Date: 20080918

Docket: T-216-07

Citation: 2008 FC 1057

Vancouver, British Columbia, September 18, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

DOMTAR INC. and
DOMTAR INDUSTRIES INC.

Plaintiffs

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA and
THE ATTORNEY GENERAL OF CANADA

Defendants

REASONS FOR ORDER AND ORDER

I. Introduction

[1] By a Statement of Claim issued on January 31, 2007, Domtar Inc. ("Domtar") and Domtar Industries Inc. ("Domtar Industries") (collectively "Domtar" or "the Plaintiffs") challenge the constitutionality of section 18 of the *Softwood Lumber Products Export Charge Act*, 2006 S.C. 2006, c. 13 (the "SLPECA" or the "Act"). By an amended Statement of Claim, filed on February 13, 2007, the Plaintiffs added Her Majesty the Queen in Right of Canada as a Defendant, together with the Attorney General of Canada (collectively "the Defendants").

[2] The Defendants now move to strike out the action and in their Notice of Motion filed on March 27, 2007, they seek the following relief:

> a) An Order striking out the Amended Statement of Claim herein (the "Claim") without leave to amend and dismissing the action, in whole or in part;
>
> b) In the alternative, an Order removing the Attorney General of Canada as Defendant;
>
> c) In the further alternative, in the event that any of paragraphs 17, 18, 20, 21, 22, 40 and 43 of the Claim are not struck out, an Order requiring the Plaintiffs to provide further and better particulars thereof within 30 days of the Order;
>
> d) If necessary, an Order extending the time for serving and filing the Statement of Defence to 30 days from the production of further and better particulars or the final disposition of this motion;
>
> e) An Order for costs of this motion; and,
>
> f) Further and additional relief as counsel may request and this Court may deem appropriate.

[3] In this case, each party filed affidavits. The Defendants, the moving party, filed the Affidavits of Jacques Maheux and Elizabeth Macauley. The Plaintiffs filed the Affidavit of Patrick Belisle.

[4] Mr. Maheux deposed to the fact that the records of the Canada Revenue Agency show that on January 31, 2007, the Plaintiffs filed a return reporting and remitting $37,769, 575.41 in duties and that the return noted that the payment was made "under protest". Mr. Maheux further deposed that based upon his review of the file, the Plaintiffs had not filed an application for refund of the monies paid, pursuant to subsection 41(3) of the SLPECA.

[5] Ms. Elizabeth Macauley, a paralegal with the Trade Law Bureau of the Department of Foreign Affairs and International Trade, Canada, also provided an affidavit. Attached as exhibits to her affidavit were the following documents:

(i) a true copy of the April 27, 2006 "Agreement in principle" entitled "Basic Terms of a Canada-United States Agreement on Softwood Lumber", referred to in paragraph 14 of the Amended Statement of Claim;

(ii) a true copy of the text of the SLA as executed by Canada and the United States on September 12, 2006;

(iii) a true copy of a amendment to the SLA executed on October 12, 2006;

(iv) a letter dated October 12, 2006, by the Department of Foreign Affairs and International Trade, Canada concerning the entry into force of the SLA pursuant to Article 11.1; and

(v) a letter dated October 12, 2006, by the Ambassador of the United States of America to Canada concerning the entry into force of the SLA pursuant to Article 11.1.

[6] In their responding motion record, the Plaintiffs filed the Affidavit of Patrick Belisle, Controller of Forest Products Division, Domtar Inc. He deposed that neither Domtar nor its wholly-owned subsidiary Domtar Industries had received an assessment under the SLPECA, but rather Domtar Inc. received a generic form from the Canada Revenue Agency. The form was to be completed by all companies who received refunds of duty deposits pursuant to the liability created by section 18 on the SLPECA. A copy of the form was attached as an exhibit. At paragraph 4 of his Affidavit, Mr. Belisle said the following:

> As a result of the liability to pay imposed by section 18 of the SLPECA, Domtar Inc. paid to the Canadian government

> approximately 37 million (Cdn) based on the duty deposits received by Domtar Inc. and Domtar Industries Inc., in accordance with the formula set out in this form. The monies were not paid by mistake.

[7] Mr. Belisle further deposed that Domtar Inc. paid approximately $37 million Cdn to the Canadian government and that the monies were not paid by mistake.

II. Allegations in the Statement of Claim

[8] Domtar is a producer of pulp and paper, lumber and other wood products. It is a publicly traded corporation operating in both Canada and the United States and has been exporting Canadian softwood lumber products into the U.S. for several decades. As a result of certain U.S. trade measures, Domtar's exports of softwood lumber products to the U.S. were subject to approximately $160 million (U.S.) in anti-dumping ("AD") and countervailing ("CV") duties from 2002 to October 11, 2006.

[9] At all relevant times, Domtar Industries was, and continues to be, the importer of record for U.S. customs purposes. Although the duties are payable by the importer of record, Domtar paid the duties to U.S. Customs and Border Protection for both itself and Domtar Industries Inc.

[10] The circumstances giving rise to this imposition of the AD and CV duties was an international trade dispute between Canada and the United States. On April 2, 2001, the U.S. Coalition for Fair Lumber Imports, representing U.S. softwood lumber producers, filed AD and CV duty petitions with the U.S. Department of Commerce (the "DOC") and the U.S. International Trade Commission (the "ITC"). As a result, AD and CV Orders were made. These Orders remained

in effect until October 12, 2006, resulting in liability for AD and CV duties on softwood lumber products from Canada to the U.S. until October 12, 2006. During the period April 2001 until October 2006, approximately $5.4 billion (U.S.) was collected by the U.S. in AD and CV duties on Canadian softwood lumber imports.

[11] Canadian lumber producers and associations challenged the U.S. AD and CV Orders before the U.S. Courts and before bi-national panels established pursuant to the North American Free Trade Agreement ("NAFTA"). Canadian producers and associations also supported the Government of Canada in its recourse to the World Trade Organization ("WTO"), and NAFTA challenges to the measures undertaken by the U.S.

[12] As a result of the proceedings before the U.S. Courts, and the WTO and NAFTA dispute panels, the imposition of the AD and CV duties were found to be contrary to both American law and to international treaty obligations. In spite of these successful challenges, the U.S. government refused to act in accordance with these rulings.

[13] In April 2006, the Canadian and American governments reached an agreement in principle to settle the continuing softwood lumber dispute. This agreement is known as the "Softwood Lumber Agreement" (the "SLA"). The SLA formally came into force on October 12, 2006, and terminated the U.S. Orders imposing the AD and CV duties on softwood lumber imports from Canada.

[14] As part of the SLA, the U.S. agreed to return the AD and CV duties that had been collected, in the amount of approximately $5.4 billion (U.S.). The Canadian government agreed that it would pay $1 billion (U.S.) of the $5.4 billion (U.S.) refunds to U.S. softwood lumber interests. The money would be allocated to members of the Coalition for Fair Lumber Imports in the amount of $500 million (U.S.), and $450 million (U.S.) would be spent on "meritorious initiatives", to be determined by the Unites States, in consultation with Canada. The balance of $50 million (U.S.) would be payable to the bi-national industry council.

