CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, September 8, 1992

Appeal No. AP-91-007

IN THE MATTER OF an appeal heard on April 2, 1992, 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, as amended;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated February 28, 1991, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

SEABOARD LUMBER SALES COMPANY LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal No. AP-91-007

SEABOARD LUMBER SALES COMPANY LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The facts in this case are not in dispute. The issue to be determined by the Tribunal is whether the softwood lumber products exported by the appellant to Puerto Rico were subject to the export charge pursuant to subsection 4(1) of the Act which, in essence, provides that there will be levied a charge on the softwood lumber products set out in Part II of the Schedule to the Act that are exported to the United States after January 7, 1987. If the appellant's exports to Puerto Rico are found to be outside of the ambit of the Act, the appellant would then be entitled to a refund of the amounts paid as export charges.

HELD: *The appeal is allowed.*

Place of Hearing:	*Vancouver, British Columbia*
Date of Hearing:	*April 2, 1992*
Date of Decision:	*September 8, 1992*
Tribunal Members:	*Kathleen E. Macmillan, Presiding member* *Sidney A. Fraleigh, Member* *W. Roy Hines, Member*
Counsel for the Tribunal:	*Robert Desjardins*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Werner H.G. Heinrich, for the appellant* *John B. Edmond, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-007

SEABOARD LUMBER SALES COMPANY LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
SIDNEY A. FRALEIGH, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal under section 18 of the *Softwood Lumber Products Export Charge Act*[1] (the Act), incorporating by reference section 81.19 of the *Excise Tax Act*.[2] Pursuant to subsection 10(1) of the Act, the appellant applied for a refund in respect of an export charge allegedly paid in error for two shipments of softwood lumber products exported to Puerto Rico. The amounts claimed are $263,290.36 and $246,674.52. By notices of determination dated October 6 and November 1, 1989, the respondent refused both refund claims. The appellant served two notices of objection to these determinations. In its reasons for objection, the appellant stated that the Act imposed an export charge only on softwood lumber products exported to the United States and not on products exported to Puerto Rico, which, it alleged, was not "the United States." In notices of decision dated February 28, 1991, the respondent confirmed both determinations.

The facts in this case are not in dispute. The issue to be determined by the Tribunal is whether the softwood lumber products exported by the appellant to Puerto Rico were subject to the export charge pursuant to subsection 4(1) of the Act which, in essence, provides that there will be levied a charge on the softwood lumber products set out in Part II of the Schedule to the Act that are exported to the United States after January 7, 1987. If the appellant's exports to Puerto Rico are found to be outside of the ambit of the Act, the appellant would then be entitled to a refund of the amounts paid as export charges.

Before addressing the arguments raised by counsel, it would seem appropriate for the Tribunal to briefly recall aspects of the background directly relating to the adoption of the Act by Parliament in May 1987.[3] On December 30, 1986, Canada and the United States signed a Memorandum of Understanding (the Understanding) which, *inter alia*, provided for the collection, as of January 8, 1987, by the Canadian government of an export charge equal to 15 percent of the f.o.b. final mill price of certain softwood lumber products destined directly or indirectly for the United States. The impetus for this Understanding, in the context of a trade

1. R.S.C., 1985, c. 12 (3rd Supp.).
2. R.S.C., 1985, c. E-15, as amended.
3. Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 23, Eighth Proceeding on Subject-Matter of Bill C-37, Twelfth Report of the Committee, May 5, 1987.

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dispute originating a few years earlier, had been a ruling by the U.S. International Trade Commission that Canadian softwood lumber exports were causing material injury to the U.S. producers of like products. This ruling triggered an inquiry by the International Trade Administration of the U.S. Department of Commerce on the question of whether Canadian lumber enjoyed a subsidy under U.S. trade law. The International Trade Administration delivered an affirmative preliminary determination in October 1986, finding subsidies to Canadian producers amounting to 15 percent of the value of the lumber. Discussions and negotiations ensued between both governments, which resulted in the Understanding.

Counsel for the appellant argued that Puerto Rico is not "the United States." Since the Act did not define the term "United States of America," the *Interpretation Act*[4] and the rules of statutory interpretation require that the ordinary and plain meaning be used. Counsel relied on dictionary definitions and British case law to contend that the plain and ordinary meaning of the term "the United States" does not include Puerto Rico. He argued that any definition of this term which includes Puerto Rico constitutes an expanded definition of the term. It was also alleged that any deviation from the plain or ordinary meaning of the term has to be clearly spelled out by the relevant legislation. Since the Act does not stipulate that a meaning other than the plain and ordinary meaning of "the United States" is to be used, there is, in counsel's view, no justification for employing the expanded definition.

