owing, including interest and penalty, of \$124,788.75. The second Notice of Assessment, dated October 21, 1987, was for the period commencing August 1, 1987, and ending August 31, 1987, resulting in an amount owing, including interest and penalty, of \$110,992.11. The third Notice of Assessment, dated April 20, 1988, was for the period commencing November 1, 1987, and ending November 30, 1987, resulting in an amount owing, including interest and penalty, of \$100,125.80. The appellant objected, pursuant to section 51.15 of the Excise Tax Act, presently section 81.15, to the assessments on the ground that its exports of softwood lumber qualified for exemption under section 15 of the Softwood Lumber Products Export Charge Act and, consequently, it was excused from any charges originating under the authority of that act and assessed under the Excise Tax Act. By three Notice of Decisions dated July 22, 1988, the Minister of National Revenue disallowed the objection on the basis that the appellant was not included in the schedule to the Softwood Lumber Products Export Charge Exemption Order P.C. 1987-1575 that lists those companies exempted from the softwood export charge.

HELD: *The appeal is dismissed.*

Place of Hearing: Vancouver, British Columbia
Date of Hearing: April 10, 1991
Date of Decision: July 19, 1991

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

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Nicole Pelletier

Appearances: Gary A. Letcher, for the appellant
Brian J. Saunders, for the respondent

Cases Cited:

Re Doctors Hospital v. Minister of Health et al., (1976), 12 O.R. (2d) 164; *Hui v. Canada (Minister of Employment & Immigration)*, [1986] 2 F.C. 96; *Ref. re Constitutional Question Act*, 46 B.C.L.R. (2d) 273; *Re Air Canada v. Attorney-General of British Columbia*, 47 B.C.L.R. 341; *Walbern Agri-Systems Ltd. v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 3000, December 21, 1989*; *The Attorney-General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735; *Thorne's Hardware Limited et al. v. Her Majesty the Queen et al.*, [1983] 1 S.C.R. 106; *Penikett et al. v. The Queen et al.* (1987), 21 B.C.L.R. (2d) 1; *Sunshine Coast Parents for French v. Sunshine Coast School, Unreported, B.C.S.C., July 5, 1990.*

Appeal No. 3071

NOVA LUMBER CO. LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

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

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

The issue in this appeal, as defined by the appellant, Nova Lumber Co. Ltd. (Nova Lumber), is whether the Minister for International Trade complied with section 15 of the *Softwood Lumber Products Export Charge Act*¹ (the Softwood Lumber Act) and, if she did not, does that disentitle the collection or retention of the charge on softwood products exported to the United States made pursuant to the same act.

For purposes of this appeal the relevant provisions of the Softwood Lumber Act are:

4.(1) There shall be imposed, levied and collected a charge determined under this Act on softwood lumber products set out in Part II of the schedule that are exported to the United States after January 7, 1987.

...

15.(1) The Governor in Council may, on the recommendation of the Minister for International Trade, by order,

(a) conditionally or unconditionally, and either generally or in respect of a particular transaction, exempt any softwood lumber products from the charge imposed thereon under this Act or exempt any person from the requirement to pay such a charge;

...

18. For the purposes of this Act, sections 81.1 to 81.32 and 81.34 to 81.39 of the Excise Tax Act apply, with such modifications as the circumstances require, in respect of a charge or other sums payable by any person under this Act.

1. R.S.C., 1985, c. 12 (3rd Supp.).

FACTS AND EVIDENCE

This is an appeal under section 18 of the Softwood Lumber Act and section 81.19 of the *Excise Tax Act* by Nova Lumber from three decisions of the Minister of National Revenue disallowing objections and confirming the assessments. The first Notice of Assessment, dated September 21, 1987, was for the period commencing July 1, 1987, and ending July 31, 1987, resulting in an amount owing, including interest and penalty, of \$124,788.75. The second Notice of Assessment, dated October 21, 1987, was for the period commencing August 1, 1987, and ending August 31, 1987, resulting in an amount owing, including interest and penalty, of \$110,992.11. The third Notice of Assessment, dated April 20, 1988, was for the period commencing November 1, 1987, and ending November 30, 1987, resulting in an amount owing, including interest and penalty, of \$100,125.80.

The appellant objected to the assessments on the ground that its exports of softwood lumber qualified for exemption under section 15 of the Softwood Lumber Act and, consequently, it was excused from any charges originating under the authority of that act and assessed under the *Excise Tax Act*.