[15] The SLA was given effect in Canadian law by the SLPECA, which received Royal Assent on December 14, 2006. The provisions relevant to this dispute were deemed to come into effect on October 12, 2006.

[16] The preamble of the SLPECA states, among other things, that the purpose of the Act is to "impose a charge on the export of certain softwood lumber products to the United States and a charge on the refunds of certain duty deposits paid to the United States …".

[17] In order to implement these charges, two mechanisms were established under the Act: a voluntary duty refund mechanism and section 18 of the SLPECA. Under the voluntary duty refund mechanism, softwood lumber companies could assign their rights to duty deposit refunds to Export Development Canada (the "EDC"), a federal Crown Corporation. In return, the EDC would subsequently pay the producer 81.94% of the refund. The balance of 18.06% would be retained by the Government of Canada, through the EDC. The Canadian Government would pay the funds,

amounting to 18.06%, to American softwood lumber interests. Those Canadian companies that did not assign their rights to the EDC in respect of the duty deposit refunds were subject to the section 18 charge.

[18] Section 18 of the SLPECA creates a charge on the refunds of duty deposits paid by the American Government. According to the formula set out in subsection 18(1), the charge is applied at a rate of 18.06% of the duty deposit refunds. The charge applies to the "person that filed the documents and information required under the applicable United States law in respect of the importation of any softwood lumber product into the United States during the period beginning on May 22, 2002 and ending on October 11, 2006." The charge applies to a "specified person" as defined in section 2 of the Act.

[19] Pursuant to subsection 18(6) of the SLPECA, if a "specified person" sells or disposes of its rights to a duty deposit refund to a person other than Her Majesty the Queen in Right of Canada, that is if the specified person did not participate in the EDC mechanism, the specified person and the other person are "jointly and severally, or solidarily, liable" to pay the charge and any penalties and interest under the SLPECA relating to the charge.

[20] Subsection 68(1) of the SLPECA imposes a fine up to a maximum of $25,000.00 or imprisonment of up to one year, or both, for any person who fails to file a return relating to a section 18 charge.

[21] The Plaintiffs allege that the section 18 charge is unlawful on the grounds that it is *ultra vires* section 91 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (the "*Constitution Act, 1867*"). They claim that the charge represents an unconstitutional intrusion on provincial jurisdiction over property and civil rights within the provinces as authorized by subsection 92(13) of the *Constitution Act, 1867*. Further, they allege that the effect of section 18 is the unlawful interference with the management and sale of public lands belonging to the province of timber and wood pursuant to subsection 92(5) and generally, all matters of a merely local or private nature in the provinces pursuant to subsection 92(16) of the *Constitution Act, 1867*.

[22] The Plaintiffs further claim that section 18 constitutes a tax in relation to forestry resources in the provinces, contrary to subsection 92A(4) of the *Constitution Act, 1867*.

[23] The Plaintiffs claim that section 18 violates sections 102 and 106 of the *Constitution Act, 1867* because the revenue raised is not for the Public Service of Canada. They allege that the provision violates the rights to enjoyment of property, due process of law and equality before the law as guaranteed by the *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III, ("*Canadian Bill of Rights*"). They submit that section 18 violates the Constitution and the law by being overbroad, disproportionate and arbitrary. The Plaintiffs also allege that the SLA and the SLPECA were motivated by political considerations.

[24] In their response to the Defendants' written submissions, the Plaintiffs consented to the removal of the Attorney General of Canada as a Defendant. They also stated they would not rely upon nor pursue the allegations respecting the *Canadian Bill of Rights*.

III. Submissions

i) The Defendants' Submissions

[25] The Defendants raise two broad arguments. First, they argue that this Court lacks jurisdiction to entertain this action on the grounds that the statutory scheme set out in the Act, together with section 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, means that the Tax Court of Canada possesses exclusive jurisdiction over the Plaintiffs' claim.

[26] Second, the Defendants submit that the Amended Statement of Claim discloses no reasonable cause of action. They argue that the Plaintiffs' challenge to the constitutionality of section 18 of the SLPECA cannot succeed since that section represents a proper and lawful exercise of Parliament's jurisdiction over international trade and commerce, pursuant to subsection 91(2) of the *Constitution Act, 1867*. According to the Defendants, the Plaintiffs' claim relative to improper and unlawful intrusion by Parliament into the sphere of provincial jurisdiction is answered by the body of jurisprudence that deals with the division of powers between the federal and provincial governments, including the doctrine of incidental effect, the broad power of Parliament to legislate for the purposes of taxation including indirect taxation, and the federal authority to expend monies other than for public purposes.

[27] As well, the Defendants submit that the Act, including section 18, represents the exercise by Parliament of its treaty-making power. Since such exercise is an aspect of the prerogative powers of Parliament and immune from review in any court, the Defendants argue the Plaintiffs' claim in that regard are doomed to failure.

[28] Further, in the alternative, the Defendants submit that the claims advanced in paragraphs 17, 18, 20, 21, 22, 40 and 43 are non-justiciable since they purport to challenge Parliament's motivation or rationale in enacting the Act or section 18 of the Act and such motivation is beyond review.

[29] With respect to the alleged lack of jurisdiction over the Plaintiffs' claims, the Defendants rely on the scheme set out in the Act that addresses the recovery of money. The Defendants submit that in essence, the Plaintiffs' action is for the recovery of the money that they paid to the Canadian government in the approximate amount of $37 million (Cdn), in satisfaction of the charge created by section 18.

[30] The Defendants argue that sections 39 through 44 address the process to be followed in seeking the refund of money paid under the Act. Section 39 of the Act provides as follows:

Statutory recovery rights 39. Except as specifically provided under this Act or the *Financial Administration Act*, no person has a right to recover any money paid to Her Majesty in right of Canada as or on account of, or that has been taken into account by Her Majesty in right of Canada as,	**Droits de recouvrement créés par une loi** 39. Il est interdit de recouvrer de l'argent qui a été versé à Sa Majesté du chef du Canada au titre d'une somme exigible en vertu de la présente loi ou qu'elle a pris en compte à ce titre, à moins qu'il ne soit expressément permis de le faire

an amount payable under this Act.	en vertu de la présente loi ou de la *Loi sur la gestion des finances publiques*.

[31] Section 41 of the Act also deals with refunds and provides as follows:

Refund of payment 41. (1) If a person has paid an amount as or on account of, or that was taken into account as, a charge, a penalty, interest or other obligation under this Act in circumstances where the amount was not payable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a refund of that amount to the person.	**Remboursement d'une somme payée par erreur** 41. (1) Le ministre rembourse à toute personne la somme qu'elle a payée au titre des droits, pénalités, intérêts ou autres obligations en vertu de la présente loi, ou qui a été prise en compte à ce titre, alors qu'elle n'était pas exigible, qu'elle ait été payée par erreur ou autrement.
Restriction (2) A refund in respect of an amount shall not be paid under subsection (1) to a person to the extent that the Minister has assessed the person for the amount under section 50.	**Restriction** (2) Le remboursement n'est pas effectué dans la mesure où le ministre a établi une cotisation à l'égard de la personne pour cette somme en application de l'article 50.
Application for refund (3) A refund in respect of an amount shall not be paid under subsection (1) to a person unless the person files, in the prescribed manner, an application for the refund in prescribed form and containing prescribed information within two years after the day on which the amount was paid by the person.	**Demande de remboursement** (3) Le remboursement n'est effectué que si la personne présente, dans les deux ans suivant le paiement, une demande en la forme, selon les modalités et accompagnée des renseignements déterminés par le ministre.

