

**Date: 20081217**

**Docket: T-1900-07**

**Citation: 2008 FC 1380**

**Ottawa, Ontario, December 17, 2008**

**PRESENT: The Honourable Mr. Justice Campbell**

**BETWEEN:**

**ISLAND TIMBERLANDS LP**

**Applicant**

**and**

**THE MINISTER OF FOREIGN AFFAIRS**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The present Application is about the Minister of Foreign Affairs' apparent unwillingness to disclose the rationale for the Policy that export permits for standing timber from the coastal region of British Columbia will not be granted. As an exporter of timber from the coastal region of British Columbia, Island Timberlands made an attempt to prompt the Minister to disclose the rationale for the Policy by filing applications for permits against the stated Policy. In my opinion, the Minister's decision rejecting Island Timberlands' applications without disclosing the rationale for the Policy is evidence that the Minister's decision-making with respect to the Policy is unfair.

[2] The legislative regime relevant to the present Application and the events leading to the making of the decision under review are not in dispute. These reasons are divided into four separate sections: a brief general description of the legislative regime and its practical implementation in the present case; a statement of the conduct of the present Application which describes how the Minister's unwillingness to disclose the rationale for the Policy is the central focus of this Application; a detailed description of the events which lead to the determination of the decision under review, and the analysis which grounds the relief to be granted.

### **I. The Legislative Regime and its Implementation in British Columbia**

[3] The export of timber from British Columbia is restricted by federal and provincial regimes. The federal regime is governed by *Export and Import Permits Act*, R.S.C. 1985, c. E-19 to ensure that, pursuant to s. 3(1)(e), there is an "adequate supply and distribution of timber in Canada for defense or other needs". The federal regime applies to timber located on private lands for which the original Crown grant was issued before March 12, 1906, while the provincial regime, as set out in Part 10 of the B.C. *Forest Act*, R.S.B.C. 1996, c. 157, ss. 127-129, applies to timber located on British Columbia Crown land and to timber located on private lands for which the original Crown grant was issued after March 12, 1906.

[4] Both control regimes limit the ability to export timber from British Columbia by a similar process of applying a "surplus test" to determine whether an export permit should be granted. By application of the surplus test, timber is allowed to be exported from the relevant jurisdiction,

British Columbia or Canada, only if the regulating government is satisfied that the timber is “surplus” to domestic needs.

[5] The details of the federal regime are set out in a document entitled “Notice 102” which was promulgated under the *Export and Import Permits Act* and published on April 1, 1998. Notice 102 requires that a proposed exporter under the federal regime must take the following steps: the proposed exporter must submit an “Application to Advertise Logs on the B.C. Federal Bi-Weekly List” to the Export Controls Division of the Department of Foreign Affairs and International Trade (DFAIT); if the application is accepted, the timber in question is offered for domestic sale on a “Bi-Weekly List”; following publication, potential purchasers have 14 days to submit written offers; if no offers are received, the timber is considered to be “surplus” to domestic needs; and because the “surplus test” is met, an export permit may be granted. However, if an offer is received, Federal Timber Export Advisory Committee (“FTEAC”) considers whether the offer is “fair” and makes a recommendation to the Minister of Foreign Affairs as to whether an export permit ought to be granted. If the offer is found to be “fair” by reference to prevailing domestic British Columbia timber prices, the timber is considered not to be surplus to domestic needs and an export permit is generally denied. However, if the offer is considered not to be “fair”, an export permit is generally granted.

[6] The process under the provincial regime is, in all material respects, identical. There is a high degree of cooperation between the federal and provincial regimes. For example, the same Bi-

Weekly List is used by both regimes, the composition of the provincial equivalent to FTEAC, which is the Timber Export Advisory Committee (TEAC), is identical to FTEAC.

[7] Island Timberlands owns significant tracts of forest lands in the coastal region of British Columbia. Indeed, it is the second largest holder of private timberlands in the Province, with holdings comprising approximately 258,000 hectares. Almost all of its land is located on Vancouver Island.

