Federal Court  Cour fédérale

Date: 20210422

Docket: T-2095-18

Citation: 2021 FC 356

Ottawa, Ontario, April 22, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Plaintiff

and

TALSMA FARMS LTD.,
CLAIRE JOHN TALSMA
AND CHERYL BENITA TALSMA

Defendants

ORDER AND REASONS

I. Nature of the Matter

[1] This is a motion for the preliminary determination of two questions of law pursuant to Rule 220 of the *Federal Courts Rules*, SOR/98-106. The questions arise from a subrogated claim for judgment against Claire John Talsma and Cheryl Benita Talsma [the Individual Defendants], relating to indebtedness from payments made by Manitoba Pork Credit Corporation [MPCC] to

Talsma Farms [Corporate Defendant] under the *Agricultural Marketing Programs Act*, SC 1997, c 20 [*AMPA*].

II. Background

[2] On May 2, 2008, the Defendants applied in writing, pursuant to an application and repayment agreement [Repayment Agreement], to MPCC for an agricultural advance payment under the *AMPA* for the 2008-2009 production period. The Defendants each represented themselves to be producers within the meaning of *AMPA*.

[3] MPCC makes an agricultural advance payment to eligible agricultural producers to fulfill the objective of the *AMPA*, which is to improve marketing opportunities for agricultural products. Agricultural producers who receive an agricultural advance payment must repay the advance plus interest to the administrator organizations. Section 3 of *AMPA* provides that the Minister of Agriculture and Agri-Food Canada [Minister] guarantees the agricultural advance payment if producers default on repayment. A tri-partite agreement between Her Majesty the Queen in Right of Canada, as represented by the Minister, the MPCC, and the lender (initially Steinbach Credit Union and subsequently Royal Bank of Canada), also set out the arrangements concerning the Minister's guarantee.

[4] On or about May 8, 2008, the Defendants received an agricultural advance payment of $100,000 by way of a cheque made out in the name of the Corporate Defendant. The Defendants did not repay this amount despite several extensions of time to repay. The Defendants were in

default as of April 1, 2013. Section 22 of the *AMPA* sets out the liability of the defaulting producer to the administrator:

Liability of defaulting producer to administrator	**Obligations du producteur défaillant envers l'agent d'exécution**
22 A producer who is in default under a repayment agreement is liable to the administrator for	**22** Le producteur défaillant relativement à l'accord de remboursement est redevable à l'agent d'exécution de ce qui suit :
(a) the outstanding amount of the guaranteed advance;	**a)** le montant non remboursé de l'avance garantie;
(b) the interest at the rate specified in the repayment agreement on the outstanding amount of the advance, calculated from the date of the advance;	**b)** les intérêts sur le montant non remboursé de l'avance garantie calculés au taux prévu dans l'accord de remboursement, courus à partir de la date du versement de l'avance;
(c) the costs, including legal costs, incurred by the administrator to recover the outstanding amounts and interest, if those costs are approved by the Minister, other than the costs that the administrator has recovered by means of a fee charged to the producer under subsection 5(4); and	**c)** les frais qui sont engagés par celui-ci pour recouvrer les sommes non remboursées et les intérêts et qui sont approuvés par le ministre, y compris les frais juridiques, mais à l'exclusion des frais qui ont été recouvrés à titre de droits auprès du producteur en vertu du paragraphe 5(4);
(d) any other outstanding amounts under the repayment agreement.	**d)** toute autre somme non remboursée en vertu de l'accord de remboursement.

[5] On August 22, 2013, pursuant to the Minister's guarantee, MPCC made a claim for payment from the Minister and was paid $103,503.62. Pursuant to section 23(2) of *AMPA*, upon payment, the Minister is subrogated to the administrator's rights against the defaulting producer and may maintain an action, in the name of the administrator or in the name of the Crown, against the producer. A producer who is in default under a repayment agreement is liable to the Minister for the interest on the subrogated amount as well as costs, including legal costs, to recover that amount (*AMPA*, s 23(3)). The Plaintiff, on behalf of the Minister, brought a subrogated claim against the Defendants for payment of the outstanding debt. The Defendants

dispute that MPCC is an administrator under the *AMPA* and dispute the claim that the Individual Defendants are jointly and severally liable for the amounts owing based on the requirements of Alberta's *Guarantees Acknowledgement Act*, RSA 2000, c.G-11 [*GAA*].