One application per reporting period (4) Subject to subsection (5), not more than one application for a refund under this section may be made by a person in any reporting period.	**Une demande par période de déclaration** (4) Sous réserve du paragraphe (5), la personne ne peut présenter plus d'une demande de remboursement par période de déclaration.
Application by branches and divisions (5) If a person who is entitled to a refund under this section is engaged in one or more activities in separate branches or divisions and is authorized under subsection 30(2) to file separate returns in relation to a branch or division, the person may file separate applications under this section in respect of the branch or division but not more than one application for a refund under this section in respect of the branch or division may be made by the person in any reporting period.	**Demandes par succursales ou divisions** (5) La personne qui a droit au remboursement, qui exerce des activités dans des succursales ou divisions distinctes et qui est autorisée par le paragraphe 30(2) à présenter des déclarations distinctes relativement à des succursales ou divisions peut présenter des demandes de remboursement distinctes au titre du présent article relativement aux succursales ou divisions, mais ne peut en présenter plus d'une par période de déclaration relativement à la même succursale ou division.

[32] The Defendants argue that, similar to the statutory scheme provided under the *Excise Tax Act*, R.S.C. 1985, c. E-15, the Act provides the opportunity for a person seeking a refund of money to follow a process of filing an objection, then pursuing an appeal, ultimately before the Tax Court of Canada. The Defendants note that the jurisdiction of the Tax Court of Canada, in relation to matters arising under the Act, was expressly addressed in an amendment to the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, following the coming into force of the Act. Subsection 12(1) of the *Tax Court of Canada Act* provides as follows:

Jurisdiction 12.(1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, *the Excise Act*, 2001, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act*, *2006* when references or appeals to the Court are provided for in those Acts.	**Compétence** 12.(1) La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application de la *Loi sur le droit pour la sécurité des passagers du transport aérien*, du *Régime de pensions du Canada*, de la *Loi sur l'exportation et l'importation de biens culturels*, de la partie V.1 de la *Loi sur les douanes*, de la *Loi sur l'assurance-emploi*, de la *Loi de 2001 sur l'accise*, de la partie IX de la *Loi sur la taxe d'accise*, de la *Loi de l'impôt sur le revenu*, de la *Loi sur la sécurité de la vieillesse*, de la *Loi de l'impôt sur les revenus pétroliers et de la Loi de 2006 sur les droits d'exportation de produits de bois d'oeuvre*, dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[33] The Defendants refers to decisions made pursuant to the *Excise Tax Act*, including the decisions in *Riverside Concrete Ltd. v. Canada*, [1995] 2 F.C. 309 (T.D.), *Federated Co-operatives Ltd. v. Canada*, [1999] F.C.J. No. 1028, 165 F.T.R. 135 (F.C.T.D.) and *Scott Paper Ltd. v. Canada* (2006), 355 N.R. 378 (F.C.A.); leave to appeal denied (2008), 370 N.R. 400 in support of their contention that Canadian courts have recognized that the *Excise Tax Act* provides a procedural code for the recovery of monies paid under that legislation, with a right of appeal lying to the Tax Court. They argue that, by analogy, the SLPECA provides a similar process and again, that jurisdiction in

respect of a claim for recovery of money falls within the exclusive jurisdiction of the Tax Court of Canada, at first instance.

[34] Relying on this foundation, the Defendants submit that pursuant to section 18.5 of the *Federal Courts Act*, this Court is without jurisdiction to adjudicate the Plaintiffs' claim. Section 18.5 of the *Federal Courts Act* provides as follows:

Exception to sections 18 and 18.1	**Dérogation aux art. 18 et 18.1**
18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[35] The Defendants argue that, having regard to the true nature of the Plaintiffs' claim, that is the recovery of money paid under the SLPECA, the combined effect of the specialized process set out in that legislation and the exclusionary effect of section 18.5 of the *Federal Courts Act*, it is

"plain and obvious" that this Court lacks jurisdiction over the within action and that the action should be struck out. In this regard, the Defendants rely on the decision in *Roitman v. Canada* (2006), 353 N.R. 75.

[36] The second substantive ground upon which the Defendants base their motion to strike the Statement of Claim herein is that the Plaintiffs' claim regarding the alleged unconstitutionality of section 18 of the *Federal Courts Act* is without merit since it is plain and obvious that that statutory provision relates to the regulation of international trade, a subject clearly within the legislative competence of Parliament pursuant to subsection 91(2) of the *Constitution Act, 1867*.

[37] Subsection 91(2) of the *Constitution Act, 1867* provides as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next	**91.** Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à

hereinafter enumerated; that is to say,--	toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :
…	…
2. The Regulation of Trade and Commerce.	2. La réglementation du trafic et du commerce.

[38] Section 18 of the SLPECA provides as follows:

Definitions **18. (1)** The following definitions apply in this section.	**Définitions** **18. (1)** Les définitions qui suivent s'appliquent au présent article.
"covered entry" « importation non tarifée » "covered entry" means an entry that, on October 12, 2006, has not been liquidated and in respect of which a duty deposit has been made.	« décret douanier américain » "United States duty order" « décret douanier américain » Selon le cas : a) le texte intitulé Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36,068 (22 mai 2002), avec ses modifications;
"duty deposit" « dépôt douanier » "duty deposit" means an amount deposited under a United States duty order.	b) le texte intitulé Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36,070 (22 mai 2002), avec ses modifications.
"duty deposit refund" « remboursement » "duty deposit refund" of a specified person means the refund of a duty deposit and all interest on that deposit accrued under United States law up to the earlier of	« dépôt douanier »

(a) the day on which the refund is issued to the specified person or a designate of the specified person, and

(b) the day on which the specified person sells the rights to the refund to Her Majesty in right of Canada.

"revocation"

« révocation »
"revocation" means a revocation of a United States duty order including any direction to end any suspension of liquidation of a covered entry or to refund any duty deposit.

"specified person"

« intéressé »
"specified person" means a person that filed the documents and information required under the applicable United States law in respect of the importation of any softwood lumber product into the United States during the period beginning on May 22, 2002 and ending on October 11, 2006.

"specified rate"

« taux applicable »
"specified rate" means the rate determined by the formula

A/B

where

"duty deposit"
« dépôt douanier » Somme donnée en dépôt au titre du décret douanier américain.

« importation non tarifée »

"covered entry"
« importation non tarifée » Importation pour laquelle un dépôt douanier a été fait et à l'égard de laquelle les droits n'ont pas été déterminés au 12 octobre 2006.

« intéressé »

"specified person"
« intéressé » Personne qui a présenté les documents et renseignements exigés par la législation américaine pour l'importation, aux États-Unis, de produits de bois d'oeuvre durant la période commençant le 22 mai 2002 et se terminant le 11 octobre 2006.