[8] In the British Columbia timber industry, the term “standing timber” refers to timber which has not yet been harvested; that is, the timber is “standing” because the trees have not yet been cut down. The term “logs” refers to timber which has been harvested. The Policy of both the Federal and British Columbia governments is to treat standing timber differently depending on the region in which the timber is located. In the interior region, the Policy of both levels of government is to accept applications to advertise with respect to either standing timber or logs. In the coastal region, the Policy of both levels of government is to accept applications to advertise only with respect to logs. In other words, in the interior, a proposed exporter may seek an export permit before harvesting, while on the coast the application process cannot begin until the timber in question has been harvested.

[9] It is important to note that, during the period of time relevant to the present Application, Notice 102 did not state that applications to advertise with respect to standing timber would be

accepted when, in fact, applications for standing timber were being accepted with respect to standing timber in the interior region of British Columbia.

[10] Another important factor that comes into play with respect to the present Application is the method by which applications are to be filed. Notice 102 specifically states that applications are to be made in writing by filing a form entitled “EXT 1718”. Nevertheless, at the time relevant to the present Application, all applications for both the interior and coastal regions of British Columbia were required to be filed electronically by a system named Export Controls Online (EXCOL). It is also important to note that, by the way that electronic application system is programmed, it is only possible to file for standing timber from the interior region.

## **II. The Conduct of the Present Application**

[11] As described in detail in the next section, the initial step taken by Island Timberlands to prompt the decision under review was to ask the Minister an ambiguous question about the application process for exporting standing timber from British Columbia. On behalf of the Island Timberlands, the question was asked by a senior and very experienced employee of the company to the Minister’s entry level officials, which was answered on an erroneous assumption. It was this answer that Island Timberlands used to prompt the chain of events leading to a decision with which it does not agree, and about which it argues that reviewable errors in its making require that the decision be set aside. The relief claimed by Island Timberlands in the Notice of Application is for an order quashing the decision to refuse to consider its applications, and an order to remit the applications back to the Minister for “determination on the merits”.

[12] The unique feature of the present Application is that Island Timberlands' motive for setting the chain of events in motion, and in bringing the present Application, is in issue. By the same token, the Minister's motive for not disclosing the rationale for the Policy being attacked has also been placed in issue. These two factors have overshadowed the original written arguments presented by both sides to the present dispute, and have resulted in a revised focus.

[13] The revised focus centres on the question as to whether a breach of due process was committed by the Minister in decision-making process leading to the rejection of Island Timberlands' applications. The revised focus has been fully argued by experienced Counsel for both Island Timberlands and the Minister, on fair notice, during the course of oral argument in the hearing of the present Application.

### **III. The Events Leading to the Making of the Decision under Review**

#### ***A. The original request for information***

[14] Island Timberlands' evidence on the present Application is centered on the affidavit of its Director of Marketing and Distribution, Mr. Richard Ringma. Richard Ringma has been employed in the timber industry since 1972, and has held various positions related to the manufacture, sorting, marketing, and distribution of timber on the coast of British Columbia.

[15] On August 29, 2007, Richard Ringma wrote the following email to Ms. Annick Lavoie, a clerk in the Minister's office:

Annick,  
Could you please forward me all rules, regulations and procedures that you have for the advertising of Federal standing timber. We at Island Timberlands would like to consider this option but can find little information on this. Any help you could provide would be appreciated.  
With thanks

(Application Record, p. 90)

[16] On September 19, 2007 at 11:54 a.m., Richard Ringma emailed Annick Lavoie and Ms.

