Federal Court of Appeal | Cour d'appel fédérale

Date: 20090629

Docket: A-473-08

Citation: 2009 FCA 218

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

BETWEEN:

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

Appellants

and

DOMTAR INC. and DOMTAR INDUSTRIES INC.

Respondents

Heard at Ottawa, Ontario, on June 17, 2009.

Judgment delivered at Ottawa, Ontario, on June 29, 2009.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: NOËL J.A.
RYER J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The Crown is appealing the order of the Federal Court dismissing its motion to strike the statement of claim of Domtar Inc. and Domtar Industries Inc. (collectively, "Domtar") in Federal Court File T-216-07. In that statement of claim, Domtar seeks a declaration that section 18 of the *Softwood Lumber Products Export Charge Act, 2006*, S.C. 2006, c. 13 ("SLPECA") is unconstitutional and an order requiring the Crown to repay Domtar approximately $37 million (Cdn) it paid pursuant to that provision. The principal issue in this appeal is whether the Federal Court judge erred in law in concluding that it is not plain and obvious that the subject matter of

Domtar's claim is within the exclusive jurisdiction of the Tax Court of Canada and, that in any event it is not plain and obvious that Domtar's constitutional challenge must fail. The reasons for the order under appeal are reported as *Domtar Inc. v. Canada*, 2008 FC 1057.

Facts as alleged in the statement of claim and relevant statutory provisions

[2] Domtar carries on business in Canada as a producer of pulp and paper, lumber and other wood products. Its business entails exporting Canadian softwood lumber products to the U.S.

[3] In April of 2001, U.S. softwood lumber interests filed petitions with the U.S. Department of Commerce and the U.S. International Trade Commission seeking the imposition of anti-dumping and countervailing duties on softwood imports from Canada. Those petitions were successful and resulted in orders imposing such duties. From 2002 until October 12, 2006, the U.S. collected duties of approximately $5.4 billion (U.S.) pursuant to those orders, including approximately $160 million (U.S.) from Domtar.

[4] Canadian softwood lumber interests challenged the duty orders in the U.S. courts and before bi-national panels established pursuant to the North American Free Trade Agreement ("NAFTA"). The Government of Canada also challenged the orders in World Trade Organization ("WTO") and NAFTA proceedings.

[5] The U.S. Courts, the WTO and NAFTA dispute panels ruled that the orders were contrary to U.S. law and U.S. international treaty obligations. The U.S. Government did not abide by or act in accordance with those rulings, some of which were enforceable under U.S. domestic law.

[6] In April of 2006, the Canadian and U.S. Governments reached an agreement in principle to resolve the on-going softwood lumber dispute. The resulting Softwood Lumber Agreement ("SLA") entered into force on October 12, 2006, putting an end to all pending trade disputes relating to softwood lumber. After that point, Canada was precluded from seeking to enforce the favourable rulings obtained to that time, including rulings that would have been enforceable under U.S. law.

[7] Under the SLA, the U.S. agreed to terminate the duty orders, to refund the $5.4 billion in duties collected between 2002 and October 12, 2006, to refrain from initiating any anti-dumping or countervailing duty investigations or other identified trade relief in respect of softwood lumber, and to dismiss any petitions filed in respect of such matters by industry.

[8] For its part, Canada agreed, among other things, to pay $1 billion (U.S.) to U.S. softwood lumber interests, which amounted to approximately 18% of the refundable duties. The SLA contemplated that the burden of the $1 billion (U.S.) payback would be borne by Canadian softwood exporters, originally on a voluntary basis but later on the basis of an imposed legal obligation.

[9] The SLA was given effect in Canadian law by the SLPECA which received Royal Assent on December 14, 2006. The Minister of National Revenue is responsible for the administration of the SLPECA.

[10] The provisions of the SLPECA that are relevant to this case came into effect on October 12, 2006. The introduction to the final version of the bill reads as follows (my emphasis):

> An Act to impose a charge on the export of certain softwood lumber products to the United 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.

[11] Section 18 of the SLPECA is the provision that, in the words of the introductory paragraph quoted above, imposes "a charge on refunds of certain duty deposits paid to the United States". That charge was the mechanism by which Canada would recover from Canadian softwood producers the funds to fulfil its obligation to pay $1 billion to the U.S. softwood lumber interests.