« remboursement »

"duty deposit refund"
« remboursement » S'agissant de l'intéressé, le remboursement de tout dépôt douanier et des intérêts afférents courus, selon le droit applicable aux États-Unis, jusqu'au premier en date des jours suivants:

a) le jour où le remboursement est fait à l'intéressé ou à la personne désignée par celui-ci;

A is US$1,000,000,000; and

B is the total, expressed in United States dollars, of all duty deposits and all interest accrued on them under United States law as of October 12, 2006.

"United States duty order"

« décret douanier américain »
"United States duty order" means

(a) the Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36,068 (May 22, 2002), as amended; or

(b) the Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36,070 (May 22, 2002), as amended.

Rounding
(2) The specified rate shall be expressed as a decimal fraction rounded off to four digits after the decimal point, but if the fifth digit is five or greater, the fourth digit is increased by one.

Imposition of charge on duty deposit refund

b) le jour où l'intéressé cède à titre onéreux son droit au remboursement à Sa Majesté du chef du Canada.

« révocation »

"revocation"
« révocation » S'agissant de tout décret douanier américain, sont assimilées à la révocation l'instruction de mettre fin à toute suspension de la tarification des importations non tarifées et celle de rembourser tout dépôt douanier.

« taux applicable »

"specified rate"
« taux applicable » Taux obtenu par la formule suivante :

A / B

où :

A représente 1 milliard de dollars américains;

B le total, en dollars américains, de tous les dépôts douaniers et des intérêts afférents courus, selon le droit applicable aux États-Unis, jusqu'au 12 octobre 2006.

Arrondissement
(2) Le taux applicable, exprimé en nombre décimal, est arrêté à la quatrième décimale, les résultats qui ont au moins cinq en cinquième décimale étant arrondis à la quatrième

(3) Every specified person in respect of whom a covered entry is to be liquidated as a result of a revocation shall pay to Her Majesty in Right of Canada a charge at the specified rate on the amount of any duty deposit refund that relates to the covered entry.

Liability for charge
(4) The charge under subsection (3) is payable by the specified person even if the refund is issued to a designate of the specified person.

When charge payable
(5) The charge under subsection (3) becomes payable by the specified person on the later of

(a) the day on which this Act is assented to, and

(b) the day that is the earlier of

(i) the day on which the duty deposit refund is issued to the specified person or a designate of the specified person, and

(ii) the day on which the specified person sells the rights to the duty deposit refund to Her Majesty in right of Canada.

Joint and several or solidary liability
(6) If, at any time after September 18, 2006, a specified person sells or otherwise disposes of the rights to a duty

décimale supérieure.

Droit sur les remboursements de dépôts douaniers
(3) Tout intéressé à l'égard duquel une importation non tarifée sera tarifée, pour cause de révocation, est tenu de payer à Sa Majesté du chef du Canada le droit au taux applicable sur le montant de tout remboursement relatif à l'importation non tarifée.

Obligation de payer
(4) Le droit est exigible de l'intéressé même si le remboursement est fait à la personne que celui-ci a désignée.

Paiement du droit
(5) Le droit devient exigible à celle des dates ci-après qui est postérieure à l'autre :

a) la date de sanction de la présente loi;

b) la date du remboursement à l'intéressé ou à la personne désignée par lui ou, si elle lui est antérieure, la date à laquelle l'intéressé a cédé à titre onéreux son droit au remboursement à Sa Majesté du chef du Canada.

Solidarité
(6) L'intéressé qui, après le 18 septembre 2006, cède son droit au remboursement à toute autre personne que Sa Majesté du chef du Canada est

deposit refund to a person other than Her Majesty in right of Canada, the specified person and the other person are jointly and severally, or solidarily, liable to pay the charge under subsection (3) and any penalties and interest payable under this Act in relation to that charge.	solidairement responsable avec cette personne du paiement du droit prévu au paragraphe (3) et des intérêts et pénalités visés par la présente loi à cet égard.

[39] The Defendants refer and rely upon the decision of the Supreme Court of Canada in *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, where the Supreme Court identified the first step in addressing the "pith and substance" analysis of legislation when its constitutional validity is challenged. At para. 17, the Supreme Court said the following:

> 17. The first task in the pith and substance analysis is to determine the pith and substance or essential character of the law. What is the true meaning or dominant feature of the impugned legislation? This is resolved by looking at the purpose and the legal effect of the regulation or law: see *Reference re Firearms Act, supra*, at para. 16. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was regulating the fishery, or venturing into the provincial area of property and civil rights. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law: see *Reference re Firearms Act, supra*, at paras. 17-18; *Morgentaler, supra*, at pp. 482-83. The effects can also reveal whether a law is "colourable", i.e. does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction?: see *Morgentaler, supra*, at p. 496. In oral argument, *Ward* expressly made clear that he is not challenging the law on the basis of colourability.

[40] The Defendants submit that having regard to the core of section 18 of the SLPECA, it is plain and obvious that that provision is related to the regulation of international trade. The Act is

intended to implement some of Canada's obligations under the SLA, an agreement that ended the softwood lumber dispute with the United States. According to the Defendants, section 18 is important for the purpose of that Agreement since the provision deals with the raising of money to pay the amount of $1 billion (U.S.) from the customs duties returned to Canada's exporters.

[41] The Defendants argue that a charge will be considered as part of a regulatory scheme if it is "necessarily incidental" to such scheme. In this regard, they rely on the decisions in *Reference Re: Proposed Federal Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004 and *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134.

[42] The Defendants concede that section 18 has incidental effects on property and civil rights but submit that such incidental impact does not impair its constitutional validity. They rely upon the decision of the Supreme Court of Canada in *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292 at paragraph 31 when the Court said the following:

> This analysis underlies the concern expressed by Laskin C.J. in the *Egg Reference*, and it arises whenever there is overlapping jurisdiction. Laws enacted under the jurisdiction of one level of government often overflow into or have incidental impact on the jurisdiction of the other governmental level. That is why a reviewing court is required to focus on the core character of the impugned legislation, as this Court did in *Carnation*; *Attorney-General for Manitoba v. Manitoba Egg and Poultry Assn.*, [1971] S.C.R. 689; the *Egg Reference*; *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; and *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42.

[43] The Defendants also rely on the decision in *Murphy v. Canadian Pacific Railway Company*, [1958] S.C.R. 626 where Locke J. found that some impact on property and civil rights is inevitable, saying the following at pp. 631-632:

> … it appears to me to be too clear for argument that the *Canadian Wheat Board Act* in so far as its provisions relate to the export of grain from the province for the purpose of sale is an Act in relation to the regulation of trade and commerce within the meaning of that expression in s. 91. As pointed out by the learned Chief Justice of Manitoba, it has been long since decided that the provinces cannot regulate or restrict the export of natural products such as grain beyond their borders. …
>
> This being so, in my opinion the fact that of necessity it interferes with property and civil rights in the province of the nature referred to in head 13 of s. 92 is immaterial. For reasons which have been stated in a great number of cases decided in the Judicial Committee as well as in this Court, it has been decided that if a given subject-matter falls within any class of subjects enumerated in s. 91 it cannot be treated as covered by any of those in s. 92 … It is, of course, obvious that it would be impossible for parliament to fully exercise the exclusive jurisdiction assigned to it by head 2 and many others of the heads of s. 91 without interfering with property and civil rights in some or all of the provinces.