By three Notice of Decisions dated July 22, 1988, the Minister of National Revenue disallowed the objections on the basis that the appellant was not included in the schedule to the Softwood Lumber Products Export Charge Exemption Order P.C. 1987-1575 that lists those companies exempted from the softwood export charge.

By letter dated October 3, 1988, Nova Lumber appealed to the Tariff Board, which appeal was taken up and continued by this Tribunal in accordance with section 60 of the *Canadian International Trade Tribunal Act*.²

Nova Lumber is in the cedar lumber manufacturing business. It commenced business in 1950 in North Vancouver and, at the time of the assessments, in the mid-1980s, it had approximately 170 employees. At the hearing, Mr. Norman Earl Noble, who was president of the appellant company at the relevant time, appeared as a witness for Nova Lumber.

Mr. Noble testified that in August of 1986 he responded to a United States Department of Commerce (the Commerce Department) questionnaire pertaining to a petition by the American Softwood Lumber Product Producers. The petition alleged that softwood lumber manufacturers in Canada were unfairly subsidized by certain federal and provincial programs and asked that a countervailing duty be placed on certain softwood lumber products imported into the United States from Canada. In his response to the questionnaire, Mr. Noble stated that Nova Lumber had not participated in any subsidy programs.

In September of 1986, Nova Lumber responded to a supplementary questionnaire by the Commerce Department indicating that it did not benefit from government subsidies to the industry. Mr. Noble testified that the Commerce Department asked the Ministry of Forests of British Columbia (the Ministry) to respond to a yes or no question as to whether Nova Lumber held stumpage rights (rights to timber on Crown lands) in the province. In this regard, for the fiscal year 1985-86, the Ministry indicated that Nova Lumber had held such rights as granted by the province of British Columbia. The witness indicated, however, that Nova Lumber had sold the licence in 1985, but that it was not registered until 1986.

2. R.S.C., 1985, c. 47 (4th Supp.).

Mr. Noble testified that the stumpage rights were for scavenger material and valued at only a few thousand dollars per annum on sales of approximately \$25 million in the same period. It was his understanding that the Government of Canada declined to present a calculation indicating that any benefit from government subsidies to Nova Lumber was below the *de minimis* thus making Nova Lumber eligible for exemption from the proposed countervailing duty to be imposed on imports of softwood products. The witness testified that it was because of this unqualified affirmative answer that the Commerce Department did not exclude the appellant. In support of his proposition, a Memorandum to File from the Department of Commerce (Exhibit A-3) was introduced indicating that Nova Lumber was not excluded because it held stumpage rights in 1985-86 and, therefore, benefits received from the government were above *de minimis*.

Mr. Noble testified that the subsidies a company received from the government were considered below *de minimis* if such benefits were not greater than 0.5 percent of sales per annum. Under such circumstances the company would not be subject to the countervailing duty. In its brief, the appellant provided calculations of the actual benefit it received from the stumpage rights indicating that such benefit varied between 0.013 and 0.01 percent of total sales, well below the *de minimis* threshold set by the United States. Mr. Noble clarified in cross-examination that the calculations were made by the British Columbia government.

On October 10, 1986, the Commerce Department issued a preliminary determination of subsidizing and started to collect a duty on the importation of softwood products from Canada. Mr. Noble stated that 20 companies were exempt from the duty. He indicated that those same companies were subsequently exempted from the charge imposed by the Canadian government under the Softwood Lumber Act as an alternative to the U.S. imposed duty. He indicated that Nova Lumber was not exempted.

On November 26, 1986, Canada re-submitted information on Nova Lumber, certifying that the benefits it received from both stumpage rights and from other benefit programs fell within the *de minimis*. However, in December 1986, a Memorandum of Understanding (MOU) between the governments of Canada and the United States was issued. It indicated that the Understanding was entered into "to resolve differences with respect to the conditions affecting trade in softwood lumber products." Pursuant to the MOU, all duties collected on the importation of softwood products were reimbursed to the exporting companies and henceforth Canada was to collect an export charge of 15 percent of the price of exports of certain softwood lumber products made on or after January 8, 1987, to the United States. The MOU also indicated that the same 20 companies were to be excluded from the charge. The Softwood Lumber Act was promulgated soon after.

In a letter dated February 25, 1987, the appellant was informed by the Minister for International Trade that officials of the Department of External Affairs had met with the Commerce Department and had raised the case of Nova Lumber with the U.S. officials. Then, in March or April of 1987, the Government of Canada arranged a meeting between Nova Lumber and the Commerce Department. Mr. Noble testified that the gist of the meeting was that Nova Lumber should look to the Government of Canada for relief as it was Canada's decision.