Counsel for the appellant also contended that when the legislator enacts legislation which has the potential to adversely affect a citizen's right or which imposes a burden upon him, the legislator must do so expressly. Since Parliament did not clearly state in the Act that softwood lumber exports to Puerto Rico would be subject to the export charge, it was argued that such a burden could not now be imposed on exporters of softwood lumber products to Puerto Rico.

Finally, counsel for the appellant argued that the Act clearly limits the use of the Understanding to the interpretation of the Schedule to the Act. He contended that if it had been intended to incorporate the expanded definition of the term "the United States" contained in the Understanding into the Act, Parliament could easily have added the phrase "for purposes of interpreting the Act and the Schedule." However, this was not done. Hence, he postulated that the definition of the United States found in the Understanding should be interpreted to apply strictly to the Schedule to the Act, with the result that Canadian authorities are authorized solely to collect a charge on exports to locations within what is ordinarily thought of as "the United States." He finally argued that the legislator's failure to clearly indicate that export charges were to be levied on exports to Puerto Rico could only be remedied by further legislative action on the part of Parliament.

Counsel for the respondent argued that the Act did not specifically limit the use of the Understanding to the interpretation of the Schedule. Rather, the reference to the Understanding, in subsection 2(3) of the Act, is designed to provide a link to other documents which supplement the Act. These documents provide further information and clarification to interested parties regarding the kinds of products upon which an export charge is to be levied. It was argued that the additional documents, the Tariff Schedules of the United States Annotated (TSUSA), the Standard Grading Rules for West Coast Lumber and the Understanding itself form part of the whole context of the Act within which specific provisions of the Act are to be interpreted.

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

Counsel for the respondent also contended that the Act was put in place to implement the Understanding. Hence, the Understanding expresses the fundamental agreement between Canada and the United States upon which the Act is based. Counsel relied upon the recent decision of the Supreme Court of Canada in *National Corn Growers Assn. v. Canada (Import Tribunal)*[5] in which the Court held that where domestic legislation is unclear, the underlying international agreement should be examined to clarify any uncertainty. Counsel argued that the Tribunal was, therefore, justified in relying upon the Understanding to resolve the question of whether Puerto Rico is included in the definition of the United States for the purposes of the Act.

Finally, counsel for the respondent argued that the absence of any reasonable justification for employing a definition of the United States, in the Act, different from the one which is to apply to the Schedule, strongly suggests that Parliament in fact intended that the definition found in the Understanding apply to both the Act and the Schedule.

Having examined the file and reviewed the arguments, the Tribunal is of the opinion that the appeal should be allowed. The contemporary approach to the construction of taxation statutes is that these statutes are interpreted in the same way as other types of legislation. The words of a taxation statute must be read in their entire context and in their grammatical sense harmoniously with the scheme and the object of the Act, as well as with the intention of Parliament. To use the words of MacGuigan J.A. in *Lor-Wes Contracting Ltd. v. The Queen*, it is a "'words-in-total-context' approach with a view to determining the object and spirit of the taxing provisions."[6] As Professor Pierre-André Côté pointed out in his book The Interpretation of Legislation in Canada,[7] "The task is to discern the legislator's intent by studying the words in the context of their enactment. In particular, this implies that the enactment's purpose must be considered."[8] In construing the term "United States of America" in the case at hand, the Tribunal shall therefore be guided by this important principle of interpretation.

At this juncture, it seems important to examine the Understanding, the mention of which is contained in subsection 2(3) of the Act. More specifically, it is worth looking at the two definitions contained in the Understanding. The first definition relates to the expression "certain softwood lumber products;" those are the products identified in Appendix A of the Understanding. The definition states that the TSUSA number, at the time of entry into force of the Understanding, controls the definition of each product covered by the Understanding. The second definition is that of the term "United States of America," defined as "the customs territory of the United States of America and foreign trade zones located in the territory of the United States." The Tribunal observes that the term "customs territory of the United States" is not defined in the Understanding. However, the reference to the TSUSA in Appendix A of the Understanding would seem to imply that the definition is to be found in the American tariff schedules. Pursuant to the second headnote of the General Tariff Schedules, that territory "includes only the States, the District of Columbia and Puerto Rico."

A factor to stress is the reflection of key elements of the Understanding in the Act. For instance, paragraph 4.a. of the Understanding stipulates that the Government of Canada will collect an export charge on exports of certain softwood lumber products made on or after

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5. [1990] 2 S.C.R. 1324.
6. [1986] 1 F.C. 346, at 352.
7. Côté, P.-A., 2nd ed., Les Éditions Yvon Blais Inc., 1992, p. 410.
8. *Ibid.*, at 410-11.

