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NOVA SCOTIA COURT OF APPEAL

Cite as: Kimberly-Clark Nova Scotia v. Nova Scotia Woodlot Owners and Operators Association, 2000 NSCA 23

Freeman, Bateman and Flinn, JJ.A.

BETWEEN:

KIMBERLY-CLARK NOVA SCOTIA Appellant	Thomas E. Hart and Jane E. O'Neill for the appellant
- and -	Joseph A. MacDonell for the respondent N.S. Woodlot Owners & Operators Association
THE NOVA SCOTIA WOODLOT OWNERS AND OPERATORS ASSOCIATION - CENTRAL WOOD SUPPLIERS DIVISION Respondent	Louise Y. Walsh Poirier for the respondents Primary Forest Products Marketing Board and AGNS
	Appeal Heard: January 13, 2000
	Judgment delivered: February 2, 2000

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Freeman and Bateman, JJ.A. concurring.

<u>FLINN, J.A.</u>:

Introduction

[1] In 1981 the respondent was registered by the Nova Scotia Public Marketing Board as the bargaining agent for all producers (excluding two) of pulpwood, in the seven Central Counties of the Province, who sell pulpwood to Scott Maritimes Limited (the predecessor of the appellant). A third group was excluded when the respondent's registration was amended in 1986.

[2] Pursuant to that Certification of Registration, the respondent and Scott entered into various collective agreements dealing with the purchase and sale of pulpwood. The Nova Scotia Pulpwood Marketing Board is now known as the Nova Scotia Primary Forest Products Marketing Board (the Board). Scott, in 1995, amalgamated with another company, and the amalgamated company carries on business as Kimberly-Clark Nova Scotia, the appellant. The appellant assumed Scott's position under the respondent's Certificate of Registration, and the subsequent collective agreements.

[3] A dispute arose as to the meaning of the word "pulpwood" in the respondent's Certificate of Registration, particularly as to whether "pulpwood" includes pulpwood chips. On a preliminary application to the Board, the Board decided that pulpwood chips were included within the meaning of the word "pulpwood" in the Certificate of Registration. The appellant made application to the Supreme Court of Nova Scotia, by way of *certiorari*, to quash the Board's decision. Following a hearing, Justice MacAdam

dismissed the *certiorari* application. The appellant appeals Justice MacAdam's decision.

Background

[4] Before dealing with the specific issues which give rise to this appeal, it would be helpful to review the relevant provisions of the unique legislation which governs here, as well as the facts which give rise to this dispute.

[5] In 1989 this Court dealt, in some detail, with the provisions of the applicable legislation. In **MacPhee et al v. Pulpwood Marketing Board (N.S.) et al** (1989), 88 N.S.R. (2d) 345, Chief Justice Clarke provided the following background in this reference to the decision which was under appeal, at p. 348:

> Mr. Justice Burchell described much of the background of the **Pulpwood Marketing Act**, S.N.S. 1972, c. 15 (the Act) and the sections relevant to the issues in his decision in the following way.
>
>> The Board is constituted under the Nova Scotia **Pulpwood Marketing Act**, S.N.S. 1972, c. 15. In the Hansard report of the debtates on that enactment, it is apparent that the main objective of the legislation was to redress an imbalance in the bargaining position of private woodlot owners in this province. As early as 1964 Mr. Robert MacSween, a provincially appointed commissioner, reported on an unusual situation in Nova Scotia where five major pulpwood companies held virtual monopolies on the supply of pulpwood within five fairly well-defined territorial divisions. At the same time approximately a third of the productive woodland was owned by thousands of small woodlot owners. Not being organized, these small owners and producers were unable to coordinate their marketing efforts and the pulp companies were in a position to dictate prices that yielded to the small producers only "substandard wages with little or nothing for stumpage or maintenance".
>>
>> Subsequent efforts to organize woodlot owners led by the

