Federal Court  Cour fédérale

Date: 20200114

Docket: T-481-18

Citation: 2020 FC 46

Ottawa, Ontario, January 14, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Plaintiff

and

JAMES MOODIE (also known as Jim Moodie) and DENETTY MOODIE (also known as Denny Moodie)

Defendants

JUDGMENT AND REASONS

I. Introduction

[1] The Plaintiff brings a motion for summary judgment, seeking to recover the amount of $45,619.11, plus interest and costs, against the Defendants, claiming that the Defendants are in default of their repayment obligations for funds received from the Advance Payment Program under the *Agricultural Marketing Programs Act*, SC 1997, c 20 [*AMPA*]. The Plaintiff argues

that this case should be determined by summary judgment, because the evidence needed to fairly adjudicate the matter is contained in the affidavits that are before the Court, and the matter turns mainly on legal questions relating to the interpretation of the *AMPA*.

[2] The Defendants do not object to this matter being determined by way of summary judgment, and submit that the Plaintiff's claim for recovery is statute-barred because it was filed outside of the limitation period. The Defendants seek summary judgment dismissing the claim, with costs.

[3] For the reasons that follow, I am granting summary judgment in favour of the Plaintiff.

II. Context

[4] The dispute in this case relates to a payment received by the Defendants under the Advance Payment Program under the *AMPA*.

[5] On April 7, 2009, the Defendants applied to the Canadian Wheat Board (CWB) for an advance payment under the *AMPA* for the 2009-10 production year (the Application). The Defendants received an advance in the amount of $25,272, less an administration fee and withhold amount, on April 7, 2009 (the Advance Payment).

[6] The Defendants add that that amount was 60% of the eligible cash advance; the remainder was to be paid upon confirmation of the actual seeded acreage. However, the Defendants' rented farmland flooded to such an extent that they could not obtain a seeded acreage report to secure the second payment nor did they have production that could be delivered to the CWB to repay the advance.

[7] The Application set out the date of default as being January 18, 2010. At that time, the outstanding balance of the Advance Payment with interest was $26,331.49. After the date of default, interest accumulates pursuant to the default provisions under the Application.

[8] On June 28, 2006, the Defendants had signed a Continuing Declaration and Guarantee Form acknowledging that they jointly and severally agree to repay any advances issued to their partnership.

[9] The CWB was entitled to seek payment for part of the moneys owed from the Minister. As required by subsection 23(1) of the *AMPA*, the Minister of Agriculture and Agri-Food (the Minister) paid out the guarantee of $25,703.13 to the CWB on March 21, 2012, following a request for payment to the Minister on July 13, 2011, and approval on March 12, 2012. Pursuant to section 23 of the *AMPA*, the Minister became subrogated to the rights of the administrators. The Plaintiff now seeks recovery on those amounts, plus interest and costs, from the Defendants.

III. Issues

[10] The overarching issue is whether summary judgment should be granted in favour of the Plaintiff. The Defendants assert that the claim is statute-barred, and, the Plaintiff should not be able to unilaterally extend the limitations period by seeking to invoke the subrogation rights of the Minister.

[11] I will address the issues in the following order:

A. Is the claim barred because it was filed beyond the applicable limitation period?

B. Should summary judgment be issued in favour of the Plaintiff?

IV. Analysis

A. *Is the claim barred because if was filed beyond the applicable limitation period?*

[12] The Plaintiff argues that the claim for recovery is subject to the specific limitation provisions set out in the *AMPA*. The general rule with respect to proceedings by or against the federal Crown is set out in section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, which provides that the laws in force in a province apply in respect of any cause of action arising in that province, and otherwise a six-year limitation period will apply. The Plaintiff submits that this action is not subject to these general rules, because it falls within the exception set out in the opening words of section 32: "Except as otherwise provided in this Act or in any other Act of Parliament…"

[13] The *AMPA* contains a specific limitation period that applies to actions by the Minister to recover any amounts owed. It should be recalled that under section 23 of the *AMPA* the Minister's rights to seek recovery of amounts owed under the Advance Payment Program only arises once a producer is in default under the repayment agreement and an administrator has made a request to the Minister for repayment. Once this happens, subsection 23(2) states:

Subrogation	**Subrogation**
(2) The Minister is, to the extent of any payment under subsection (1) or (1.1), subrogated to the administrator's rights against the producer in default and against persons who are liable under paragraphs 10(1)(c) and (d) and may maintain an action, in the name of the administrator or in the name of the Crown, against that producer and those persons.	**(2)** Le ministre est subrogé dans les droits de l'agent d'exécution contre le producteur défaillant et les personnes qui se sont engagées au titre des alinéas 10(1)c) et d), à concurrence du paiement qu'il fait en application des paragraphes (1) ou (1.1). Il peut notamment prendre action, au nom de l'agent d'exécution ou au nom de la Couronne, contre ce producteur et ces personnes.

[14] The *AMPA* then sets out various rules regarding limitations of actions by the Minister, including the general rule set out in subsection 23(4):

Limitation or prescription period	**Prescription**
(4) Subject to the other provisions of this section, no action or proceedings may be taken by the Minister to recover any amounts, interest and costs owing after the six year period that begins on the day on which the Minister is subrogated to the administrator's rights.	**(4)** Sous réserve des autres dispositions du présent article, toute poursuite visant le recouvrement par le ministre d'une créance relative au montant non remboursé de l'avance, aux intérêts ou aux frais se prescrit par six ans à compter de la date à laquelle il est subrogé dans les droits de l'agent d'exécution.

[15] The Plaintiff submits that this provision governs this proceeding and that it launched its action for recovery within the six-year time period after the Minister became subrogated to the claims of the administrator.

[16] The Defendants advance several arguments in support of their position that the claim is barred by the operation of limitation periods. First, the Defendants submit that since the CWB was an administrator of the Advance Payment Program under the *AMPA* on behalf of the Minister, this organization and the Minister are, in reality, "one and the same." Under this view, the Minister cannot be in any better position than the administrator under the terms of the agreement signed by the Defendants.

[17] Second, the Defendant argues that the contract terms were fixed by the Minister and were not subject to any negotiation and, therefore, any ambiguity must be interpreted in their favour; the doctrine of *contra preferentum* applies. The Defendants, whose farm is in Saskatchewan, is bound by the agreement by which the more favourable two-year limitation period in the relevant Saskatchewan legislation does not apply and instead the six-year period set out in the Manitoba

legislation applies. This is a departure from a fundamental right which was meant to protect persons such as the Defendants.

[18] In addition, the Defendants note the wording of the agreement which establishes the link between the administrator and the Minister, including paragraph "m" of the application form for the CWB payment, under which a producer undertakes: "upon default, to repay the Minister of Agriculture and Agri-Food Canada for the amount in default, through the administrator, including interest at the rate shown in this application and any collection costs, including legal costs." The Defendants also point to the provision that "the CWB as an administrator, can forward the outstanding balance to Agriculture and Agri-Food Canada for collection." These provisions confirm that the Minister and the administrator are essentially the same entity under the terms of the agreement.

[19] The core of the Defendants' arguments derives from the specific situation that arises on the facts of this case. This is not a situation where a third-party guarantor steps into the place of the principal to honour the loan guarantee. Here, the Minister and the administrator are, in reality, one and the same entities. Furthermore, the Minister defined the terms of the Advance Payment Program, which provides payments to qualifying farmers without the usual due diligence involved in arranging a commercial loan. The Minister defined all of the relevant terms and conditions of the program. The Minister decided to involve administrators in the operation of the program on a day-to-day basis. Under the terms of the *AMPA* and the agreement entered into by the Defendants, the Minister knew that if a default occurred, it would be obliged to pay the amounts owing if requested by the administrator. Therefore, the Defendants argue, the Minister's subrogation rights arose when the loan was defaulted, not when it made any payment to the

administrator. As a consequence of this, they submit that the claim is filed out of time because the default arose long before the six-year period prescribed by the Manitoba legislation.