Lynn Sabatino, Deputy Director of the Export Controls Division:

Annick, have you managed to dig anything up for me??  
Thks  
Richard

(Application Record, p. 90)

In response, September 19, 2007 at 2:55 p.m., Lynn Sabatino wrote:

Richard  
Annick is not in the office today but I expect that she will be back tomorrow. She will be in touch with you then.  
Thanks  
Lynne

(Application Record, p. 90)

Immediately following her response to Richard Ringma, at 2:56 p.m., Lynn Sabatino emailed

Annick Lavoie:

Annick  
I would presume that all this information is in Notice 102.  
Lynne

(Application Record, p. 91)

***B. The answer provided***

[17] On September 20, 2007 at 10:14 a.m., Annick Lavoie sent the following email to Richard Ringma:

Hi Richard,  
Procedures and rules for advertizing [sic] Federal standing timber are the same as procedures and rules for harvested timber. We just did not get a chance to update Notice 102 which will be done in the near future.  
Regards,  
Annick Lavoie

(Application Record, p. 92)

At 11:24 a.m. the same day, the following email was sent by Ms. Wendy Salloum, Sales Administration, Island Timberlands, to Annick Lavoie regarding the use of the Minister's electronic filing system:

Hi Annick  
We've been checking the EXCOL site to see exactly how we would do the advertising. The screens look very similar to what we normally use. The exception is on the ITEMS screen, when we select standing timber the only options for the BC Forest Regions are Northern Interior & Southern Interior. We need to be able to select our region – Coastal. What would you suggest that we do for this?  
Thanks  
Wendy

(Application Record, p. 95)

With respect to Wendy Salloum's email, Lynn Sabatino wrote to Annick Lavoie at 3:50 p.m.:

See Annick we did respond to him...not sure what to do now...talk to BCMOF. If we allow coastal to advertise standing I think we are in for a mess as no one will be able to make offers on the advertisement and then we will be forced to issue a surplus letter that potentially could cover hundreds of permit applications.



Lynne

(Application Record, p. 92)

[18] On September 21, 2007, Wendy Salloum wrote the following email to Annick Lavoie:

Hi Annick  
Just wondering if you have been able to find anything out for me?  
Richard said he would like to try for Monday to submit an  
application for advertising the standing timber.  
Thanks  
Wendy

(Application Record, p. 95)

***C. The action taken based on the answer***

[19] On September 24, 2007, Island Timberlands proceeded, by email, to submit three applications to advertise standing timber located on the coast. At 4:40 p.m., Ms. Lynn King, Sales Administration, Island Timberlands, sent an email to Annick Lavoie, Lynn Sabatino, Ms. Liliana Vaduva, Wendy Salloum, and Richard Ringma labeled “high importance” stating the following:

Hello Annick  
I am attaching a letter and 3 applications for advertising Standing  
Timber. Please let me know if you have any questions regarding  
this advertisement.  
Thank you  
Lynn  
(Application Record, p. 109)

The attached letter is dated September 24, 2007:

Attention: Annick Lavoie  
Standing Timber Advertising

Dear Madam:  
I have enclosed 3 Applications to Advertise for Standing Timber.

We are submitting these to you in this format as we cannot at this time select the appropriate B.C. Forest Region when we select Standing Timber advertising in EXCOL.

Please let us know if you require any more information for these applications.

If we do not hear from you we will expect these applications to be on the Bi-weekly Advertising List that starts advertising on October 5, 2007.

Thank you  
Lynn King  
Sale Administration  
Island Timberlands

Cc: Lynn Sabatino  
Wendy Salloum  
Richard Ringma

(Application Record, p. 110)

***D. Deliberation by the Minister***

[20] On September 25, 2007, a DFAIT official had a discussion with the British Columbia Ministry of Forests and Range (BCMOF) to ascertain whether British Columbia's policy was still to accept applications for standing timber from the interior region but not from the coastal region.

[21] On September 25, 2007 at 7:23 a.m., Annick Lavoie sent an email to Lynne Sabatino marked "high importance":

Lynne,  
We need to do something asap about this. They are still pushing in order to process their application to advertise for standing timber.  
Regards,  
Annick Lavoie

(Application Record, p.1 15)

Lynne Sabatino responded at 9:24 a.m.:

Annick

My understanding is that Notice 102 states we will not allow standing timber to be advertised however it sounds like we have done this in the past anyway. Is this timber on the coast or in the interior. [sic]

If it is in the interior did we not tell them that we would not accept advertisements for standing timber in the interior.

Have you spoken to BCMOF?