> Extension Department of Saint Francis Xavier University resulted in the formation of the Nova Scotia Woodlot Owners' Association but that unincorporated body was unsuccessful in its attempts to establish a marketing plan under the legislation then existing.
>
> In 1971 the Province of Nova Scotia retained Mr. Ian MacKeigan (who was later to become Chief Justice of Nova Scotia) to attempt to establish a pulpwood marketing plan through mediation between producers and the pulpwood companies. Mr. MacKeigan's conciliation efforts did not immediately succeed but in his report dated January 17, 1972, he recommended the adoption of special legislation that, inter alia, would establish a representative board with broad regulatory and investigatory powers, the power to license both producers and purchasers, the power to certify parties to act as bargaining agents for producers and the power to impose fees or levies proportional to quantities of pulpwood bought or sold. Substantially all of Mr. MacKeigan's recommendations were accepted and embodied in the **Pulpwood Marketing Act** (supra) which received Royal Assent on May 15, 1972.

[6] The initial legislation (S.N.S. 1972, c. 15) has been amended. There were minor amendments in 1976 (S.N.S. 1976, c. 42) including an amendment to the definition of "pulpwood". In 1986 there were more substantial amendments (S.N.S. 1986, c. 52). The name of the Act was changed to the **Primary Forest Products Marketing Act**. The name of the Board was changed to Primary Forest Products Marketing Board. The composition of the Board was changed. It now consists of seven members, one of whom must be experienced in the saw mill industry, one experienced in the pulp and paper industry, two woodlot owners who are not engaged in the saw mill or pulp and paper industry and three persons not engaged in the production, marketing or processing of primary forest products. It was the newly constituted seven member Board which dealt with the matter which is now under appeal.

[7] There were further changes in 1986. References to "pulpwood" in the initial

legislation were replaced with the words "primary forest products". The definition of "pulpwood" was repealed and replaced with a definition of "primary forest products". This fact is not relevant to this appeal because, when the respondent's Certificate of Registration was amended in 1986, it was amended pursuant to the provisions of the initial legislation. Therefore, to determine the meaning of the word "pulpwood" in the respondent's Certificate of Registration, reference must be made to the provisions of the initial legislation.

[8] Pulpwood is defined in the initial legislation, as amended by S.N.S. 1976, c. 42, as follows:

> 1. In this Act, ...
>
> (j) "pulpwood" means wood other than sawmill chips, cut and prepared primarily for processing into wood pulp, paper, paper products, compressed board or any product manufactured from wood fibre, excluding lumber;

[9] The Board has broad powers relating to the marketing of pulpwood. Those powers are set out in s. 4 of the initial legislation as follows:

> 4. The Board may
>
> (a) register any association as the bargaining agent for all or any group or groups of producers or buyers of pulpwood;
>
> (b) investigate the cost of marketing, producing, distributing and transporting any pulpwood, prices, price spreads, trade practices, methods of financing, management, grading, policies and other matters relating to the marketing of pulpwood;
>
> (c) do such acts and make such orders and directions as are necessary to

enforce the due observance and carry out the provisions of this Act, the regulations or any plan;

(d) stimulate, increase and improve the marketing of pulpwood for the purpose of carrying out any plan;

(e) exempt from any plan or any order or direction of the Board any person or class of persons engaged in the producing or marketing of any pulpwood or any class, variety or grade of pulpwood;

(f) require persons engaged in the acquiring or purchasing of pulpwood in any area or areas designated by the Board to register with the Board the quantity of pulpwood acquired or purchased by them and the names, addresses and occupations of persons from whom pulpwood is acquired or purchased, and require persons engaged in the producing or marketing of pulpwood to furnish such additional information in regard to the said pulpwood as the Board may determine;

(g) co-operate with any Board or agency established under any Act of the Parliament of Canada or any Provincial Act or any Act of any province to market or promote, facilitate, control, regulate or prohibit the marketing of pulpwood and to act jointly with any such Board or agency;

(h) accept, have and exercise all powers or regulation in relating to the marketing of pulpwood outside the Province in inter-provincial and export trade that are conferred upon it by or pursuant to any Act of the Parliament of Canada and for the purpose of such regulation to exercise all the powers conferred upon the Board by this Act. (emphasis added)

[10] I have highlighted s. 4(a) and (e) because these provisions are particularly relevant to the issue at hand.