[20] The Defendants claim that the references in the agreement they signed about the Minister's subrogation rights are "merely procedural verbiage" which they had absolutely no control over. The Minister was not a party to the contract the Defendants signed; the contracting party, the CWB, chose not to pursue its rights to seek recovery from the Defendants. Instead, it chose to request reimbursement from the Minister. This cannot have the effect of creating a completely open-ended limitations clause, to the detriment of the Defendants.

[21] As an alternative argument, the Defendants submit that the subrogation rights arise when the Minister is subrogated to the rights of the administrator, not when the Minister decides to make a payment pursuant to a demand from an administrator. On this reading of the agreement, the Minister's subrogation rights arise at the date the obligation to pay arises, and at the latest when the demand for payment is made, rather than the date the payment is actually made. To interpret the agreement otherwise is to give to the Minister an unfettered right to unilaterally extend the applicable time limits, to the prejudice of the Defendants.

[22] The Defendants further contend that subrogation is an equitable remedy and, since the Minister's rights are the same as the administrator's rights, the time limitation must start to run at the same time for both. As stated in the Defendants' written representations, "[t]o infer anything to the contrary would be manifestly unfair to all producers and facilitate improper conduct by the Government…" The Defendants argue that the Minister should be barred from bringing actions now to pursue debts that were in default on January 18, 2010, because the Minister does not come to court with "clean hands." It does not make sense that the Minister can bring this action

within six years of making the payments to the administrator, because that means that the Minister can unilaterally extend the time limit by delaying the payment to the administrator.

[23] The starting point for the analysis is the agreement signed by the Defendants, which incorporates or reflects certain of the provisions of the governing statute, the *AMPA*. In one sense this agreement may be seen as an "ordinary commercial transaction" by which farmers obtain advances on crops or livestock, which are to be repaid at the end of the growing season once the crop or livestock are sold to market. In reality, this agreement is more than that – it is the means by which the government has chosen to achieve its program objectives, consistent with the terms of the legislation adopted by Parliament to give effect to this objective, namely the *AMPA*. In this regard, this agreement takes on the aspect of a program delivery vehicle, whose terms are set in part by the legislation.

[24] I agree with the Defendants that all of the key terms at issue in this case were fixed by the government. I also agree that it was the choice of the government to implement the program by using third party organizations it designated as the day-to-day administrators of the Advance Payment Program. I am not persuaded, however, that this has the legal effect of making the Plaintiff and the administrator "one and the same" for the purposes of this claim. The *AMPA* and the agreement signed by the Defendants make clear that the agreement is between the producer (here, the Defendants) and the administrator. The administrator may be acting on behalf of the Minister, but that, in and of itself, does not effect a legal merger. As the Plaintiff notes, the administrators have legal rights separate and apart from those of the Minister; furthermore, the legislation which created the CWB stated explicitly that the CWB was not an agent of Her

Majesty or a Crown corporation (subsection 4(2) of the *Canadian Wheat Board Act*, RSC 1985, c C-24).

[25] I find that, at all times relevant to the questions in issue in this matter, the Plaintiff and the CWB were separate and independent entities; this is confirmed by the applicable legislation and consistent with the agreement signed by the Defendants.

[26] The Plaintiff's right of action in this case derives from the operation of the *AMPA*; this is a claim based on statute, not contract. The relevant terms of the statute, and in particular the Minister's subrogation rights, are reflected in the agreement signed by the Defendants, but that does not have the effect of transforming their essential nature. I do not accept the Defendants' contention that these are to be interpreted as equitable or contractual claims. I will discuss the "clean hands" argument below.

[27] I find that the agreement and the *AMPA* are consistent and clear: the Minister's right to bring an action for recovery of the amount due arises only when a number of conditions have been met. First, the producer must be in default (section 22, *AMPA*). Second, the administrator must have made a demand to the Minister for payment of the amount specified by the legislation and Regulations (subsection 23(1), *AMPA*). Third, the Minister must have made a payment to the administrator pursuant to that demand (subsections 23(1) and (1.1), *AMPA*). Only if these conditions have been fulfilled does the Minister become subrogated to the rights of the administrator (subsection 23(2), *AMPA*). Once this occurs, the producer is liable to the Minister for the subrogated amount (subsection 23(3), *AMPA*). This is when the statutory limitation or prescription period begins to run, subject to the other provisions regarding time limitations set out in subsections 23(6) to (9) of the *AMPA*.