[44] The Defendants argue that paragraphs 37 and 38 of the Amended Statement of Claim should be struck since they purport to challenge the wisdom of the SLA.

[45] Paragraphs 37 and 38 of Amended Statement of Claim say the following:

> Section 18 of the SLPECA is *ultra vires* section 91 of the *Constitution Act, 1867,* as it deals with matters assigned solely to provincial jurisdiction. More specifically, the section 18 charge does not involve "the raising of Money by any Mode or System of Taxation", as assigned to the Federal Government under subsection 91(3). Rather, the section 18 charge is a regulatory charge applied to monies owed by a foreign government to Canadian companies, to be

> collected for the sole purpose of re-distributing those monies to foreign interests.
>
> The section 18 regulatory charge relates to "Property and Civil Rights in the Province", as assigned to provincial jurisdiction under subsection 92(13). In addition or in the alternative, the charge relates to
>
> (a) "the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon", as assigned to provincial jurisdiction under subsection 92(5); and/or
>
> (b) "Generally all Matters of a merely local or private Nature in the Province", as assigned to provincial jurisdiction under subsection 92(16); and /or
>
> (c) "the raising of money by any mode or system of taxation in respect of …forestry resources in the province and the primary production therefrom", as assigned to provincial jurisdiction under subsection 92A(4).

[46] The Defendants submit that the wisdom or benefits of the SLA *per se* cannot be the subject of litigation. The allegations made in paragraphs 37 and 38 do not "detract from the self-evident trade-related character" of the SLA and related legislation. The Defendants refer to the decision in *Reference Re: Firearms Act (Can)*, [2000] 1 S.C.R. 783 at paragraph 18 where the Supreme Court said the following:

> Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: *Morgentaler*, *supra*, at pp. 487-88, and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373. Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better

> understand its "total meaning": W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40. In some cases, the effects of the law may suggest a purpose other than that which is stated in the law: see *Morgentaler, supra*, at pp. 482-83; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.) (*Alberta Bank Taxation Reference*); and *Texada Mines Ltd. v. Attorney-General of British Columbia*, [1960] S.C.R. 713; see generally P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at pp. 15-14 to 15-16. In other words, a law may say that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be "colourable".

[47] Alternatively, the Defendants argue that section 18 is a valid exercise of Parliament's jurisdiction pursuant to subsection 91(3) of the *Constitution Act, 1867* which provides as follows:

POWERS OF THE PARLIAMENT

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[…]

3. The raising of Money by any Mode or System of Taxation.

POUVOIRS DU PARLEMENT

Autorité législative du parlement du Canada

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

[…]

3. Le prélèvement de deniers par tous modes ou systèmes de taxation.

[48] The Defendants refer to the decision of the Supreme Court of Canada in *Westbank First Nation*, where the Court set out the factors to be considered in determining whether or not a charge is a tax, saying the following at paragraphs 21 and 22:

> The natural starting point for characterizing a governmental levy is this Court's decision *in Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, at pp. 362-63. In that case, Duff J., as he then was, explained that the impugned charges in that case were taxes because they were: (1) enforceable by law, (2) imposed under the authority of the legislature, (3) imposed by a public body, and (4) intended for a public purpose. Duff J. also noted that the charges there were compulsory, and affected a large number of people.
>
> These indicia of "taxation" were recently adopted by this Court in Eurig Estate, supra, at para. 15. Major J., writing for the majority of this Court, added another possible factor to consider when characterizing a governmental levy, stating at para. 21 that "[a]nother factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided". This was a useful development, as it helps to distinguish between taxes and user fees, a subset of "regulatory charges".

[49] The Defendants submit that the section 18 charge "bears all the hallmarks of taxation" since it is enforceable by law; failure to file or return or pay the charge can lead to penalties under the Act. The charge is imposed by Parliament which is a "public body". The charge is intended for a "further purpose" that is to reimburse the public treasury for the amount of $1 billion (U.S.) paid by Canada in order to give effect to the SLA.

[50] The Defendants argue that incidental effects upon provincial jurisdiction, pursuant to the exercise of valid federal taxation jurisdiction, does not create a constitutional problem and relies

upon the decision in *Reference re: Goods and Services Tax Act*, [1992] 2 S.C.R. 445 at 469, in this regard.

[51] The Defendants submit that section 18 is not contrary to section 102 of the *Constitution Act, 1867* as alleged in paragraph 39 of the Amended Statement of Claim as follows:

> In addition or in the alternative, section 18 of the SLPECA is contrary to sections 102 and 106 of the *Constitution Act, 1867*, as the monies raised are to be paid to, and for the benefit of, U.S. softwood lumber interests and are not "for the Public Service of Canada".

[52] Section 102 of the *Constitution Act, 1867* provides as follows:

VIII. REVENUES; DEBTS; ASSETS; TAXATION	**VIII. REVENUS; DETTES; ACTIFS; TAXE**
Creation of Consolidated Revenue Fund	Création d'un fonds consolidé de revenu
102. All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.	Tous les droits et revenus que les législatures respectives du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick, avant et à l'époque de l'union, avaient le pouvoir d'approprier, sauf ceux réservés par la présente loi aux législatures respectives des provinces, ou qui seront perçus par elles conformément aux pouvoirs spéciaux qui leur sont conférés par la présente loi, formeront un fonds consolidé de revenu pour être approprié au service public du Canada de la manière et soumis aux charges prévues par la présente loi.

[53] The Defendants submit that section 102 is not intended to limit Parliament's jurisdiction pursuant to section 91 of the *Constitution Act, 1867* and relies, in that regard, upon the decision of the Privy Council in *Attorney General of British Columbia v. Attorney General of Canada and Attorney General of Ontario*, [1923] 4 D.L.R. 669 (P.C.) at pp. 670-71 as follows:

> It is to be found in a series of sections which, beginning with s. 102, distribute as between the Dominion and the Province certain distinct classes of property, and confer control upon the Province with regard to the part allocated to them. But this does not exclude the operation of Dominion laws made in exercise of the authority conferred by s. 91. The Dominion have the power to regulate trade and commerce throughout the Dominion, and, to the extent to which this power applies, there is no partiality in its operation. Sect. 125 must, therefore, be so considered as to prevent the paramount purpose thus declared from being defeated.

[54] Further, the Defendants argue that the Plaintiffs' claim that section 18 offends the rule of law is not a reasonable claim. First, they submit that the Plaintiffs have failed to plead sufficient facts to support their claim. Further, they argue that if the Plaintiffs are relying upon section 7 of the *Charter of Rights and Freedoms* to support this claim, then such reliance is misplaced since it is well-established that corporations such as the Plaintiffs cannot rely upon the protection of that provision; see *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at paragraph 96.

[55] The Defendants also take issue with the Plaintiffs' claim in paragraph 43 of the Amended Statement of Claim, that section 18 effectively expropriates the Plaintiffs' property "for no legitimate public purpose". The Defendants argue that there is no Constitutional protection against expropriation and accordingly, paragraph 43 discloses no reasonable cause of action.