Facts

[11] In 1981, under the authority of the initial legislation, the Pulpwood Marketing Board issued the following Certificate:

Nova Scotia Pulpwood Marketing Board

C E R T I F I C A T E O F R E G I S T R A T I O N
A S
B A R G A I N I N G A G E N T

This is to certify that the Nova Scotia Pulpwood Marketing Board, under the authority of the Pulpwood Marketing Act (Chapter 15 of the Statutes of Nova Scotia 1972) registered

NOVA SCOTIA WOODLOT OWNERS' & OPERATORS ASSOCIATION

as the Bargaining Agent for all producers of pulpwood within the Counties of Antigonish, Guysborough, Pictou, Hants, Halifax, Cumberland and Colchester who sell pulpwood to Scott Maritimes Limited, excepting and excluding:

(a) all producers of pulpwood who are members of the Wood Product Manufacturers Association, from time to time, who sell pulpwood to Scott Maritimes Limited; and

(b) all producers of pulpwood who are principally engaged in the manufacture of wood products beyond the cutting and delivering of round wood, who sell pulpwood to Scott Maritimes Limited, other than those members, from time to time, of the Nova Scotia Woodlot Owners' & Operators Association

Issued on the 31st day of August, 1981.

[12] A third exclusion was added when the Nova Scotia Pulpwood Marketing Board amended the Certificate of Registration on the 21st of November, 1986. That third exclusion from the Certificate of Registration is:

> All producers who supply in excess of 3,000 cords (10,860 cubic metres stacked) of pulpwood per year to Scott Maritimes Limited.

[13] As to the three exclusions from the respondent's Certificate of Registration, as amended, the Board, in its decision which is the subject of this appeal, said the

following:

> There are certain exemptions in the registration order but the exemptions deal with producers of pulpwood who are primarily "saw millers" because that group of producers was found by the Supreme Court of Nova Scotia to have a different community of interest than non-sawmill producers. In addition, producers who supply in excess of 3,000 cords per year were excluded as per the amended order of 1986.

[14] Pursuant to the Certificate of Registration, the respondents and Scott continued to do business from 1981 to 1995. During this time, the parties entered into a series of collective agreements for the purchase and sale of pulpwood for use by Scott's mill. Until 1995, the pulpwood which was being supplied to Scott, by the respondent's members, was in the form of round wood pulpwood. At various times, these were 8 foot lengths, random lengths and/or tree length.

[15] In 1995, Scott made a decision to cease processing, at its mill, round wood pulpwood. It had concluded that processing pulpwood chips, instead of round wood pulpwood, would be more economically feasible. Further, Scott intended to purchase those pulpwood chips from sources other than the respondent's members.

[16] Scott wrote a letter to the respondent and advised that the company "will permanently cease processing round wood pulpwood .... as of July 1, 1995." Scott advised that it was modifying its production process and replacing round wood pulpwood with pulpwood chips. Scott advised the respondent that it would honour outstanding volumes under the current collective agreement, however, said:

> I must point out however that as we are ceasing to use round wood pulpwood, there will be no future collective agreements beyond our present one.

[17] Also in 1995, the amalgamated company Kimberly-Clark Nova Scotia, the appellant, came into being.

[18] There is provision in both the initial legislation and the current legislation which permits the respondent, being registered as a bargaining agent, to make an application to the Board for a declaration that a bargaining situation exists between itself and another person or persons. The Board is empowered to make such a declaration following which collective bargaining must begin between the parties.

Previous Proceedings

[19] The respondent made an application to the Board for a declaration that a bargaining situation existed between itself and the appellant, as a result of the appellant's unilateral decision to cease purchasing pulpwood from the respondent's members.

[20] Prior to the respondent's application coming on for hearing before the Board, the parties reached an agreement that they would, firstly, ask the Board to make a determination with respect to the meaning of the term "pulpwood" as contained in the respondent's Certificate of Registration; and particularly whether the term "pulpwood" as contained in the Certificate of Registration includes pulpwood chips. It was agreed that the respondent's application, for a declaration that a bargaining situation existed between the parties, would be held in abeyance pending the preliminary ruling. That

application is still in abeyance pending the disposition of this appeal.

