Date: 20090313

Docket: T-549-08

Citation: 2009 FC 258

OTTAWA, ONTARIO, MARCH 13, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ISLAND TIMBERLANDS LP

and

THE MINISTER OF FOREIGN AFFAIRS AND KEMP FOREST PRODUCTS LTD

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision, made by the Respondent Minister of Foreign Affairs (the "Minister") to allow a custom cutter, the Respondent Kemp Forest Products Ltd. ("Kemp") to make offers on logs designated for export. That decision was made pursuant to the *Export Control List* (the "*ECL*") promulgated by regulation (SOR/89-202) under the *Export and Import Permits Act*, R.S.C. 1985, c. E-19 (the "*EIPA*"), according to which anyone wishing to export logs from Canada must first obtain an export permit from the Department of Foreign Affairs and International Trade ("DFAIT").

BACKGROUND

[2] The Government of Canada has sole jurisdiction to control the export of harvested timber ("logs") from Canada. Logs from timber grown on provincial lands are also subject to additional provincial requirements. Beginning in 1867, the Government of Canada exercised export controls jurisdiction under the *Customs Act*, followed by the *War Measures Act* and emergencies legislation. In 1947, log export controls were authorized by the *EIPA* and the *ECL*.

[3] Logs were originally placed on the *ECL* in 1947 primarily for the purposes of s. 3(1)(e) of the *EIPA*, namely "to ensure that there is an adequate supply and distribution of the article in Canada for defence or other needs". Section 3(1)(b) of the *EIPA* has become an equally applicable purpose, as placing logs on the *ECL* "ensures that any action taken to promote the further processing in Canada of a natural resource that is produced in Canada is not rendered ineffective by reason of the unrestricted exportation of that natural resource".

[4] All federal export controls over logs are administered by the Export Controls Division within DFAIT. In order to provide guidance to exporters, DFAIT issues "Notices to Exporters" which set out the procedures to apply for specific types of permits and criteria which the Minister normally considers in exercising his or her discretion.

[5] Federal export control procedures specific to logs from British Columbia have been in place since 1969. In 1986, the Government of Canada harmonized the provincial and federal logs surplus tests through the implementation of *Notice to Exporters Serial No. 23* (*"Notice 23"*). Under *Notice*

23 and its successors, *Notice 102*, logs originating from federal land can be exported only if they are surplus to domestic requirements. Logs are determined to be surplus if no domestic processor makes a domestic fair market value offer to purchase the logs.

[6] *Notice 102* replaced *Notice 23* on April 1, 1998, and remains in effect to this day. *Notice 102* is a statement published under the Minister's authority to clarify the policy and administrative practices concerning the export of logs from British Columbia (a different regime applies to the export of logs from other parts of Canada). For logs originating from provincial lands, *Notice 102* provides that normally an export permit will be issued when the exporter presents a provincial authorization stating that the legal requirements for removing the logs from British Columbia have been met.

[7] For logs originating from federal land, *Notice 102* sets out the procedure for obtaining authorization to export logs harvested on Federal Land. In her affidavit, Mrs. Lynne C. Sabatino, Senior Policy Analyst in the Export Controls Division of DFAIT, summarizes that procedure in the following way:

a. Applicants for permits to export logs from federal land in British Columbia must first submit to Export Controls an application to advertise logs for domestic sale on the B.C. Federal Bi-weekly List;

b. Upon receipt of the application to advertise, Export Controls will request the British Columbia Ministry of Forests to notify potential domestic purchasers that logs are available for domestic sale and that they may submit written offers within fourteen days of the notification date;

c. If offers to purchase are made within the required time period, the offers are forwarded by Export Controls to the Federal Timber Export Advisory Committee

("FTEAC") to determine whether the offers reflect domestic fair market value for the logs;

d. The role of FTEAC, which consists of a Chair, a provincial secretary, industry members and a federal representative, is to provide advice and recommendations to the Minister. FTEAC makes an assessment as to whether an offer is valid according to *Notice 102* and is at domestic fair market value based on a market review;

e. If an offer is valid and at domestic fair market value, FTEAC makes a recommendation to the Minister that the logs should be considered to be not surplus to domestic needs. If FTEAC finds that an offer is invalid or low compared to domestic fair market value, FTEAC makes a recommendation to the Minister that the logs should be considered surplus to domestic needs;

f. In weighing a FTEAC recommendation, the Minister's objective in deciding whether to issue an export permit is to ensure that there is an adequate supply and distribution within Canada of such logs, consistent with an assessment of domestic needs. This is generally done by permitting only the export of logs that are surplus to those needs, consistent with the authorized purposes for export controls in s. 3(1) of the *EIPA*.