[56] Finally, the Defendants submit that in the event the action as a whole is not struck out, then paragraphs 17, 18, 20, 21, 22, 40 and 43 should be struck out on the grounds that they make allegations that are irrelevant and immaterial, scandalous, frivolous and vexatious, and/or disclose

no reasonable cause of action. In any event, the Defendants argue that the issues raised in these paragraphs are non-justiciable.

[57] According to the Defendants, the Plaintiffs are challenging the wisdom of the SLA in paragraphs 17 and 18. The Defendants take issue with paragraphs 20 through 22 on the grounds that the Plaintiffs are challenging the motivation of Parliament in enacting the SLA and enacting the SLPECA.

[58] Finally, with reference to paragraph 43 of the Amended Statement of Claim, the Defendants submit that the Plaintiffs' claim that section 18 of the Act is contrary to the rule of law is not a reasonable cause of action.

ii) The Plaintiffs' Submissions

[59] For their part, the Plaintiffs argue that the Defendants have failed to establish either that this Court lacks jurisdiction over their claim or that the Amended Statement of Claim fails to disclose a reasonable cause of action. They further submit that the Defendants failed to set out, in their written memorandum, their submissions that certain paragraphs in the Amended Statement of Claim are scandalous, frivolous or vexatious or otherwise an abuse of process, and that this Court should not address that issue.

[60] The Plaintiffs argue that the Defendants have failed to show that it is plain and obvious that the Court lacks jurisdiction to adjudicate their claim. They submit that their claim is based upon a

challenge to the constitutional validity of section 18 of the Act; they are not seeking a refund of money paid under the Act in accordance with the scheme set out in that regard. The Plaintiffs say that the money was not paid in error but pursuant to the liability created under the Act and to avoid the substantiated penalties that could apply in the event of non-compliance.

[61] Relying on the decisions in *British Columbia Native Women's Society v. Canada*, [2001] 4 F.C. 191 (T.D.) and *R. v. Amway of Canada Ltd*., [1986] 2 F.C. 312 (T.D.), varied on other grounds [1987] 2 F.C. 524 (C.A.), the Plaintiffs argue that serious questions of law are not to be determined on a summary basis**.**

[62] The Plaintiffs submit that jurisprudence pertaining to the *Excise Tax Act* is irrelevant. They argue that the objection and appeal processes of the Act, which may lead to an appeal before the Tax Court of Canada, are not engaged by the subject matter of their claim. Relying on the decision in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, they argue that the constitutional validity of legislation has always been justiciable.

[63] Furthermore, the Plaintiffs submit that section 18.5 of the *Federal Courts Act* does not preclude this action. The action is brought pursuant to section 17 of the *Federal Courts Act*. Section 18.5 of the *Federal Courts Act* does not apply since the Plaintiffs are not challenging a decision or order of a federal board.

[64] The Plaintiffs argue that the decision in *Roitman*, relied on by the Defendants, is not applicable. In that case, the Federal Court of Appeal referred to section 18.5 as one way of limiting jurisdiction over challenges to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) before the Tax Court.

[65] As well, the Plaintiffs submit that the appeal process contained in the SLPECA applies to "assessments" made under the Act, not to the special charge created by section 18.

[66] The Defendants argue that the section 18 charge relates, in pith and substance, to this regulation of international trade and commerce pursuant to subsection 91(2) of the *Constitution Act, 1867* or alternatively, to the federal taxation power pursuant to subsection 91(3). In response, the Plaintiffs submit that this assertion by the Defendants raise complex questions of fact and law that cannot be disposed of summarily. They rely, in this regard, on the decision in *Reference Re Alberta Bills*, [1938] 4 D.L.R. 433 (P.C.).

[67] The Plaintiffs acknowledge that the doctrine of inter-jurisdictional immunity may be invoked to protect the powers of one level of government against intrusion, including incidental ones, by another level of government, relying on their decision in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3. An enactment that is found to be, in pith and substance, *ultra vires* Parliament's authority and not "necessarily incidental" to the proper exercise of powers may be severed from its surrounding legislation; see *Peel (Regional Municipality v. MacKenzie*, [1982] 2 S.C.R. 9.

[68] The Plaintiffs submit that section 18, in its pith and substance is a regulatory charge and not a tax. Further, they say that the Defendants acknowledge this characterization in their written submissions.

[69] The Plaintiffs refer to the decisions in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357 and *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 where the Supreme Court of Canada identified five criteria for characterizing a government levy, as follows:

1. Is the levy enforceable by law;
2. Is the levy imposed under this legislature's authority;
3. Is the levy imposed by a public body;
4. Is the levy intended for a public purpose; and
5. Is the levy unconnected to any form of a regulatory scheme.

[70] The Plaintiffs submit that the fifth criteria is most important in the present action having regard to the two substantive objectives of the Act that are identified in its preamble, which provides as follows:

> to introduce an Act to impose a charge on the export of certain softwood lumber products to the Unites States and a charge on refunds of certain duty deposits paid to the United States, to authorize certain payments, to amend the Export and Import Permits Act and to amend other Acts as a consequence.

[71] The Plaintiffs argue that section 18 creates a detailed regulatory code relative to debts owed by the Government of the United States to Canadian softwood lumber exporters and that section 18 is designed to extinguish part of that debt by the expropriation of certain monies by the Government of Canada for the benefit of American softwood lumber interests.

[72] Further, the Plaintiffs submit that the cost of the regulatory scheme is defined in the formula set out in section 18. The amount, that is 18.06% of the duty refunds to be paid to Canadian softwood lumber exporters, will yield U.S. $1 billion. The Plaintiffs submit that this amount provides a nexus with the cost of the regulation. In the absence of section 18, the Plaintiffs would be able to pursue collection of the full amount of the duty refund, being a debt owed to them by the United States government, as they would pursue collection of any other debt.

[73] The Plaintiffs argue that if section 18 is a regulatory charge, then it is *ultra vires* Parliament's authority pursuant to subsection 91(2) of the *Constitution Act, 1867*. They submit that the section 18 charge does not regulate trade but is rather designed to regulate debt in a particular sector or industry. Insofar as the Act purports to achieve two purposes, that is, to impose a charge on exports of softwood lumber and to impose a charge on duty deposit refunds, the Plaintiffs argue that it is appropriate to sever the section 18 scheme from the balance of the Act.

[74] Alternatively, the Plaintiffs argue that the section 18 charge is *sui generis* and even if the surrounding regulatory scheme is *intra vires* the Federal government's authority, section 18 is not necessarily incidental to the proper exercise of that power.

[75] In short, the Plaintiffs argue that the section 18 charge falls within provincial powers pursuant to subsection 92(13) of the *Constitution Act, 1867* that is power over property and civil rights, including the creation and extinction of debts. The Plaintiffs rely in this regard upon the decision in *Ladore v. Bennett*, [1939] A.C. 468 (P.C.). In the further alternative, the Plaintiffs submit

that section 18 falls within provincial powers pursuant to subsection 92(16) of the *Constitution Act, 1867* that is matters of a merely local or private nature within the province, which has been found to include debts and the regulation of the creditor-debtor relationship; see *Ontario (Attorney General) v. Scott*, [1956] S.C.R. 137.