[12] Section 18 imposes a charge on refunds of duties that the U.S. paid to Canadian softwood exporters pursuant to the SLA. The amount of the charge payable by each exporter is approximately 18% of the refund payable to that exporter.

[13] A softwood lumber exporter could take the option of assigning its refund to Export Development Canada, a federal crown corporation, in which case its obligation to pay the charge

would be remitted by an order made under the *Financial Administration Act*, R.S.C. 1985, c. F-11. Export Development Canada would retain approximately 18% of the refund and remit the balance to the exporter. Domtar did not avail itself of that option.

[14] The SLPECA also contains provisions relating to the administration and enforcement of section 18, and for the resolution of disputes arising from it. Most of these provisions are similar in form and content to analogous provisions in federal taxing statutes.

[15] Section 26 of the SLPECA imposes an obligation on any person who is subject to the section 18 charge to file a return in prescribed form by a specified date, to calculate the amount payable, and to pay it. On January 31, 2007, Domtar filed a return under section 26 and paid the amount of its section 18 liability, which was approximately $37 million (Cdn).

[16] The SLPECA provides a procedure for claiming a refund of any amount paid under the SLPECA. For the purposes of this case, the most important provisions relevant to a claim for a refund are sections 39 and 41, which provide as follows:

a) Section 39 provides that no person has a right to recover any money paid “as or on account of, or that has been taken into account by Her Majesty in right of Canada as, an amount payable under” the SLPECA, except as specifically provided in the SLPECA or the *Financial Administration Act*.

b) Subsection 41(1) provides that 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 must refund that amount to the person, subject to subsections 41(2) and 41(3).

c) Subsection 41(3) precludes the payment of a refund under subsection 41(1) unless an application for the refund is filed "in prescribed form and containing prescribed information within two years after the day on which the amount was paid".

[17] Nothing in the SPLECA requires the Minister to assess any amount payable under the SPLECA, or to provide a notice of assessment in response to a return filed under section 26. However, subsections 51(1) and 52(1) of the SPLECA require the Minister to assess the amount of any refund for which an application is made pursuant to subsection 41(3) of the SPLECA, and to provide the applicant a notice of that assessment.

[18] A notice of assessment gives the applicant for a refund a right to file a notice of objection to challenge the Minister's assessment of the refund payable (section 54 of the SLPECA) and, if unsatisfied with the result of such an objection, to appeal the assessment to the Tax Court of Canada (section 56 of the SLPECA). The objection and appeal procedure is similar to the objection and appeal procedure set out in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for income tax assessments.

[19] Domtar has never filed an application pursuant to subsection 41(3) of the SLPECA for a refund of the amount it paid pursuant to section 18, and the deadline for doing so expired on January 31, 2009.

[20] On January 31, 2007, Domtar filed the statement of claim that is the subject of this appeal. In that statement of claim, Domtar seeks a declaration that section 18 of the SLPECA is unconstitutional, an order requiring the Crown to repay Domtar the amount it paid pursuant to that provision, interest and costs.

The Crown's motion

[21] The Crown moved to strike the statement of claim pursuant to Rule 221(1) of the *Federal Courts Rules*, SOR/98-106. It is undisputed that the leading authority on such motions is *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, and that according to that case a motion to strike a statement of claim cannot be granted unless it is plain and obvious that the claim cannot succeed.

[22] The Crown's motion was based on two alternative arguments. The first argument is that it is plain and obvious that the Federal Court has no jurisdiction to entertain Domtar's claim because it is essentially a claim for the return of money paid under the SLPECA and the subject matter of that claim falls within the exclusive jurisdiction of the Tax Court of Canada. The second argument is that it is plain and obvious that Domtar's constitutional challenge cannot succeed because the enactment of section 18 of the SLPECA is a valid exercise of the authority of Parliament over the regulation of international trade and commerce, federal taxation, or both.

[23] The motion was heard by Justice Heneghan. She rejected both of the Crown's main arguments. In this appeal, the Crown acknowledges that Justice Heneghan cited the correct principle from *Hunt v. Carey*, but says that she erred in law in applying it.