When becoming aware of the provisions of the Softwood Lumber Act, Mr. Noble testified that the appellant asked and relied upon the Minister for International Trade to use her authority to grant an exemption to Nova Lumber pursuant to section 15 of the Softwood Lumber Act. In this regard, Mr. Noble indicated that he instructed counsel for the appellant to communicate with the Minister for International Trade and Revenue Canada. However, such efforts seemed to be of no avail. For several

months the appellant was liable for the export charge that amounted to several hundred thousand dollars. Then, on March 3, 1988, the appellant received a letter from the Minister for International Trade indicating that the Government of Canada had renegotiated the MOU and that commencing November 30, 1987, the export charge on softwood lumber products milled in British Columbia and exported to the United States had been terminated.

ARGUMENTS

Counsel for the appellant summarized the appellant's argument by stating that the Minister for International Trade had a duty to consider whether or not to make a recommendation to the Governor in Council to have the appellant exempted from the export charge pursuant to section 15 of the Softwood Lumber Act. According to counsel, there is a strong inference that the Minister for International Trade believed there could be no exemption to the export charge without U.S. approval and, as such, she took into account a matter she had no authority to consider. Consequently, the Minister for International Trade fettered her discretion in that she did not put her mind to making a recommendation. Counsel also argued that in not considering whether the appellant should be exempted from the charge unless the United States agreed, the Minister for International Trade took into account unauthorized considerations.

Counsel referred the Tribunal to the decision of *Re Doctors Hospital v. Minister of Health et al.*³ and suggested that it is within the power of the Tribunal to determine whether the Minister for International Trade lawfully considered making the recommendation pursuant to section 15 of the Softwood Lumber Act. Counsel then referred to *Hui v. Canada (Minister of Employment & Immigration)*⁴ and argued that it is unlawful for a decision maker to fetter her discretion, to exceed her jurisdiction or to allow herself to predetermine a decision.

Counsel also argued that the appellant had a legitimate expectation that the Minister for International Trade would comply with her statutory obligation pursuant to section 15 of the Softwood Lumber Act. In this regard, he referred the Tribunal to *Ref. re Constitutional Question Act.*⁵

In conclusion, counsel referred the Tribunal to the decision in the *Re Air Canada v. Attorney-General of British Columbia*⁶ where Mr. Justice Taggart stated at page 679 that:

The following principles of constitutional law may be gathered from the B.C. Power and Amax cases as follows:

- (1) The prerogatives of the provincial Crown, including immunity, are restricted to matters falling within its constitutional powers.*
- (2) A province cannot retain, by direct or indirect means, monies collected under compulsion, pursuant to an ultra vires statute.*
- (3) Immunity afforded by a provincial statute to protect the province from the recovery of unlawful exactions is offensive to the Constitution.*

3. (1976), 12 O.R. (2d) 164.

4. [1986] 2 F.C. 96.

5. 46 B.C.L.R. (2d) 273.

6. 47 B.C.L.R. 341.

(4) *If a State cannot take by unconstitutional means it cannot retain by unconstitutional means.*

Counsel then argued by analogy stating that the Minister for International Trade has acted unlawfully by failing to put her mind to a decision or by stopping at the road block of approval from the United States and it has resulted in the appellant being liable to pay the export charge and, pursuant to the *Air Canada* case quoted above, the state cannot retain that tax.

As his initial argument, counsel for the respondent stated that the Tribunal has jurisdiction to entertain appeals only from decisions of the Minister of National Revenue. In effect, the appellant is not asking that the Tribunal review an assessment, rather, it is being asked to review an alleged error on the part of the Minister for International Trade in failing to recommend that the appellant be exempted from the export charge. Basically, counsel argued that it is the role of the Tribunal to determine whether the assessment is in accordance with the law as set out in the Softwood Lumber Act, and that the appellant is in the wrong forum for the relief it is seeking.