[76] In the further alternative, the Plaintiffs argue that the section 18 charge is within provincial powers pursuant to subsection 92(5) of the *Constitution Act, 1867* that is the power to legislate in relation to the management and sale of public lands belonging to the province and of the timber thereon. The Plaintiffs submit that the debt that is the subject of the section 18 charge is integrally related to the provinces' power under subsection 92(5) since the debt is a result of the sale of timber grown on the lands belonging to the provinces. They argue that the section 18 charge may properly be classified under subsection 92(5).

[77] Again, in the alternative the Plaintiffs submit that if the section 18 charge is a tax, then it is not plain and obvious that section 18 is *ultra vires* the provinces' authority pursuant to subsection 92(4) of the *Constitution Act, 1867*. Under that subsection provinces are authorized to raise money by any system of taxation relative to forestry resources in the province and the primary production from those resources. They say that it is arguable that the section 18 charge falls within provincial taxing authority under subsection 92A(4).

[78] The Plaintiffs also submit that it is not plain and obvious that section 18 is consistent with sections 102 and 106 of the *Constitution Act, 1867*. Section 102 creates the Consolidated Revenue

Fund, that is, the aggregate of all monies belonging to Canada. Sections 103 through 105 of the *Constitution Act* provide for specific appropriation of funds without the necessity of annual Parliamentary votes. Section 106 provides for appropriation by Parliament for three purposes not addressed in sections 103 through 105, as long as the purpose of the appropriation is for the "Public Service of Canada".

[79] The Plaintiffs argue that the question of whether sections 102 and 106 of the *Constitution Act, 1867* impose limits on Parliament's spending authority has not been conclusively adjudicated. They submit that it is a question of statutory interpretation and factual analysis to determine if payment of the amount of US$1 billion to American softwood lumber interests is contrary to sections 102 and 106 of the *Constitution Act, 1867*. Accordingly, the Plaintiffs submit that it is not plain and obvious that their challenge to section 18, upon the bases of sections 102 and 106, is doomed to fail.

[80] The Plaintiffs further argue that it is not plain and obvious that section 18 is consistent with the rule of law. They acknowledge that invocation of the rule of law to invalidate legislation is controversial; however, they rely on the decision in *Shubenacadie Indian Band v. Canada (Attorney General et al.)* (2001), 202 F.T.R. 30 (T.D.), aff'd (2002), 228 F.T.R., 317 (note) where this Court held that a statement of claim should not be struck on the ground that the state of the law is evolving or uncertain if there is a "glimmer of a cause of action, even though vaguely or imperfectly stated".

[81] The Plaintiffs also refer to and rely on the decision in *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3 and *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005], 2 S.C.R. 473 in support of their claim based upon the rule of law.

[82] The principles of the rule of law were also addressed by the Supreme Court of Canada in *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873. Relying on this decision, the Plaintiffs argue that the Supreme Court has acknowledged that the principle of the rule of law, as the basis for a constitutional challenge to legislation, is still developing.

[83] The Plaintiffs argue that their reliance on the principles of overbreadth, proportionality and arbitrariness in support of their rule of law claim is appropriate given that the issue of the capability of the rule of law to challenge and limit government authority is not settled. They submit that it is not plain and obvious that this cause of action will fail.

[84] The Plaintiffs' response to the Defendants' claim that paragraphs 17, 18, 20, 21, 22, 40 and 43 of the Amended Statement of Claim are not justiciable is that the Defendants have failed to show that it is plain and obvious that these claims will not succeed. Relying on the decision in *Chiasson v. Canada* (2001), 215 F.T.R. 293, the Plaintiffs submit that this Court has already decided that a question of justiciability should not be disposed of in a summary way upon a motion to strike, but should be determined by a trial judge upon a complete hearing on the merits.

[85] Further, the Plaintiffs argue that a Court should not refuse to decide an issue on the basis of its policy context, relying in this regard upon the decision in *Operation Dismantle v. Canada*, [1985] 1 S.C.R. 441.

[86] As well, the Plaintiffs rely on the decision of the Ontario Court of Appeal in *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.) in response to the Defendants' submissions about the non-justiciability of the claim made in the above-referenced paragraphs. The Plaintiffs argue that the exercise of prorogation power is justiciable as long as the subject matter of that power is "amenable to the judicial process".

[87] Finally, the Plaintiffs argue that if there are deficiencies in their Amended Statement of Claim, such flaws are capable of rehabilitation either by the provision of particulars or by amendment. They submit that leave to amend must be granted where there is a "scintilla" of a true cause of action, in spite of any vagueness in the pleading.

IV. Discussion and Disposition

[88] The Defendants' motion is based upon Rule 221(1) of the Rules which provides as follows:

Motion to strike	Requête en radiation
221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

e) qu'il diverge d'un acte de procédure antérieur;

f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[89] The threshold for striking a pleading is high and the burden upon the moving party is a heavy one, since it must be shown that it is beyond doubt that the case cannot possibly succeed at trial.

[90] The decision in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 has been adopted in setting out the test upon a motion to strike a pleading. At page 980, the Supreme Court said the following:

> Most recently, in *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24(a).

[91] The "plain and obvious" test also applies when a party brings a motion to strike upon a lack of jurisdiction. In this regard, I refer to the decision in *Hodgson et al. v. Ermineskin Indian Band et al.* (2000), 267 N.R. 143 (C.A.), aff'g (2000), 180 F.T.R. 285 (T.D.) where the Federal Court of Appeal said the following at paragraph 5:

> While we are by no means confident that this Court has jurisdiction over the Plaintiffs' claims against the Ermineskin Defendants under section 17 of the *Federal Court Act*, we are not prepared to say that the Court's lack of jurisdiction is plain and obvious and beyond doubt. This is a case involving claims against an Indian band and band council as well as the Crown. While the Court clearly has jurisdiction in respect of judicial reviews of decisions of Indian band councils, jurisdiction in the case of actions against bands is far less clear. Insofar as the breach of fiduciary duty claim is concerned, the Band's argument that it has no fiduciary duty to non-members, while seemingly obvious at first blush, rests upon the Plaintiffs never having been members or being entitled to membership. It is not plain and obvious that, if the Plaintiffs or their ancestors were wrongly deleted or not added as members, there may not be some fiduciary duty owed to them.

[92] In respect of a motion to strike on the basis of a lack of jurisdiction, evidence may be advanced for the purpose of establishing jurisdictional facts; see *Mil Davie Inc.* where the Federal Court of Appeal said the following at p. 374:

> […] all refer to specific facts either material to the jurisdictional facts necessary under ss. 36 and 45 of the Competition Act to establish the jurisdiction of the Trial Division or tending to show a reasonable cause of action.

[93] The affidavits filed by the parties, that is the affidavits of Ms. Macauley, Mr. Maheux and Mr. Belisle speak to the basic facts underlying this action, that is the existence of a liability under section 18 of the Act to pay a charge and to the payment of that liability by the Plaintiffs. The claim set out by the Plaintiffs is that the provision creating the section 18 charge is unconstitutional. The issue arising on this motion is whether the Defendants have shown that it is "plain and obvious" that the Plaintiffs action is either beyond the jurisdiction of the Court or whether the claim fails to disclose a reasonable cause of action.