[8] In accordance with this policy, the purpose of which appears to be to ensure an adequate supply of logs for log processors in British Columbia, Section D(3)(c) provides that:

> For the purposes of surplus testing, normally the FTEAC will consider offers only from persons who are involved in log processing. That is, those persons who own or operate log processing facilities.

[9] According to the non-contradicted affidavit of Mrs. Sabatino, DFAIT' and FTEAC's practice prior to 2006 was to accept domestic offers to purchase logs advertised on the B.C. Federal Bi-weekly List from entities that owned log processing facilities, which could include offers made on behalf of third parties. Following representations received from entities that operate log processing facilities through rental or leasing arrangements, FTEAC recommended on November 10, 2006, that such entities also be allowed to offer to purchase logs on the B.C. Federal Bi-weekly

List if they have a history of processing logs through rented or leased facilities and/or they are able to prove the logs will be manufactured locally. The Minister in turn accepted FTEAC's recommendation.

[10] According to the Applicant, the aim of clarifying who could offer to purchase logs on the B.C. Federal Bi-weekly List was to promote the objectives of *Notice 102*, namely, to "ensure that there is an adequate supply and distribution of the article in Canada for defence or other needs" (*EIPA*, s. 3(1)(e)).

[11] This new practice was published on the Export Controls website on May 12, 2008, under the title "Clarification of "operator" status under *Notice 102* for the purposes of determining who may submit offers for logs (Section D(3)(c))". According to this Clarification, the following factors were to be taken into consideration to determine whether a person operates a log processing facility according to Section D(3)(c) of *Notice 102*:

> 1. Evidence that the person has established a regular log cutting relationship with an entity that includes a particular sawmill, maintenance and/or planer facilities (the sawmill);
>
> 2. Evidence that the sawmill has endorsed the person as an independent purchaser of logs that will be processed in the sawmill;
>
> 3. Confirmation from the sawmill that the person's operation will maintain employment in the sawmill; and;
>
> 4. Identification of the person's expected log processing volume at the sawmill.

THE IMPUGNED DECISION

[12] By letter of January 22, 2008, Kemp provided Mrs. Sabatino with a letter from S&R Sawmills purporting to show that it had established a regular log cutting relationship with that particular sawmill to manufacture the logs being purchased and that the sawmill had endorsed Kemp as an independent purchaser of logs. That material part of the letter from Sawmills Ltd. reads as follows:

> I am writing this letter to provide you with information that you requested from Kemp Forest Products regarding their bid to be included in the surplus testing system.
>
> Kemp Forest Products seeks to be included in the surplus testing system as a means to gain access to purchase suitable logs for cutting exclusively at S&R Sawmills. With access to suitable timber Kemp Forest Products anticipates cutting approximately 5,000m^3 per month which will provide direct employment at S&R Sawmills.
>
> To facilitate Kemp Forest Products bid to be included in the surplus testing system and to continue to operate and maintain staffing levels we endorse Kemp Forest Products as an independent log buyer for logs to be processed at S&R Sawmills.

[13] At its February 1, 2008 meeting FTEAC considered Kemp's request. After having noted that the same issue had been discussed in early 2007 and that the committee had not recommended approval of status at the time, and despite the reservations of many members, the committee supported the new application and recommended granting Kemp interim operator status, which would allow Kemp to achieve a cutting program.

[14] The Minister concurred with the FTEAC recommendation; DFAIT advised Kemp of the decision by letter on February 14, 2008. The gist of that letter transpires from the following two paragraphs:

> The Department of Foreign Affairs and International Trade Canada, taking into account the recommendations of FTEAC, has considered this matter and is prepared to consider, on an interim basis, Kemp Forest Products Ltd to be an "operator of a log processing facility" for the purposes of Section 4.3c) of Notice to Exporters No. 102: this means that in principle its offers should be considered valid.
>
> The FTEAC did however recognize that your previous record of manufacturing has been somewhat limited and therefore a re-evaluation will be required by September 1st, 2008. At that time Kemp Forest Products Ltd should be prepared to provide new evidence of manufacturing activity to confirm its status as an operator.

THE ISSUES

[15] The Applicant challenges the decision of the Minister on both substantive and procedural grounds. Substantively, the Applicant alleges that the decision is unreasonable as it is based on a finding of fact unsupported by the evidence. More particularly, the Applicant argues that there is a complete absence of any evidence that Kemp actually had the capacity to process 5,000 cubic meters of timber per month. The issue, therefore, is whether the application does raise a reviewable error.

