

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Western Forest Products Limited v. HMTQ***,
2007 BCCA 418

Date: 20070816
Docket: CA035166

Between:

Western Forest Products Limited

Appellant
(Respondent)

And

**Her Majesty the Queen in Right of the
Province of British Columbia as represented by
The Minister of Forests and Range**

Respondent
(Appellant)

And

Forest Appeals Commission

Respondent
(Respondent)

Before: The Honourable Madam Justice Prowse
(In Chambers)

J. Hunter, Q.C.
J.E. Gouge, Q.C.

Counsel for the Appellant
Counsel for the
Respondent
HMTQ

Place and Date of Hearing:

Vancouver, British
Columbia
August 9, 2007

Place and Date of Judgment:

Vancouver, British
Columbia
August 16, 2007

Reasons for Judgment of the Honourable Madam Justice Prowse:

[1] Western Forest Products Limited (“Western”) is applying for leave to appeal from the order of a chambers judge, made May 16,

2007, staying a decision of the Forest Appeals Commission (the “Commission”), made September 21, 2005, finding that a log dump at Jordan River was “not suitable” as an appraisal log dump for the purpose of calculating stumpage to be paid by Western to Her Majesty the Queen in Right of the Province of British Columbia (the “Province”).

[2] Counsel for Western submits that the question at the heart of the proposed appeal is whether the proper application of law, including the relevant principles of statutory interpretation, precludes an appraisal log dump that has been determined to be unsuitable for the cutting authorities of one licensee from being used as the appraisal log dump for cutting authorities of other licensees. That is, can an appraisal log dump be suitable for the cutting authorities of a single licensee.

[3] Counsel for Western submits that this issue gives rise to important questions of statutory interpretation, the role of policy in interpreting regulatory or quasi-regulatory instruments, the admissibility of evidence regarding policy in administrative proceedings, and the appropriate standard of review.

[4] Counsel for Western submits that the chambers judge erred in law in stating and applying the standard of review from the Commission’s decision; in finding that the Commission erred in relying upon an expert opinion and other evidence tendered by Western in interpreting provisions of the Coast Appraisal Manual (“CAM”); and in finding that the Commission erred in concluding that recognized policies of “licensee neutrality”, “notional average operator” and “average efficient operator” were relevant in interpreting s. 4.1 of the CAM and in determining whether Jordan River was “unsuitable for the cutting authority area” within the meaning of that section. (I have taken some liberty in reframing the issues stated by Western in its written outline in accordance with the argument as it was developed before me in oral submissions.)

[5] In determining whether leave to appeal should be granted, the court must consider the criteria set forth in ***Queens Plate Dev. Ltd. v. Vancouver Assessor, Area 09*** (1987), 16 B.C.L.R. (2d) 104 (C.A. Chambers), namely:

- (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction

- of the tribunal appealed from ...
- (b) whether the appeal is limited to questions of law involving:
 - (i) the application of statutory provisions ...
 - (ii) a statutory interpretation that was particularly important to the litigant ...
 - (iii) interpretation of standard wording which appears in many statutes, for example the in force provisions of retroactive legislation ...
 - (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...
 - (d) whether there is some prospect of the appeal succeeding on its merits ... although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
 - (e) whether there is any clear benefit to be derived from the appeal ...

[6] In this case, the most relevant criteria are those set forth in (b)(i), (ii), (c), (d) and (e).

[7] With respect to the merits test, it is not seriously disputed that the chambers judge incorrectly set forth the relevant standard of review at para. 60 of his decision, where he stated:

... if standard of review is viewed as a continuum from correctness (and little deference) at one end, to patent unreasonableness (with great deference) at the other, and with reasonableness *simpliciter* somewhere near the middle, I conclude that the appropriate standard of review here lies between reasonableness *simpliciter* and correctness. On that narrower portion of the continuum, I would put it closer to reasonableness *simpliciter*.

[8] It is common ground that this statement of the standard of

review does not accord with the analysis of the Supreme Court of Canada in **Law Society of New Brunswick v. Ryan**, 2003 SCC 20, [2003] 1 S.C.R. 247, where the Court clearly stated that there are only three standards of review and rejected the concept of a continuum or “spectrum of deference” (paras. 24-26). (As a practical matter, I note that the chambers judge made it clear that he would have allowed the appeal even if he had found the standard of review to be patent unreasonableness.)

[9] In submissions before me, counsel did not agree on the applicable standard of review: Western argued that it was reasonableness; the Province argued that it was correctness. Both agreed (albeit with some hesitation) that the **Administrative Tribunals Act**, S.B.C. 2004, c. 45 did not apply to the issue of standard of review.

[10] Western submits that adopting the correct standard of review was critical to a proper analysis by the chambers judge of the Commission’s decision. I agree with that statement and, in any event, I am of the view that the standard of review is a significant ground of appeal insofar as it appears to be in dispute. In that regard, counsel for the Commission provided a letter to the Court in support of Western’s application for leave in relation to the issue of standard of review.

[11] I am also satisfied that there is an arguable case that the chambers judge erred in his interpretation of s. 4.1 of the CAM and in finding that policies of “licensee neutrality”, “notional average operator” and/or “average efficient operator” were, in effect, not relevant to his interpretation of that provision. With respect to the issue of interpretation of s. 4.1, counsel agreed, and the chambers judge accepted, that the ordinary rules of statutory interpretation should be applied, in accordance with para. 6 of this Court’s decision in **MacMillan Bloedel Ltd. v. British Columbia (Ministry of Forests)**, 2000 BCCA 351, [2000] B.C.J. No. 1128 (Q.L.).

[12] I note that the role of these policies in the interpretation of the CAM (as amended from time to time) has been referred to in prior administrative decisions referred to by the parties, and in at least two decisions of this Court, namely, **Canadian Forest Products Ltd. v. British Columbia (Ministry of Forests)** (1998), 55 B.C.L.R. (3d) 221, and **MacMillan Bloedel Ltd. v. British Columbia (Minister of Forests)** (1984), 51 B.C.L.R. 105. Further, it is evident from the Commission’s

decision that the interpretation of s. 4.1 of the CAM is part of a continuing dispute between the Ministry and various licensees regarding whether Jordan River is an “unsuitable” appraisal log dump for the purposes of assessing stumpage.

[13] The interpretation of s. 4.1 the CAM also raises questions as to whether, and to what extent, experts and documentary evidence describing historical practices and policies of the Ministry in relation to stumpage are admissible as an aid to interpretation.

[14] In my view, these are questions of general importance to the industry beyond the obvious interest of these parties. The policy issues have been touched on in this Court, but none of the cases has raised the issues as clearly as they are raised here. In my view, there is a clear benefit to these parties and others to have the issues addressed by the Court.

[15] In the result, I am satisfied that the relevant criteria for granting leave have been met and I would grant leave to appeal.

“The Honourable Madam Justice Prowse”