January 8, 1987, directly or indirectly from Canada to the United States; subsection 4(1) of the Act mirrors the obligation undertaken by Canada and provides that there shall be levied a charge on softwood lumber products exported to the United States after January 7, 1987. It is worth observing that the dates marking the beginning of the collection of the export charge coincide in both documents. In order to achieve such a result, Parliament had to make an exception to the general rule that a statute normally produces its effects only for the future and saw fit to make the export charge retroactive. Also of significance is the rate of the export charge, set in both documents at 15 percent. In addition, there is the requirement that exporters of softwood lumber products to the United States obtain a licence, as well as the necessity for the exporter to present an export notice for each shipment of softwood lumber products. Finally, Parts II and III of the Schedule to the Act correspond, almost word for word, to Appendices A and B of the Understanding.

Bearing in mind the foregoing, the Tribunal has come to the conclusion that the Act was adopted to implement the Understanding. This should not, however, be taken as meaning that the Understanding is part of the Act. Incidentally, it should be pointed out that the Tribunal's conclusion is supported by a reading of the relevant parliamentary debates. There is, for instance, the statement of the Parliamentary Secretary to the Minister for International Trade, who had introduced the draft legislation in the House of Commons, to the effect that the Understanding embodied the agreement between Canada and the United States, "implementation of which requires authority to collect the export charge. That authority is contained in Bill C-37 which reflects the elements of the memorandum of understanding."[9]

Although it would appear that the Understanding cannot be regarded as a treaty or as a binding document subject to international law, there is no dispute between the parties that the objective of the legislation was to give effect to the Understanding. In this connection, the Tribunal is of the view that the thrust of the principle put forth by the Supreme Court of Canada in the *National Corn Growers* case is relevant in this instance and that it is appropriate for the Tribunal to have regard to the Understanding to "clarify any uncertainty" with respect to domestic law.

With this principle in mind, the Tribunal carefully examined the definition of the "United States of America" found in the Understanding to establish what is encompassed by the words "customs territory of the United States of America." The Understanding itself does not provide any assistance in this regard although Appendix A of the Understanding refers to particular tariff items in the tariff schedules of the United States to more clearly identify classes of goods that are to be subject to the softwood export charge. As noted above, the Harmonized Tariff Schedule of the United States defines the customs territory of the United States as "only the States, the District of Columbia and Puerto Rico" and, thus, it would seem reasonable to conclude that this was the definition in the minds of the signatories to the Understanding.

However, for whatever reason, this definition was not carried forward in the Act, and the Tribunal cannot concur with counsel for the respondent that the reference to the Understanding in subsection 2(3) of the Act effectively provides a link between the Act and the

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9. Commons Debates, May 13, 1987, at 6077. Mention could also be made of the statement of the Hon. Duff Roblin who, moving the second reading of Bill C-37, stated in the Senate that "the two governments, the Government of Canada and the Government of the United States, reached an agreement on a Memorandum of Understanding, which is now enshrined and is the basis of Bill C-37." Senate Debates, May 26, 1987, at 1076.

term "customs territory of the United States" as found in the Understanding. In the Tribunal's view, the wording of subsection 2(3) is clear and unambiguous in specifying that recourse could be had to the Understanding in "interpreting the schedule" to the Act and not the entire Act. This view is supported by the fact that the Appendices of the Understanding and the Schedule to the Act are almost identical in wording.

Given this conclusion, the Tribunal must decide whether the words "exported to the United States" in subsection 4(1) of the Act encompass Puerto Rico. In this regard, the Tribunal heard a number of arguments relating to the legal and constitutional status of Puerto Rico to the United States. The Tribunal does not believe that it is necessary to explore these in depth, save to note that the relationship between the two is substantially different from that of any of the fifty states to the nation as a whole. Moreover, the weight of the evidence received was that Puerto Rico is not regarded in American, British or Canadian law as an integral part of the United States. It is particularly relevant to note, however, that related Canadian legislation, namely the *Customs Act* and the *Customs Tariff*, both define explicitly that the "United States" means "the customs territory of the United States, including the fifty states of the United States, the District of Columbia and Puerto Rico." This expanded and long-established definition in Canadian law was not incorporated into the Act and, in the Tribunal's view, one cannot equate it with the term "United States" as found in the Act.

Given the foregoing, the Tribunal has come to the conclusion that, in interpreting the Act, it is bound by the wording of the legislation, and it is not within the Tribunal's prerogative to extend the meaning of the Act beyond what has been legislated. Indeed, the Tribunal believes that the legislation is quite explicit and that this appeal should be allowed on the grounds that one must resort to the ordinary meaning of "United States of America" which, based on the evidence received by the Tribunal, is normally defined restrictively as comprising the fifty states and the District of Columbia. While this decision may be in conflict with the intent of the legislation, in the Tribunal's view, it would be necessary to amend the law to achieve the desired result.

The appeal is allowed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Sidney A. Fraleigh
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