Lynne

(Application Record, p. 115)

On September 27, 2007, after confirming the Policy of the BCMOF, Lynn Sabatino took action confirmed in the cross-examination on her affidavit filed in the present Application as follows:

Q: All right. And at that point, you say in paragraph 20 of your Affidavit: "I therefore began the process of drafting a letter to Island Timberlands."?

A: Yes.

Q: That letter eventually became the letter of October 12, 2007 denying or communicating the decision?

A: Correct.

Q: And I take it that the time gap between September 27<sup>th</sup> and October 12<sup>th</sup> was explained at least in part because you had to run this one up the chain?

A: A lot of people.

Q: A lot of people?

A: Yes, sir.

Q: Did this one go all the way up to the Minister?

A: It went to the Director General. Legal Counsel Director.

(Application Record, p. 172)

[22] On October 9, 2007, Lynne Sabatino received an email from Richard Ringma complaining about the decision not to advertise the British Columbia coastal standing timber on the October 5, 2007, Federal Bi-Weekly List:

Lynne,

In reviewing the Bi-weekly list which was posted on the BCMOF web page on Friday afternoon (Oct 5<sup>th</sup> 2007), it is with disbelief and regret that I do not notice the posted volumes and sorts of standing timber that we requested to be advertised.

We have been clear in our communications that this is very important to our business and have through multiple communications offered whatever information we felt was required to initiate this process. Knowing that EXCOL was not currently capable of dealing with this application, we forwarded our application on a form 1718. In our request we asked clearly to be notified if there was any chance of these applications not going onto the Oct 5<sup>th</sup> list. We to this date have not received any request for further information or any indication that these applications would not be posted.

We are offended that our sense of urgency in this regard has been ignored. As a result of this application not going through within this time window, our cash flow will be negatively affected by over \$2,300,000.00 for 2007 and I am looking for accountability within your department for this flagrant disregard to our request.

If you could please find the reasons why these applications were not posted and forward them to me in writing as I will be required to address them. Thank you for your help this matter (sic).

Best Regards  
Richard Ringma

(Application Record p. 51)

***E. The Minister's decision***

[23] On October 12, 2007, the decision rejecting Island Timberlands' applications was formally communicated to Island Timberlands in the following letter from Lynne Sabatino:

Dear Mr. Ringma

Thank you for the email message dated October 9, 2007.

As you know, and as has been discussed with you, it is the Minister's Policy not to accept Applications to Advertise standing timber

located on the coast. In this regard, you may wish to review section A5 of Notice to Exporters No. 102 which provides that only harvested logs will be considered for export and therefore by extension, Applications to Advertise can be accepted only for harvested logs.

Recently you presented, without substantial justification, a request to depart from this Policy. We were unable to consider your request since you provided no justification for it. It was unfortunate that we were not able to convey our decision to you in writing prior to the posting of the relevant bi-weekly advertisement list. However, your applications were submitted only one day before the final date for receipt of applications. Island Timberlands is aware of the Policy respecting advertisement of standing timber on the coast. Any departure from our current Policy could be based only on an assessment of the merits of a specific request.

Sincerely,  
Lynne C. Sabatino

[Emphasis added]  
(Application Record, p. 52)

I find that this is the decision under review in the present Application.

#### **IV. The Course of the Present Proceedings**

[24] In initial written argument, Island Timberlands offered two grounds to argue that the Minister's rejection of the coastal standing timber applications was made in reviewable error: the Minister's discretion was wrongly fettered, and the decision of October 12<sup>th</sup> was rendered contrary to the legitimate expectation that the Minister's decision-making would proceed in a timely fashion and would be concluded in time to publish in the October 5, 2007, Bi-Weekly List.

[25] During the course of the first of two sessions of the hearing of the present Application, being September 22, 2008, I questioned how Island Timberlands would not know the answer to the initial question posed by Mr. Ringma, given its long experience in the forest industry in British Columbia. The concern I expressed is that, as judicial review is a discretionary remedy, I will not exercise my discretion unless I am satisfied that the present Application is based on legitimate grounds. In response, Counsel for Island Timberlands made it clear that Island Timberlands' purpose in challenging the decision-making under review is to have the Minister disclose the rationale for the Policy, which has not been disclosed. On the basis that the failure to disclose the rationale for the Policy can be characterized as a breach of due process, Counsel for Island Timberlands requested the opportunity to present written and oral argument on this characterization. This opportunity was provided with full right of response to Counsel for the Minister.