[16] Procedurally, the Applicant raises two issues. First, it is contended that DFAIT changed the relevant rules without consultation with Island Timberlands and then sought to justify the new rules

after the fact by issuing an addendum to *Notice 102* setting out new criteria. Second, the Applicant is of the view that DFAIT has breached the principles of procedural fairness in refusing to give written reasons for the decision, despite two requests for such reasons. In its written representations, the Applicant had also raised the fact that DFAIT refused to produce the record of the decision on this application pursuant to a request made under Rule 317 of the *Federal Courts Rules* until ordered to do so by this Court. At the hearing, however, it was conceded that this was no longer an issue. The questions for the Court to decide, then, are whether the requirements of procedural fairness apply to the Minister's policy decisions, and if they do, whether they have been breached.

[17] The Respondent Minister has also raised a third issue, challenging the standing of the Applicant to seek judicial review of the Minister's decision to grant Kemp operator status. I shall deal with this issue first.

ANALYSIS

[18] It is trite law that a party that is not a party to a decision taken by a Minister has no status to seek judicial review of that decision under s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. This section provides that the Attorney General of Canada or "anyone directly affected" by the matter in respect of which relief is sought, has standing to apply for judicial review. It has been held time and again that a party who is only affected in the commercial sense by the decision of a Minister has no status to seek judicial review: see, for ex., *Rothmans of Pall Mall Canada Ltd*. v. *Canada (Minister of National Revenue)*, [1976] 2 C.F. 500 (F.C.A.); *Merck Frosst Canada Inc.* v.

Canada (Minister of Health and Welfare) (1988), 146 F.T.R. 249 (F.C.A.); *Aventis Pharma Inc.* v. *Canada (Minister of Health)*, 2005 FC 1396.

[19] It is true, as noted by the Applicant, that Kemp is somewhat more directly affected by the impugned decision of the Minister than were the applicants in the above-mentioned cases. In those cases, the applicants were complaining essentially because they had to face a new competitor for the product they were selling. The same would be true here if another custom cutter was challenging the decision to allow Kemp to make an offer for purchasing logs on the B.C. Federal Bi-Weekly List.

[20] That being said, I agree with the Respondent Minister that the Applicant is nevertheless simply seeking to protect its purported commercial advantage or interest associated with being able to export logs rather than having to sell them domestically by trying to prevent Kemp's inclusion in to the pool of eligible domestic log purchasers. Moreover, this Application for Judicial Review appears at the very least to be premature. The decision made by the Minister with respect to Kemp will not prevent the Applicant from seeking judicial review of the Minister's eventual decision that its logs are not surplus to domestic needs, whether as a result of a valid offer by Kemp or by any other owner or operator of log processing facilities.

[21] As a result, this Application for Judicial Review could be dismissed on the sole ground that it is premature and/or that the Applicant lacks the requisite status to challenge the Minister's decision to grant Kemp operator status. In addition to not being a party to the Minister's decision,

and in the absence of any entitlement under the *EIPA* to export logs, the decision neither affects the Applicant's legal rights nor does it impose any legal obligations.

[22] Out of abundance of caution, and in case I have misdirected myself on the standing issue, I shall nevertheless address the substantive and procedural arguments raised by the Applicant.

[23] It was agreed between the parties before the Court, namely the Applicant and the Respondent Minister, that the applicable standard of review with respect to the alleged substantive error is that of reasonableness, while the standard of correctness governs the analysis of the suspected procedural defects.

[24] According to the Applicant, the decision of the Minister was not within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. In its view, there was no evidence capable of supporting a key finding of fact upon which the decision was made, namely that Kemp could and would process 5,000 cubic metres of timber per month. This would represent an increase of 53 times its average cutting over the past five years.

[25] The problem with this argument is that there is no evidence the decision was premised on the assumption that Kemp would be processing 5,000 cubic metres of timber per month. It is true that in its supporting letter, Sawmills Ltd. mentions that Kemp anticipates cutting approximately 5,000 cubic meters per month. According to the minutes of the FTEAC meeting held on February 1st, 2008, it also appears that the recommendation was that a six month period be allowed so that

Kemp get his cutting program up to the average of 5,000 cubic metres per month. However this figure is nowhere to be found in the decision as communicated to the Applicant by letter on February 14, 2008.

[26] I fail to see how the decision to grant operator status to Kemp under *Notice 102* falls outside the range of possible outcomes contemplated under Section D3(c) of that Notice, especially when read in light of the subsequent Clarification. The evidence of Kemp's track record was not ignored, and indeed it is presumably on that basis that the decision of the Minister was provisional. Kemp is not given a blank cheque, but is required to provide new evidence of manufacturing activity six months after the decision in order to have its status as an operator confirmed. This is clearly not an unreasonable outcome.

[27] Even if the decision was considered not to be in conformity with *Notice 102*, it could not be determinative of its reasonableness. While *Notice 102* sets out the policy applicable to log exports from British Columbia, the policy cannot by itself constrain the Minister's discretion under the *EIPA*. This is indeed reflected in the use of the word "normally" in Section D3(c) of *Notice 102*; it does echo the fact that nothing in the *EIPA* constrains the Minister's discretion respecting the scope of parties that may submit offers for logs advertised in the B.C. Federal Bi-Weekly List. The absence of a similar word in the French version of *Notice 102* cannot detract from this fundamental principle of administrative law.