[94] I am satisfied that the Defendants have failed to discharge their burden.

[95] First, with respect to the question of jurisdiction it is not "plain and obvious" that the subject matter of the Plaintiffs' claim falls within the exclusive jurisdiction of the Tax Court. It is not plain and obvious that the assessment, objection and appeal processes provided under the SLPECA are engaged. In my view, in describing the Plaintiffs' action as one for the recovery of money, the Defendants are mischaracterizing the claim set out in the Amended Statement of Claim.

[96] The Plaintiffs are challenging the constitutionality of section 18 of the Act. If successful, it would appear that the monies paid under protest could be returned. However, the Plaintiffs are not basing this action on a claim for the return of money paid, *per se*.

[97] The submissions made for the Defendants concerning the exclusive jurisdiction of the Tax Court, to the exclusion of the jurisdiction of this Court, demonstrate that complex questions of fact and statutory interpretation are involved. Repeatedly, this Court and the Federal Court of Appeal have said that questions of statutory interpretation should not be decided on a summary basis. A recent statement in that regard was made by the Federal Court of Appeal in *Laboratoires Servier et al. v. Apotex et al.* (2007), 370 N.R. 200.

[98] The next question is whether it is "plain and obvious" that the Amended Statement of Claim fails to disclose a reasonable cause of action. Again, I observe that the Defendants have adopted a very narrow perspective on the nature of the claim raised. The Plaintiffs are challenging the constitutionality of section 18 on basic grounds relative to the division of powers, principally by reference to subsection 91(2) and subsection 91(3) of the *Constitution Act, 1867* respecting regulation of international trade and commerce and federal taxation power, respectively.

[99] The Plaintiffs' allegation relative to these provisions relate to subsidiary allegations involving subsections 92(16), 92(5) and 92A(4) of the *Constitution Act, 1867* respecting provisional power over matters of a purely local or private nature within the province, the power to legislate with respect to the management and sale of public lands belonging to the province and the timber on

the lands, and the power of a province to tax relative to forestry resources in the provinces and the primary production from their lands, respectively.

[100] As argued by the Plaintiffs, the constitutionality of legislation has always been justiciable. I refer to the judgment of the Supreme Court of Canada in *Thorson* where Mr. Justice Laskin (as he then was) said the following at page 145:

> … The substantive issue raised by the plaintiff's action is a justiciable one; and, *prima facie*, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

[101] In my opinion, the Plaintiffs have identified various alternate claims to challenge the constitutional validity of section 18. It is not "plain and obvious" that these claims are doomed to fail. It is not appropriate that any of these claims be struck out, at this stage.

[102] The Defendants argue that the Plaintiffs' reliance upon the rule of law, as a challenge to the validity of section 18, fails to disclose a reasonable cause of action. I disagree.

[103] In *Christie*, at para. 20-21, the Supreme Court of Canada discussed the rule of law and its decision in *Imperial Tobacco*, relied upon by the Plaintiffs as follows:

> The rule of law embraces at least three principles. […]
>
> It is clear from a review of these principles that general access to legal services is not a currently recognized aspect of the rule of law. However, in *Imperial Tobacco*, this Court left open the possibility that the rule of law may include additional principles. It is therefore necessary to determine whether general access to legal services in

> relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law.

[104] I agree with the submissions of the Plaintiffs that it is not "plain and obvious" that their plea respecting the rule of law cannot succeed. This plea is made by the Plaintiffs as an aspect of their challenge to the constitutional validity of section 18 and should be determined by a Court upon a full record.

[105] I reject the arguments of the Defendants that the matters raised in paragraphs 17, 18, 20, 21, 22, 40 and 43 of the Amended Statement of Claim are not justiciable. In *Chiasson* this Court said the following at para. 12:

> 12 Without commenting on the strength of the respondent's case, or indeed that of the appellant, having heard the parties and upon review of the materials, I am not convinced that it is plain and obvious that the respondent's claim will fail. In my view the claim is not so futile or bereft of any possibility of success as to warrant striking. I am in agreement with the conclusion reached by Prothonotary Aronovitch. The principle issue raised in this claim calls for a determination of the scope of the Committee's power by reference to the Letters Patent and the Regulations. The respondent argues that this issue is justiciable. It is not plain and obvious to me that it is not. The matter should be disposed of by a judge who has the benefit of a full and complete hearing on the merits.

[106] Paragraphs 17, 18, 20 and 22 may be regarded as setting forth a factual context for the background to the passage of the Act, including section 18. It will remain for the trier of fact to decide the consequences of these allegations.

[107] No submissions were made by the Defendants relative to the claim in paragraphs 17, 18, 20, 21, 22 and 43 pursuant to Rule 221(1)(c), that is on the grounds that the allegations in these paragraphs are scandalous, frivolous or vexatious. The paragraphs will remain because I am not satisfied that the Defendants have otherwise shown that it is "plain and obvious" that no reasonable cause of action is disclosed.

[108] Paragraph 40 of the Amended Statement of Claim raises a plea concerning the *Canadian Bill of Rights*. The Plaintiffs have agreed to withdraw this claim and nothing further need be said in that regard.

[109] The Plaintiffs have also agreed to an Order removing the Attorney General of Canada as a Defendant. The sole Defendant will be Her Majesty the Queen in Right of Canada.

[110] In the event that they were unsuccessful in their motion to have paragraphs 17, 18, 20, 21, 22, 40 and 43 of the Amended Statement of Claim struck out, the Defendants requested an extension of time, that is, 30 days for the production of better particulars before filing their Statement of Defence.

[111] The Defendants have produced no evidence to show that they do not understand the nature of the claims raised in paragraphs 17, 18, 20, 21, 22 and 43. In light of the Plaintiffs' agreement to abandon any claim with respect to the *Canadian Bill of Rights*, no more need be said about paragraph 40.

[112] I am not persuaded that further particulars are required from the Plaintiffs and no order for particulars will be made.

[113] However, the Defendants are granted an extension of time to serve and file their Statement of Defence, that is, a period of 30 days after receipt of a further Amended Statement of Claim from the Plaintiffs.

[114] In the result, the Defendants' motion is dismissed. The Plaintiffs are granted leave to file a further amended Statement of Claim to show that the Attorney General is no longer a party and to withdraw their claims relative to the *Canadian Bill of Rights*. That further Amended Statement of Claim is to be served and filed within 30 days of receipt of this Order.

[115] The Plaintiffs shall have their costs to be taxed.

ORDER

THIS COURT ORDERS that:

1) The Defendants' motion to strike is dismissed.

2) The Plaintiffs are granted leave to file a further Amended Statement of Claim to show that the Attorney General of Canada is no longer a party and to withdraw their claims relative to the *Canadian Bill of Rights* as now set out in paragraph 40.

3) The Defendants' request for particulars relative to paragraphs 17, 18, 20, 21, 22 and 43 is denied.

4) The Plaintiffs shall serve and file their further Amended Statement of Claim within 30 days of receipt of this Order.

5) The Defendants are granted an extension of time, that is, 30 days from receipt of the Plaintiffs' further Amended Statement of Claim, to serve and file their Statement of Defence.

6) The Plaintiffs shall have their taxed costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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