Standard of Review

[24] There is no dispute as to the standard of review. A decision on a motion to strike is discretionary but is subject to being reversed on appeal if, for example, it is based on an error of law or principle (*Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374, *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.*, 2005 FCA 50).

Analysis

[25] The Crown alleges that the dismissal of its motion to strike was based on a number of errors of law. I need not mention all of the errors the Crown has asserted. In my view it is sufficient for the purposes of this appeal to deal with Crown's argument that it is plain and obvious that the subject matter of Domtar's claim is within the exclusive jurisdiction of the Tax Court of Canada.

[26] It is common ground that the question of jurisdiction requires, as a first step, a characterization of the essential nature of the claim. The Crown argued in the Federal Court and in this Court that Domtar's claim is essentially for the recovery of the money Domtar paid pursuant to section 18 of the SLPECA. Domtar argues that its claim is essentially for a declaration that section 18 of the SLPECA is constitutional, and that the claim for the return of the money is an ancillary remedy.

[27] Justice Heneghan accepted the position of Domtar and concluded that the action is "not a claim for the return of money *per se*" (paragraph 96 of her reasons). As she does not offer any analysis for that conclusion, it appears to be based solely on a literal reading of the language of the statement of claim, which contains a prayer for relief seeking a declaration that section 18 is unconstitutional and an order for the return of the money paid. In my respectful view, Justice Heneghan erred in law by characterizing the essential nature of the claim on the basis of the wrong test.

[28] The correct approach to the determination of the essential nature of a claim is established by the decision of this Court in *Canada v. Roitman*, 2006 FCA 266. That case stands for the proposition that in determining whether a court has the jurisdiction to entertain a claim, the question of the essential nature of the dispute must be based on a realistic appreciation of the practical result sought by the claimant. This was explained by Justice Décary, writing for this Court in *Roitman* (at paragraph 16):

> A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and the remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court.

[29] In *Roitman*, as in this case, there was a dispute as to whether a particular claim was within the exclusive jurisdiction of the Tax Court of Canada, so that the Federal Court lacked the jurisdiction to entertain the claim. The claimant had commenced an action in the Federal Court, framed as a

claim for damages for misfeasance of public office. The factual basis of the claim rested on an allegation that the Minister of National Revenue had issued a notice of assessment under the *Income Tax Act* knowing that the assessment was based on an incorrect interpretation of the law. The claim was struck out because it was essentially a challenge to the legal validity of an income tax assessment, a matter within the exclusive jurisdiction of the Tax Court of Canada.

[30] In this case, there is no assessment to be challenged (I will return to this point later), but there is no doubt that Domtar's principal objective is to receive a return of the amount it paid pursuant to section 18 of the SLEPCA. There is no reason to believe that Domtar would be pursuing its claim unless it had the prospect of recovering that money. For that reason, I accept the argument of the Crown that essentially, Domtar is asserting a claim for a refund of money paid under the SLPECA. That is the essential nature of its claim even though the claim is based on a constitutional challenge.

[31] Given that characterization of the essential nature of the claim, the question of the jurisdiction of the Federal Court must be determined as follows:

a) Domtar's statement of claim is made pursuant to section 17 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. By virtue of subsection 17(1) of the *Federal Courts Act*, the Federal Court would have the jurisdiction to entertain Domtar's claim unless its jurisdiction is ousted by another federal statute giving another court exclusive jurisdiction over the claim. Subsection 17(1) reads as follows:

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.	**17.** (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.

b) Subsection 12(1) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, ousts the jurisdiction of the Federal Court over matters arising under the SLPECA to the extent the SLPECA provides a right of appeal to the Tax Court of Canada. That provision reads as follows:

12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under […] the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.	**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 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.

c) The SLPECA provides a statutory procedure (described above) for claiming a refund of any amount paid under the SLPECA, and provides a right to appeal to the Tax Court of Canada for the resolution of any dispute as to whether a person who has paid an amount under the SLPECA is entitled to a refund.

d) Because Domtar's refund claim can be the subject of an appeal to the Tax Court of Canada, it is within the exclusive jurisdiction of the Tax Court of Canada and cannot be entertained by the Federal Court.

[32] Domtar argues on a number of grounds that it could not have had recourse to the statutory scheme in the SLPECA for refunds, objections and appeals, or that such recourse would have been futile.