III. Issues

[6] On February 28, 2020, Prothonotary Tabib, upon motion brought by the Plaintiff, ordered that there would be a preliminary determination of the following questions of law pursuant to Rule 220(1):

(a) Was Manitoba Pork Credit Corporation an administrator within the meaning of subparagraph 2(1)(s) of the *Agricultural Marketing Programs Act*, SC 1997, c 20 when it made the agricultural advance payment (AAP) to the Defendants and in its subsequent dealing with the Minister of Agriculture and Agri-Food Canada?

(b) Did the instruments executed by the Defendants Claire John Talsma and Cheryl Benita Talsma result in personal liability on their part, in the absence of a certificate issued under s. 4 of *Alberta's Guarantees Acknowledgement Act*, RSA 2000, c.G-11?

[7] The February 28, 2020 Order states that the documentary evidence for the determination of the questions of law would consist of the Statement of Claim, the Statement of Defence, and the facts and documents set out in the Request to Admit.

IV. Parties' Submissions

A. *The Plaintiff's Position*

[8] The Plaintiff submits that MPCC was an administrator when it made the agricultural advance payment to the Defendants, during its subsequent dealings with the Defendants, and at the time of its dealings with the Minister.

[9] The Plaintiff states that MPCC, by virtue of its corporate status pursuant to Manitoba law, has the capacity to sue and be sued and that it has maintained this capacity despite not extra-provincially registering in Alberta pursuant to section 295(1) of Alberta's *Business Corporations Act*, RSA 2000, c B-9 [*BCA*]. The MPCC therefore meets the definition of administrator under *AMPA*.

[10] Additionally, the Plaintiff submits that the Repayment Agreement does not meet the definition of guarantee under the *GAA* and is clearly an indemnity, making both Individual Defendants liable in their personal capacity. It points to the wording of the covenants in support of its position.

B. *The Defendants' Position*

[11] The Defendants submit that MPCC could not be an administrator under the *AMPA* because it did not, and still does not, have the capacity to sue in its own name in Alberta. Since MPCC paid the agricultural advance payments in Alberta and the Defendants received confirmation of the acceptance of their application in Alberta, MPCC must have the capacity to sue in Alberta to qualify as an administrator, which it does not. They rely on the extra-provincial registration requirements contained in the Alberta's *BCA*.

[12] Since MPCC is not an administrator, the Plaintiff was not able to enter into the Repayment Agreement with MPCC and acted *ultra vires* by entering into the Repayment Agreement with MPCC.

[13] The Individual Defendants state that they are not personally liable as they signed a guarantee, not an indemnity, which is invalid because there was no certificate issued under section 4 of Alberta's *GAA*.

V. Analysis

[14] Various other submissions were made that were not directly applicable to the determination of the questions before me. I have focused on the two questions.

A. *Question 1*

[15] After considering the parties' submissions, I have determined that it is not necessary to delve into the requirements of extra-provincial registration pursuant to Alberta's *BCA* to answer the first question. Rather, a plain reading of the governing legislation, the *AMPA*, dispenses with this question.

[16] The term “administrator” is defined in section 2(1) of the *AMPA*:

administrator means one of the following organizations, if it has the power to sue and be sued in its own name:	**agent d’exécution** S’ils ont la capacité d’ester en justice :
(a) an organization of producers that is involved in marketing an agricultural product to which Part I applies;	**a)** toute association de producteurs qui participe à la commercialisation d’un produit agricole assujetti à la partie I;
(b) an organization, other than a lender, that the Minister, taking into account any criteria prescribed by regulation, determines to be an organization that represents producers who produce, in an area, a significant portion of an agricultural product to which Part I applies; or	**b)** tout organisme, autre qu’un prêteur, dont le ministre conclut, compte tenu de tout critère réglementaire, qu’il représente, dans une région, des producteurs y produisant une proportion importante d’un produit agricole assujetti à la partie I;
(c) an organization, including a lender, that the Minister determines to be an organization that would be able to make advances more accessible to producers and that the Minister designates as an administrator. (agent d’exécution)	**c)** tout organisme — notamment un prêteur — que le ministre désigne à ce titre et dont celui-ci conclut qu’il pourrait accroître l’accès des producteurs à des avances. (administrator)
[Emphasis added.]	[Je souligne.]