[28] Sections 3(1)(b) and (e) of the *EIPA* confer a broad discretion to the Minister, and he cannot fetter his discretion by the issuance of guidelines or policies. This principle was clearly affirmed in *Maple Lodge Farms Ltd.* v. *Canada*, [1982] 2 S.C.R. 2. Commenting on a policy adopted within the context of s. 8 of the *EIPA*, Mr. Justice McIntyre (for the Court) wrote (at pp. 6-7):

> It is clear, then, in my view, that the Minister has been accorded a discretion under s. 8 of the Act. The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; …" does not fetter the exercise of that discretion. The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general term what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion.

[29] Even if a person other than an owner or operator of a log processing facility were to make an offer on logs advertised on the B.C. Federal Bi-Weekly List, the Minister would still have to take into account the merits of such a request provided that person had a credible basis for considering a departure from *Notice 102*. The Minister would fetter his discretion if he were to do otherwise because the *EIPA* does not define or limit who can offer to purchase logs on the B.C. Federal Bi-Weekly List.

[30] In the present case, there is no evidence that the decision of the Minister with respect to Kemp is unreasonable, or for that matter that the policy change following which that decision was made is alien to the purposes of the *EIPA*. The Minister is entrusted with the discretion to decide whether or not there is any need to restrict the export of goods on the Export Control List in order to ensure adequate supply and distribution of that article in Canada. According to the Clarification, there will still be some processing made in Canada as requested by s. 3(b) of *EIPA*. It may well be that, as a result of the policy change and of the broadening of the category of persons who may be considered as operator, there will be less processing of logs in Canada. Nonetheless, absent a showing of bad faith, of a breach of the principles of natural justice where required, or of irrelevant considerations in the making of that decision, this is a choice better left to the Minister.

[31] For all of the foregoing reasons, I have not been convinced that the decision to grant Kemp operator status is unreasonable.

[32] Turning now to the alleged breaches of procedural fairness, it is the Applicant's contention that its legitimate expectations were violated as a result of the redefinition after the fact of the persons who may be considered to "operate" a processing facility. According to the Applicant, it was unfair to "backtrack" on substantive promises – namely the statement in *Notice 102* that the right to make offers on the B.C. Federal Bi-Weekly List is limited to "persons who own or operate log processing facilities", which for a decade was interpreted as not including custom cutters like Kemp without consultation. Moreover, the Applicant submits that the failure to give reasons,

considering the impact of the decision on its revenues and on its reputation, is a further breach of procedural fairness.

[33] These arguments can be easily answered. First of all, it is well established that the rules governing procedural fairness or natural justice do not apply to the Minister's policy decisions. The Applicant is seeking to impose public notification and consultation requirements when no such thing has been stipulated by the *EIPA*. While there are statutes in which regulations or policies cannot be promulgated without notifying and consulting the public, the *EIPA* does not contain such a provision. As the Supreme Court stated in *Martineau* v. *Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 608

> A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision.
>
> See also: *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 R.C.S. 525, at p. 558; *A.G. of Canada* v. *Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, at p. 758; *Canadian Association of Regulated Importers* v. *Canada (A.G.)*, [1994] 2 F.C. 247 (F.C.A.).

[34] Moreover, it appears from the affidavit of Mrs. Sabatino that consultations were held and that representations were made to FTEAC from entities that operate log processing facilities through rental or leasing arrangements. As for the claim that the Clarification was drafted after the fact and was meant to regularize the decision made with respect to Kemp, it appears to be pure speculation

and is contradicted by Mrs. Sabatino in her affidavit. Not only does she provide, as an annex to her affidavit, the minutes of a FTEAC meeting held on November 10, 2006, recommending that entities operating log processing facilities through rental or leasing arrangement be allowed to offer to purchase logs on the B.C. Federal Bi-Weekly List under certain circumstances, but she also testified that until the Clarification was published on the Export Controls website on May 12, 2008, entities asking DFAIT about their eligibility to make offers on logs advertised on the B.C. Federal Bi-weekly List were informed verbally of DFAIT's new policy in this regard.

[35] Therefore I find that, even assuming for the sake of the argument that principles of procedural fairness apply to the circumstances of this case, they have not been breached. The rules were not changed after the fact; they were communicated to all those enquiring about their eligibility to make offers. The Applicant was not entitled to the reasons of the decision as it was not the affected party.

[36] For all of those reasons, this Application for Judicial Review is dismissed, with costs.

ORDER

THIS COURT ORDERS that the Application for Judicial Review is dismissed, with costs.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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