Counsel argued that if the taxpayer falls within the letter of the taxing statute the Tribunal cannot relieve the taxpayer from its obligation to pay the tax on compassionate grounds. He argued that the Tribunal must apply the law as it is set out in the Softwood Lumber Act. As authority for this proposition, he referred the Tribunal to its decision in *Walbern Agri-Systems Ltd. v. the Minister of National Revenue*.⁷

Counsel then proceeded to address the various administrative law principles raised by the appellant. With regard to the alleged lack of evidence that the Minister for International Trade considered making a recommendation pursuant to section 15 of the Softwood Lumber Act, counsel referred the Tribunal to correspondence from the Minister for International Trade arguing that it is at least implicit from the letters that such consideration was given. He also argued that it was completely reasonable for the Minister for International Trade to take into account Canada's international commitments in deciding whether to make a recommendation to the Governor in Council.

Counsel argued that The Tribunal is being asked to review a legislative function and that such process is reviewed along very narrow jurisdictional grounds only. He identified one ground as being failure to comply with a statutory condition precedent and noted that, where no recommendation has been made, there has been no violation of the statutory condition precedent. In this regard, counsel referred the Tribunal to the decisions of *The Attorney-General of Canada v. Inuit Tapirisat of Canada et al.*⁸ and *Thorne's Hardware Limited et al. v. Her Majesty the Queen et al.*⁹ Counsel noted that the latter case supported the proposition that a court should not look into the motives of the Governor in Council in passing a regulation. By analogy, counsel argued that the Tribunal should not look into the motives of the Governor in Council in not passing a regulation, or presumably, but not explicitly argued, the Minister for International Trade in not making a recommendation to the Governor in Council.

With regard to legitimate expectation, counsel argued that there was no obligation on the Minister for International Trade to make a recommendation or the Governor in Council to pass an

7. Canadian International Trade Tribunal, Appeal No. 3000, December 21, 1989.

8. [1980] 2 S.C.R. 735.

9. [1983] 1 S.C.R. 106.

exemption order. It was also argued that the doctrine does not apply to the legislative process. In support of this proposition, the Tribunal was referred to two decisions, *Penikett et al. v. The Queen et al.*¹⁰ and *Sunshine Coast Parents for French v. Sunshine Coast School*.¹¹

Counsel also argued that the doctrine of estoppel as argued in the appellant's brief has no application in the present case. He stated that there was no evidence that any representation was made to the appellant and no evidence that the appellant suffered detriment by relying on such representation. Counsel also argued that estoppel cannot override statutory law.

FINDING OF THE TRIBUNAL

The Tribunal is in agreement with counsel for the respondent that it does not have the jurisdiction to provide the relief sought by the appellant. In form, the appellant is appealing an assessment and asking the Tribunal to set aside a decision of the Minister of National Revenue. In substance, the appellant is asking the Tribunal to review an alleged error by the Minister for International Trade in failing to consider making a recommendation to exempt the appellant from the export charge or in considering irrelevant factors in declining to make that recommendation.

The Tribunal is a statutorily created body whose powers, duties and functions have been defined by legislation. The Softwood Lumber Act, pursuant to section 18, has incorporated the provisions of the *Excise Tax Act* dealing with assessments and appeals therefrom in respect of any charge or other sums payable by any person under that Act. Pursuant to section 18 and subsection 81.1(1) of the *Excise Tax Act*, the Minister of National Revenue may assess a person for any tax, penalty, interest or other sum payable by that person under the Softwood Lumber Act. The *Excise Tax Act* also provides for reconsideration of the assessment by the Minister of National Revenue. In turn, a party may appeal the assessment to the Tribunal that must determine whether the person was properly assessed under the *Excise Tax Act*. The appellant did not provide evidence to establish that, based on the provisions of the Softwood Lumber Act, the Minister of National Revenue improperly assessed it and, on this basis, the Tribunal cannot find that the Minister of National Revenue did.

The appellant has asked the Tribunal to go behind the actual assessment to consider the actions of the Minister for International Trade in not exempting it from liability under the Softwood Lumber Act thus rendering it subject to assessment. However, the powers of the Tribunal on disposition of an appeal are stated in now section 81.27 of the *Excise Tax Act*, which does not authorize it to pursue the inquiry or provide the relief sought by the appellant.

10. (1987), 21 B.C.L.R. (2d) 1.

11. Unreported, B.C.S.C., July 5, 1990.

CONCLUSION

The Tribunal renders this judgment with considerable regret. It has great sympathy for the appellant, particularly since the facts of this case clearly suggest that the appellant was mistakenly included under the *Softwood Lumber Products Export Charge Act* and that decisions about exemptions from the Act were made in a forum that provided the taxpayers affected no opportunity for input or appeal. However, for the reasons stated above, the Tribunal has no choice but to dismiss the appeal.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member