[21] The respondent took the position that the word "pulpwood" in its Certificate of Registration includes pulpwood chips. That position formed the basis of the respondent's application to the Board for the declaration. The appellant took the position that pulpwood chips are not included in the meaning of the word "pulpwood" in the Certificate of Registration, and the appellant is free to purchase pulpwood chips as it sees fit.

[22] The Board decided, by a majority decision, that pulpwood chips are included within the term "pulpwood" as that term is used in the respondent's Certificate of Registration.

[23] The appellant made an application, by way of *certiorari*, to quash the Board's decision. Following a hearing in Supreme Court Chambers, Justice MacAdam refused to quash the Board's decision. Following a lengthy review of the case law dealing with judicial review of the decision of an administrative tribunal, Justice MacAdam decided that, in reviewing the Board's decision, a standard of reasonableness *simpliciter* should be applied. In applying that standard, he decided that "it cannot be said that the decision of the Board was clearly wrong". He, therefore, denied the *certiorari* application. The appellant appeals Justice MacAdam's decision.

Standard of Review

[24] The matter before the Chambers judge was not a statutory appeal. There is no provision in the Statute providing for an appeal of the Board's decision, nor is the Board's decision protected by any privative clause. The appellant proceeded by way of *certiorari* to quash the Board's decision. In **Doiron v. Duplisea et al** (1998), 170 N.S.R. (2d) 15, Justice Chipman, of this Court, said the following concerning the distinction between a statutory appeal and proceedings by way of *certiorari* at pp. 19-20:

> **<u>Standard of Review</u>:**
>
> This was not dealt with at any length by counsel in the argument. Counsel referred to **Pezim v. British Columbia (Superintendent of Brokers)**, [1994] 2 S.C.R. 557 and **Canada (Director of Investigation and Research Competition Act v. Southam Inc.**, [1997] 1 S.C.R. 748. These cases dealt with statutory appeals. The jurisdiction of a court hearing such an appeal is broader than the jurisdiction of a court on judicial review. This proceeding is by way of **certiorari**, not by way of statutory appeal. The court's powers on **certiorari** were discussed extensively by Estey, J. (dissenting in part) in **Douglas Aircraft Co. of Canada v. McConnell**, [1980] 1 S.C.R. 245 at p. 264 **et seq** and summarized by Collier, J. in **Bala v. Minister of Employment and Immigration** (1988), 20 F.T.R. 155 (Fed. Ct. T.D.) at p. 157:
>
>> At the outset, I point out this is not an appeal, or a review of the evidence. In certiorari, it is not for the court to review the merits of an administrative decision. A decision may be quashed for excess or lack of jurisdiction, error of law, and breach of the rules of natural justice, including breach of a duty of fairness. (See **Halsbury's Laws of England**, (4th Ed.), volume 1, paragraph 147 and **Toor et al. v. Minister of Employment and Immigration** (1987), 9 F.T.R. 292 (Dubé, J.)).

See also **McPhee et al v. Pulpwood Marketing Board (N.S.) et al**, **(supra)** per Clarke, C.J.N.S. at p. 362.

Grounds of Appeal

[25] There is no suggestion that the Board breached the rules of natural justice, or its duty of fairness, in reaching its decision. The position of the appellant on this appeal

is, essentially, two-fold:

1. that the Board erred in law in its interpretation of the Certificate of Registration; and alternatively,
2. that the Board exceeded its jurisdiction.

[26] The following is a summary of the appellant's submission on these two issues:

1. with respect to error of law, the Chambers judge applied the wrong test in reviewing the Board's decision, and that the Board was wrong at law in its interpretation of the word "pulpwood" in the Certificate of Registration which the Board issued to the respondent. That error, the appellant submits, is in failing to take into account the context in which the Certificate of Registration was issued. That context, the appellant submits, is that all of the parties understood, at the time the Certificate of Registration was issued by the Board, and when it was amended by the Board in 1986, that in using the term "pulpwood" the Board meant round wood pulpwood, because that was the variety of pulpwood which was being produced for sale to Scott. The processing of pulpwood chips, the appellant submits, had not even come into being at the time the Certificate of Registration was issued by the Board. Therefore, when the Certificate of Registration was issued, the Board could not have considered that pulpwood chips were included within the meaning of "pulpwood" in the Certificate of Registration.