[28] The main elements of this scheme are reflected in the agreement, which includes several references to the Minister's subrogation rights upon default. The Defendants signed this agreement, and the Continuing Declaration and Guarantee they had signed in June 2006 declared their agreement to be jointly and severally liable for any debts owed to the CWB. Even if the *contra preferentum* doctrine is applied to this agreement, it is not evident how this advances the argument of the Defendants. Under the *AMPA* and the agreement, the producer is to apply for funds from an administrator of the Advance Payment Program – that is precisely what the Defendants acknowledge doing here. The funds were advanced, and a contractual liability was owed by the Defendants to the CWB, as program administrator. The terms of the liability are set out in detail in the agreement, including liability for interest and the rate of interest to be paid.

[29] It is simply not possible to interpret this agreement, or this statute, as having the effect of making the Minister and the administrator to be identical in legal interest or position. They are not, and never have been "one and the same." The Defendants' argument to this effect must be rejected as contrary to the clear terms of the agreement and the statute that governs it. For example, the Defendants rely on paragraph "m" of the agreement, but a plain reading of that clause makes clear that the obligation upon default is to repay the funds advanced to the producer. The fact that the funds originate from the government, as appropriated to the Minister, and flowed through the administrator to the producer, does not somehow have the effect of merging the rights and interests of the Minister with those of the administrator. The Minister has no automatic and independent right to seek recovery of the funds. Under the terms of the agreement, and the *AMPA*, the Minister's rights only arise if the pre-conditions set out above are met.

[30] I therefore reject the argument that the agreement and the *AMPA* must be interpreted and applied as though the Minister and the administrator are "one and the same" entities. A number of conclusions flow from this finding.

[31] First, the Minister's subrogation rights did not trigger at the same time as the Defendants went into default under the agreement. The terms of the agreement were subject to the terms of the *AMPA*, which sets out the statutory pre-conditions pursuant to which the Minister's subrogation rights arise. An interpretation that these rights arise at the same time as the default on the obligation to the administrator is inconsistent with both the terms of the agreement and the scheme of the *AMPA*.

[32] Further, the argument that it is unfair or inequitable to the Defendants to interpret the *AMPA* as creating an "open-ended" right on the part of the Minister to unilaterally extend the limitation period is not well-founded either on the facts or the law. Here, the Minister is seeking to enforce an obligation that arises by operation of the *AMPA*, and the Defendants have not demonstrated any unfairness or undue prejudice relating to the period between their original default on the agreement and the launch of these proceedings. Without pronouncing on the question of whether such arguments could have any impact on the operation of the statute or terms of the agreement if undue delay was demonstrated, I would simply observe that such arguments would need a solid factual foundation. No such foundation has been established here.

[33] I therefore reject the Defendants' argument that the references to the Minister's rights amount to "mere procedural verbiage" or that the Minister does not come to this Court with "clean hands."

[34] For all of these reasons, I find that the Plaintiff's claims are not barred by the operation of the Manitoba limitations legislation. The Minister has acted within the time limits fixed by subsection 23(4) of the *AMPA* and this is the provision that governs these proceedings.

B. *Should summary judgment be issued in favour of the Plaintiff?*

[35] The Defendants have advanced a number of arguments against summary judgment that relate to unfairness because of the Plaintiff's delay, in addition to the limitation argument considered above. In their Statement of Defence, the Defendants denied that they are indebted to the Plaintiff, and in the alternative argue that the Plaintiff's recovery is barred by estoppel by laches. I will deal with these arguments briefly.

[36] The Defendants claim that the context must be considered. They received an advance from the CWB, but, in reality, there was no due diligence or other normal steps taken by a lender before making an advance. They state that the overall concept under this program is that the producer pre-sells that year's production to the CWB, which obtains a continuing security interest in the crop. Upon harvest, the crop is to be delivered to the CWB, which will deduct the spring advance from the proceeds from the sale of the crop. The producer does not repay the advance by submitting a cheque, but rather by delivering the grain at the end of the harvest.