[33] First, Domtar argues that it could not have applied for a refund because subsection 41(1), the only provision that could possibly permit a refund application, is too narrow. As mentioned above, subsection 41(1) provides that 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 must refund that amount to the person, subject to subsections 41(2) and 41(3). The Minister must assess and send a notice of assessment, and if the Minister refuses the refund application, the applicant may file an objection and, if unsatisfied, appeal to the Tax Court of Canada.

[34] The language of subsection 41(1) is clearly broad enough to cover the approximately $37 million (Cdn) that Domtar paid to the Crown on January 31, 2007. That payment was taken into account by the Minister as a charge payable under section 18 of the SLPECA, and the argument Domtar is asserting in its statement of claim is that, as a matter of law, that amount was not payable under section 18 (because section 18 is unconstitutional). Contrary to the argument of Domtar, the phrase "whether the amount was paid by mistake or otherwise" does not limit the scope of subsection 41(1), but ensures that it applies to any payment for which a refund is sought, regardless of the reason for the payment.

[35] Second, Domtar argues that it could not have applied for a refund because it was not assessed. That argument is also misconceived. Domtar cannot avoid the exclusive jurisdiction of the Tax Court of Canada by declining to claim a refund in the manner required by the statutory scheme. As explained above, the SLPECA contains a comprehensive and mandatory procedure for claiming a refund of an amount paid under the SLPECA. Under that procedure, an assessment must be made and a notice of assessment must be sent in response to an application for a refund under subsection 41(1), giving rise to the right to file a notice of objection and to appeal to the Tax Court of Canada.

[36] Third, Domtar argues that it would have been futile to engage the statutory refund scheme. In that regard, Domtar points out that the application for a refund is considered first by the Minister, who either would not or could not entertain the constitutional challenge. This statement is correct, but it is a red herring. Domtar's entitlement to a refund is not a matter of ministerial discretion, but a question of mixed law and fact upon which the Minister does not have the last word. The statutory scheme grants Domtar a right to appeal the Minister's decision to the Tax Court of Canada.

[37] Finally, Domtar argues that the jurisdiction of the Tax Court of Canada is limited to determining the legal or factual correctness of the assessment in issue, which does not include issues of the constitutionality of the statutory provision upon which the assessment is based. This argument is also wrong in law.

[38] In most cases when the Tax Court of Canada is called upon to determine whether the Minister has correctly assessed an amount payable or refundable under a fiscal statute, the Minister is

engaged in resolving a dispute about the interpretation of one or more statutory provisions, or a factual dispute, or both. However, the lawfulness of an assessment may be challenged on constitutional grounds and, when that occurs, the Tax Court of Canada can and must determine whether the challenge is well founded. Justice Evans, writing for this Court in *Canada (Attorney General v. Canada) v. Campbell*, 2005 FCA 420 (at paragraph 23), said this:

> […] it is clear in light of *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, that, pursuant to subsection 52(1) of the Charter, the Tax Court has jurisdiction to decide Charter challenges to the validity of a provision in the *ITA* or its application to particular facts, or of administrative action purportedly taken pursuant to it, when necessary to dispose of an appeal otherwise within its jurisdiction.

In this regard, I see no distinction between a constitutional challenge based on the Charter and a constitutional challenge based on the division of powers, as in this case.

[39] Domtar has not suggested that Justice Evans' statement in *Campbell* is not correct in law. Indeed, Domtar conceded that there is no reported case in which the Tax Court of Canada, when considering the validity of an assessment, has declined on jurisdictional grounds to consider a constitutional challenge to a statutory provision upon which the assessment is based. Neither this Court nor the Supreme Court of Canada has suggested that the Tax Court of Canada could decline to consider such an issue when raised as part of the basis of an appeal from an assessment.

[40] In my view, it is plain and obvious that the Tax Court of Canada has the exclusive jurisdiction to entertain Domtar's claim. That is sufficient to justify allowing this appeal. I express no opinion on the merits of Domtar's constitutional challenge.

Conclusion

[41] I would allow this appeal with costs and set aside the order under appeal. Giving the judgment which ought to have been given by the Federal Court, I would allow the Crown's motion to dismiss the statement of claim with costs.

"K. Sharlow"
J.A.

"I agree
Marc Noël J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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