2. alternatively, the appellant submits, that if an error of law is not sufficient to quash the Board's decision (i.e., if the Board is considered to be an expert Board, and, as such, should be accorded deference in interpreting its own statute and Certificate of Registration) then, in reaching its conclusion, the Board exceeded its jurisdiction. The appellant submits that the Board's decision, in concluding that potential producers of pulpwood chips are in the bargaining unit covered by the Certificate of Registration in question, an absurd result is reached. The members of the respondent bargaining unit, he submits, do not produce pulpwood chips at the present time. As a result, persons are put in a bargaining unit without going through the application and registration process. It circumvents what the Board should have been doing if it was properly exercising its jurisdiction. The Board, therefore, exceeded its jurisdiction.

Analysis

[27] I reject both of those submissions.

[28] Counsel for the appellant concedes that the definition of "pulpwood", which appears in the initial legislation, is broad enough to include pulpwood chips. I repeat that definition as follows:

> 1. (j) "pulpwood" means wood other than sawmill chips, cut and prepared primarily for processing into wood pulp, paper, paper products, compressed board or any product manufactured from

wood fibre, excluding lumber;

[29] He submits, however, that the word “pulpwood” which appears in the Board’s Certificate of Registration has a different meaning. Counsel submits that it must be read in the context of what the parties understood it to mean at the time the Certificate was issued. The evidence shows, he submits, that the parties understood it mean round wood pulpwood, and nothing more.

[30] I do not agree with counsel’s analysis.

[31] The Board’s authority to register the respondent, as bargaining agent, comes from s. 4(a) of the initial legislation. The Board is authorized to:

(a) register any association as the bargaining agent for all or any group or groups of producers or buyers of pulpwood.

[32] The Certificate of Registration which the Board issued to the respondent is, by its terms, issued “under the authority of the **Pulpwood Marketing Act**.”

[33] Under the terms of the Certificate, the respondent is registered “as the Bargaining Agent for all producers of pulpwood within the Counties of Antigonish, Guysborough, Pictou, Hants, Halifax, Cumberland and Colchester who sell pulpwood to Scott Limited” (with three exclusions).

[34] Further, the Board has the authority under s. 4(e) of the initial legislation to:

(e) exempt from any plan or any order or direction of the Board any person or class of persons engaged in the producing or marketing of any pulpwood or any class, variety or grade of pulpwood;

[35] This is, clearly, recognition that, in issuing a Certificate of Registration, the Board may take into account classes, varieties or grades of pulpwood. Other than the three exclusions from the Certificate of Registration to which I have referred, the Board made no further exemptions from the respondent's Certificate of Registration; nor did the Board restrict that Certificate of Registration to round wood pulpwood.

[36] Taking all of these factors into account, there can be no doubt that the Board, in using the term "pulpwood", in the respondent's Certificate of Registration, was using that term as it is defined in the initial legislation. Since the definition of "pulpwood" in the initial legislation is broad enough to include pulpwood chips (and counsel for the appellant concedes that point), then the term "pulpwood" in the Certificate of Registration, likewise, includes pulpwood chips.

[37] The Board, in its majority decision, said the following:

It is the decision of this Board that the word "pulpwood" as defined in the Act and referred to in the registration order made August 31, 1981 and amended November 21, 1986 includes all forms of wood, cut and prepared and purchased by Kimberly-Clark primarily for processing into wood pulp at its mill in Pictou County, except sawmill chips and lumber as specifically excluded in the Act.

The definition of "pulpwood" in the legislation clearly includes wood in any form which is cut and prepared primarily for processing into wood pulp. The only wood excluded from the definition is wood in the form of sawmill chips and lumber. .....