[37] In this case, the crop was not produced for reasons beyond the Defendants' control, due to significant flooding. At that stage, the Defendants went into default, and both the CWB and the Plaintiff must be taken to have been aware of that fact.

[38] The Defendants argue that it is unfair and inequitable to allow the CWB and the Minister to extend the limitations period which applies to the action for recovery. The Minister's

subrogation rights must trigger at the same time as the CWB's right to recovery; otherwise the Minister is in a better position through subrogation than the CWB is as the party to the contract, and that cannot be so. At the latest, the subrogation rights must trigger when the CWB makes the demand for payment to the Minister.

[39] The Defendants submit that accepting the Plaintiff's argument that the subrogation rights only trigger when the Minister decides to make the actual payment to the CWB is unfair to farmers, because that enables the Minister to unilaterally extend the limitation period. This is patently unfair.

[40] For the reasons discussed earlier, I am not persuaded by this argument. The rights of the parties are clearly set out, and although the terms of the agreement and its context may be unusual, as argued by the Defendants, that does not make them inherently unfair and no substantive argument against enforcing the debt has been advanced.

[41] Based on the affidavit evidence filed by the Plaintiff I am satisfied that the Plaintiff has established that the advance payments were made, and that the Defendants are in default. The evidence also demonstrates that a demand for payment has been made by the Plaintiff, but the amounts remain outstanding.

[42] In a motion for summary judgment, both sides must put their best foot forward. In particular, Rule 214 of the *Federal Courts Rules*, SOR/98-106 provides that a defendant cannot rely on making assertions about what the evidence at trial will show; instead, the Rule requires that the defendant set out specific facts and adduce evidence showing that there is a genuine issue for trial: see *Moroccanoil Israel Ltd v Lipton*, 2013 FC 667 at para 10.

[43] On the record before me, I can find no basis to decline to award summary judgment in favour of the Plaintiff.

V. Conclusion

[44] I find that the Plaintiff has established its claim for summary judgment, and that there is no compelling evidence or argument against the award of summary judgment in favour of the Plaintiff. I therefore award summary judgment in favour of the Plaintiff.

[45] The written representations of the Plaintiff and the affidavit of Glenda Probert filed in support of this Motion seek a judgment in the amount of $45,619.11. This includes the amounts owed to the Minister, including the principal and interest outstanding in regard to the Defendants' default, calculated as of April 8, 2019. In addition, the Plaintiff seeks pre-judgment interest from April 8, 2019, until the date of this judgment, calculated at a *per diem* rate of $8.69.

[46] The Plaintiff also claims costs in the amount of $1,245.19, including disbursements plus counsel time calculated in accordance with Tariff "B". In exercise of my discretion pursuant to Rule 400, I find this to be a reasonable cost award. Finally, the Plaintiff submits that post-judgment interest should be fixed at an annual rate of 5% per annum from the date of the judgment, in accordance with the *Interest Act*, RSC 1985, c I-15.

[47] For the reasons set out above, the Plaintiff is entitled to the relief requested, including judgment in the amount of $45,619.11 and pre-judgment and post-judgment interest, as well as costs.

JUDGMENT in T-481-18

THIS COURT'S JUDGMENT is that:

1. The motion for summary judgment is granted in favour of the Plaintiff.

2. The Defendants shall pay to the Plaintiff the sum of $45,619.11in relation to the Advance Payment;

3. The Defendants shall pay to the Plaintiff pre-judgment interest from April 8, 2019 until the date of this judgment, calculated on a *per diem* rate of $8.69.

4. The Defendants shall pay to the Plaintiff costs and disbursements in the amount of $1,245.19.

5. The Defendants shall pay to the Plaintiff post-judgment interest at the rate of five (5) percent per annum, in accordance with the *Interest Act*.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-481-18
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v MOODIE ET AL

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*.

JUDGMENT AND REASONS:	PENTNEY J.
DATED:	JANUARY 14, 2020

APPEARANCES:

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