

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20091202

Docket: A-171-09

Citation: 2009 FCA 353

**CORAM: SHARLOW J.A.
RYER J.A.
TRUDEL J.A.**

BETWEEN:

ISLAND TIMBERLANDS LP

Appellant

and

THE MINISTER OF FOREIGN AFFAIRS and KEMP FOREST PRODUCTS LTD.

Respondents

Heard at Ottawa, Ontario, on December 2, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on December 2, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on December 2, 2009)

TRUDEL J.A.

[1] This is an appeal from the Order of de Montigny J. (the Judge) (2009 FC 258), in which he dismissed the application for judicial review of Island Timberlands LP (Timberlands) of an interim decision made by the respondent Minister of Foreign Affairs (the Minister). The Minister allowed a custom cutter, the respondent Kemp Forest Products Ltd. (Kemp) to make offers on logs designated for export by the appellant. We agree with the decision of the Judge substantially for the reasons he gave.

[2] As stated by the Judge, the Minister's decision was made pursuant to the *Export Control List* promulgated by regulation (SOR/89-202) under the *Export and Import Permits Act*, R.S.C. 1985, c. E-19, 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 (Department).

[3] As guidance to exporters, the Department issues "Notices to Exporters" setting out the procedures to apply for specific types of permits and criteria which the Minister normally considers when exercising his discretion to grant an export permit. The general policy is that an export permit is granted only for logs originating from federal lands that are considered surplus to domestic requirements.

[4] Of relevance to this appeal is *Notice to Exporters Serial No. 102 (Notice 102)*, under which the proposed exporter, here, Timberlands, must first submit an application to advertise logs for domestic sale on a federal by-weekly list (the list), following which potential domestic purchasers are invited to submit written offers for these logs. If the offer is determined to meet certain criteria, including a price at domestic fair market value, a recommendation is made to the Minister that the logs not be considered to be surplus to domestic needs. Kemp was allowed to make offers on logs advertised on that list, including those of Timberlands, which then could not be considered surplus to domestic needs and could not be sold at a higher price by the appellant on the international market.

[5] Normally, for the purposes of surplus testing, the Department will consider offers only from persons who are involved in log processing, that is persons who own or operate log processing facilities (see section D(3)(c) of *Notice 102*). Kemp is not one of these persons. It is a custom cutter that, the Department was “prepared to consider, on an interim basis, ... [to be an] operator of a log processing facility” pending Kemp’s obligation “to provide new evidence of manufacturing activity to confirm its status as an operator” (Minister’s decision of February 14, 2008).

[6] In the Federal Court, Timberlands challenged the Minister’s decision on both substantive and procedural grounds. It alleged that the Minister’s decision to allow Kemp into the pool of eligible bidders affects its property rights and that it was unreasonable as it was unsupported by the evidence. It also alleged that the Department had breached the principles of procedural fairness by changing the rules regarding potential bidders without consulting Timberlands and by not giving reasons for the decision. For his part, the Minister challenged these arguments and also the appellant’s standing to seek judicial review of his decision regarding Kemp.

[7] On the issue of standing, the Judge first noted 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” (reasons for Order at paragraph 18). Then, he concluded that “the [appellant] is ... 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 the pool of eligible domestic log purchasers" (reasons for Order at paragraph 20).

[8] Although he could have stopped there, and out of abundance of caution, the Judge proceeded to the examination of Timberlands' grounds for the application. The Judge concluded, amongst other things, that the Minister's decision was reasonable in that it fell within the range of possible outcomes (reasons for Order at paragraph 26).

[9] We have not been persuaded that the Judge has made any error of law or any other error warranting the intervention of this Court. The Judge correctly identified the issues and legal principles at play. It was open to him to conclude as he did on the basis of the evidentiary record.

[10] Therefore, this appeal will be dismissed with costs.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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