The intent of the *Pulpwood Marketing Act* was to provide wood producers with the opportunity to collectively bargain with buyers for the raw material which would be

> converted into pulp, with the exception of sawmill chips. The form of the product changed from time to time. At some times one or more of the companies purchased wood in the form of four-foot lengths, at other times eight-foot lengths were required to be provided, and at still other times the entire tree was required to be provided. In 1995 the form of product purchased by Scott changed to chipped wood, but the product remained the same - pulpwood. Regardless of the form of wood purchased, the product purchased by Scott continued to be wood pulp. The form of the wood and other specifications as well as amount of product and price were matters to be covered by negotiation. The negotiators of the Collective Agreement would have discussed the sale/purchase of round wood, as that was the form of wood used by Scott at the time, but they were nevertheless negotiating the purchase/sale of the raw material to be converted into wood pulp.....
>
> The Board reviewed affidavit evidence of individuals who stated that they considered pulpwood to be round wood and chips to be a separate product. The applicant, on the other hand, considers the product to be the same, but in a different form. Although there is no dispute that the form of the product purchased differed, the product, pulpwood, remained the same. The raw material, in whatever form, was primarily used for processing into wood pulp.
>
> Although the parties were negotiating for eight-foot round wood in 1986, neither the definition in the Act nor the interpretation by the parties of the word "pulpwood" was restricted to eight-foot wood. No one considered it necessary to come back to the Board for an amendment of the registration order when the specifications of the product changed from eight-foot to random length and/or tree length wood. Chips are not a new or different product but simply a much "shorter" form of the same product. The fact that chips and round wood are measured differently does not mean they are a different product.

[38] Without deciding the point, the Board is probably one to which deference is owed in the interpretation of its own statute and Certificate of Registration. However, it is not necessary for me to deal with that issue because, even if I was required to review the Board's decision on a correctness standard, the Board, in my opinion, made no error of law in coming to its conclusion.

[39] Since the Board was acting entirely within its jurisdiction in interpreting the word "pulpwood", in the respondent's Certificate of Registration, (and counsel for the

appellant concedes that point); and since, as I have determined, the Board made no error of law in its interpretation of that Certificate of Registration, it is not necessary for me to deal with the appellant's alternative submission. I will, nevertheless, make the following comments with respect to that alternative submission.

[40] It is apparent from the alternative submission raised by counsel for the appellant, that there is a broader issue in this dispute. That broader issue is the appellant's contention that the respondent may not be the proper party to be bargaining with the appellant over the purchase and sale of pulpwood chips.

[41] The difficulty with this submission is that the Board was not asked to address that broader issue. The Board was asked, in isolation from any broader issue, to address, solely, the interpretation of the word "pulpwood" in the respondent's Certificate of Registration. The evidence which the Board heard was restricted to this narrow issue.

[42] Counsel for the appellant admitted, quite candidly, that he agreed to that course of action because he anticipated that the Board would decide that pulpwood chips were not included within the meaning of the word "pulpwood" in the respondent's Certificate of Registration. Such a ruling would, from the appellant's perspective, end the matter.

[43] Having agreed to that course of action, the appellant cannot now ask this

Court to address issues which were not dealt with by the Board. The Board was created by statute to deal with the broader issue which the appellant raises in his alternative submission. It is for the Board, not this Court, to deal with that broader issue, at least in the first instance.

[44] That broader issue, as the appellant sees it, may be addressed when the Board deals with the respondent's application for a declaration that a bargaining situation exists between the parties, which application is being held in abeyance pending the disposition of this appeal. Further, there is nothing which prevents the appellant from requesting the Board to consider the issues that arise from its unilateral decision to change the method of processing pulpwood. The present Board, as did its predecessor, has broad powers relating to the marketing of pulpwood [Primary Forest Products] in this Province, and would have the responsibility to consider, in context, the broader issues which the appellant might raise. The context in which the Board would consider those broader issues would, obviously, involve evidence that to this date the Board has not heard. To this point, the Board has been asked to determine, only, the narrow question as to whether the word "pulpwood" in the respondent's Certificate of Registration includes pulpwood chips.

Conclusion

[45] The Board was acting entirely within its jurisdiction in interpreting the word "pulpwood" in the respondent's Certificate of Registration, and in doing so, the Board

made no error of law. The Chambers judge dismissed the appellant's *certiorari* application, and I agree with that result, although I have arrived at that result for different reasons.

[46] I would, therefore, dismiss this appeal. I would order the appellant to pay to the respondent its costs of this appeal which I would fix at $1,000.00 plus disbursements.

Flinn, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.