[26] At the conclusion of the first session, given the statements in the letter of October 12<sup>th</sup>, and with a hope that the present Application could be resolved by agreement, I asked Counsel for the Minister to determine whether the Minister is prepared to explain the rationale for the existing Policy and to provide Island Timberlands with an opportunity to provide a justification for the Policy to be changed. By letter dated October 2, 2008, Counsel for the Minister responded with the message that it is the Minister's position to seek a ruling on the merits of the issues raised in the materials filed, and, as a result, respectfully declines the invitation to resolve the Application through other means.

[27] At the second session of the hearing on November 25, 2008, Counsel for the Applicant argued that the Minister's answer confirms that the Minister wishes to keep the rationale for the Policy a secret. I do not take the Minister's response as any support for this argument as I consider that the question asked, and the answer given, are without prejudice.

**V. Why is the Minister's Decision-Making with respect to the Policy Unfair?**

[28] Island Timberlands initially argued that the rejection of the applications was unfair because of conduct relating to the activities which were a prelude to the October 12<sup>th</sup> decision. That is, the Minister's discretion was fettered and based on irrelevant considerations because of the consultations within the harmonized relationship with the British Columbia authority, and because the Minister considered the Policy to be mandatory, and, therefore, did not deal directly with the purpose of the legislative regime which is to determine whether the standing timber, which is the subject matter of the applications, is excess timber. In addition, because the Minister's officials did not correct Ms. Lavoie's "incorrect" information, and did not respond to the applications before the publication date requested, a failure to meet a legitimate expectation held by Island Timberlands occurred. I find that each of these arguments fails on the evidence.

[29] With respect to fettering, I accept the Minister's argument that there is no evidence that the exercise of the Minister's enforcement of the federal Policy is in any way contingent on British Columbia's approval; that is, the relationship between the federal and provincial regimes is only complementary. Indeed, on the issue of the Policy being applied as mandatory, on the evidence, I

find that Island Timberlands' applications did get due consideration resulting in a substantive conclusion, albeit, not the conclusion that Island Timberlands wanted.

[30] With respect to an unmet legitimate expectation arising from Mr. Ringma's involvement with the Minister's officials, I find that on a fair evaluation, the misunderstandings and policy confusion resulting in the failure to publicize the applications is understandable and do not attract judicial review accountability.

[31] Mr. Ringma's question called for an answer with respect to both the coastal and interior regions of British Columbia. Apart from Ms. Sabatino's assertion contained in her letter of October 12<sup>th</sup> that Mr. Ringma knew of the Policy when he asked the question on behalf of Island Timberlands, on the existing record there is no evidence of the content of the rationale, there is no evidence that the rationale has ever been made public, or that Island Timberlands had any knowledge of the Policy. Mr. Ringma was not examined on his affidavit evidence by Counsel for the Minister.

[32] It is agreed that Mr. Ringma's question was misconstrued; it appears that, initially, the Minister's official thought he was only requesting information about the interior region because export applications are received for standing timber from only that region. This was not an unreasonable conclusion to draw given that Island Timberlands is known as a coastal exporter. The inference that can be drawn is that Mr. Ringma was inquiring about a subject matter about which he needed new information.



[33] However, it soon became very apparent that Island Timberlands was asking for information about the export of standing timber from the coastal region, because it was going to make an application for a permit to do so. This knowledge caused concern at the entry level of the administration in the Minister's Policy; in this respect Ms. Sabatino's email of September 20<sup>th</sup> is very important. The content of this email expresses a fear that, if Island Timberlands' application is granted, a disruption in the orderly administration of the Policy would occur. There is no evidence on the existing record to interpret the meaning behind Ms. Sabatino's expressed fear, but there is no question that the fear existed. As a result, the strategy on how to deal with Island Timberlands' application was taken up the line of decision-making to the Director General in the Minister's office. Given the need for the consultations, I find that, understandably, no answer could be given to the acceptance or rejection of the applications before the requested publication date.

[34] Therefore, I find that Island Timberlands' supplementary argument with respect to the fairness of the October 12<sup>th</sup> decision presents the issue for determination in the present Application.

#### **VI. The Minister's October 12<sup>th</sup> Letter as Evidence of the Breach of Due Process**

[35] It is agreed that the decision in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650 at para. 5 requires that five factors be considered in reaching a determination on a breach of due process argument:

The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to

which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body...

[36] With respect to the statutory scheme, the nature of the decision, and the decision-making process under consideration, Counsel for the Minister makes two primary arguments. First, the decision-making authority of the Minister is discretionary, and, as such, is to be accorded the highest level of deference, and second, the duty of fairness required to be shown to Island Timberlands by the Minister is very low. My answer to these arguments is that, given the importance of the October 12<sup>th</sup> decision to Island Timberlands, and given that the decision was rendered in such a non-transparent manner in form and substance, even at the highest level of deference, and the lowest level of due process, a breach of due process occurred.

[37] The Minister's failure to make a public statement of the rationale for the Policy is the most important element of the unfair nature of the processing of Island Timberlands' applications. The October 12<sup>th</sup> decision expresses an expectation which was unknown to Island Timberlands at the time the applications were made. This is unfair. The October 12<sup>th</sup> invitation to Island Timberlands to provide a reason to deviate from the Policy begs an obvious question: what is the worth of a submission for change without knowledge of the rationale for maintaining the status quo? In my opinion, the answer is "worthless". There is no evidence of the rationale for the Policy in the existing record of the present judicial review Application, and there is no evidence that the Policy has been publicly disclosed. The cardinal breach of due process in the present case is the failure of the Minister to administer a transparent and meaningful process to allow Island Timberlands to

make a credible argument for granting an export permit for standing timber in the coastal region of British Columbia.

### **VII. Does the Breach of Due Process Qualify for Relief?**

[38] Counsel for the Minister argues that the present Application is moot because the publication date respecting Island Timberlands' applications has long passed. In my opinion, this fact is irrelevant to the question of whether the decision of October 12<sup>th</sup> was rendered in reviewable error.

[39] The fact that the applications were rejected after the publication date requested by Richard Ringma is incidental to the main point, which is, but for the Minister's rejection of the applications, they remain alive.

### **VIII. Conclusion**

[40] For breach of due process, I find that the October 12, 2007 decision under review was rendered in reviewable error and must be set aside. As a result, I find that a redetermination of the applications, on certain directions, will meet the need for fairness in the rendering of a further decision by the Minister.

**ORDER**

Accordingly, I set aside the Minister's decision of October 12, 2007 and refer Island Timberlands' applications submitted on September 24, 2007 back to the Minister for redetermination on the following directions:

1. The Minister first state the rationale for the Policy to Island Timberlands;
2. The Minister then provide a reasonable opportunity to Island Timberlands to submit an argument for a change to the Policy with respect to decision-making on its applications;  
and
3. Upon considering Island Timberlands' applications and argument, the Minister decide whether to accept or reject the applications, and provide written reasons for the decision rendered.

As the successful party, costs in the present Application are awarded to Island Timberlands.

\_\_\_\_\_  
"Douglas R. Campbell"  
Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1900-07

**STYLE OF CAUSE:** ISLAND TIMBERLANDS LP v.  
THE MINISTER OF FOREIGN AFFAIRS

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 25, 2008

**REASONS FOR ORDER  
AND ORDER:** CAMPBELL J.

**DATED:** December 17, 2008

**APPEARANCES:**

Geoff R. Hall  
Orlando Silva  
Catherine Lawrence

FOR THE APPLICANT

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

McCarthy Tétrault LLP  
Toronto, Ontario

FOR THE APPLICANT

John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Ottawa, Ontario

FOR THE RESPONDENT