[17] The Supreme Court of Canada has stated that the modern approach to statutory interpretation requires that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 at para 21, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983) at p 87).

[18] The *AMPA* authorizes administrators to pay funds to the eligible agricultural producers for improving marketing opportunities for agricultural products. The only mention within the *AMPA* of the legal personality concerning an administrator is that an administrator is to

possesses "power to sue and be sued in its own name" as emphasized above. There is no requirement for extra-provincial registration nor any additional conditions on the administrator.

[19] Therefore, I find that since MPCC, is created pursuant to the Manitoba *Corporations Act*, CCSM, c C225, it is a legal person who has the power to sue and be sued in its own name by virtue of section 15(1) of that *Act*. In applying the principles of statutory interpretation, I find that MPCC, being a legal person, met the definition of an administrator for the purposes of *AMPA* and the agricultural advance payment. With respect to the Defendants, the arguments of extra-provincial registration are not relevant to this narrow question.

B. *Question 2*

[20] The Request to Admit set forth the various contractual documents relied on by the Plaintiff. One such document is the Repayment Agreement, which the Defendants submit should have complied with Alberta's *GAA*. The Repayment Agreement included two sections, reproduced below, that the Individual Defendants signed:

> **1.5 Guarantee Declaration**
>
> **Personal Guarantee (for Corporation with sole shareholder)**
>
> I, being the sole shareholder of the Corporation stated in Section 1.2 of this Application for an Advance in consideration of an advance being made to it by the Administrator, for the amount stated in Part 2 of this Application for an Advance for the 2008-2009 APP production period and the Minister of Agriculture and Agni-Food Canada guaranteeing the repayment of such advance and interest thereon, do hereby agree to be personally liable to the Administrator or the Minister of Agriculture and Aqri-Food Canada for any amount owing by the Corporation under the APP.
>
> By signing this document, you understand and agree that action may be taken against you personally to be liable under Section 5.0

> of the Terms and Conditions of the Repayment Agreement and to repay the full amount of any defaulted advance.
>
> **Joint and Several Guarantee (for Co-operative, Partnership or Corporation with Multiple Shareholders [)]**
>
> We, being Shareholders, Members or Partners, as the case may be, of the Corporation, Cooperative or Partnership, as stated in Section 1.2 of this Application for an Advance, in consideration of an advance being made to the Corporation, Cooperative or Partnership, as the case may be, by the Administrator for the amount stated in Part 2 of this Application for an Advance, for the 2008-2009 APP production period and the Minister of Agriculture and Agri-Food Canada guaranteeing the repayment of such advance and interest thereon, do hereby agree to be jointly and severally liable to the Administrator or the Minister of Agriculture and Agri-Food Canada for any amount owing by the Corporation, Cooperative or Partnership, as the case may be, pursuant to the APP.
>
> By signing this document, you understand and agree that action may be taken against you personally to be liable under Section 5.0 of the Terms and Conditions of the Repayment Agreement to repay the full amount of any defaulted advance.

[21] The Plaintiff submits that, despite the word "guarantee" in the above sections of the Repayment Agreement, it is an indemnity rather than a guarantee. Therefore, the *GAA* does not apply and there is a direct obligation on the Individual Defendants, which is not conditional on default by the Corporate Defendant.

[22] The Individual Defendants disagree and state that since the title included the word "guarantee", it was a guarantee. Therefore, the provisions of the *GAA* apply. They state that since section 4 of the *GAA* required them to attend a lawyer's office and receive a certificate, which they did not, the Repayment Agreement is not in compliance, is defective, and there is no claim of personal liability against them.

[23] Additionally, the Individual Defendants state that the Repayment Agreement contains indications of both an indemnity and a guarantee. They submit that since the Repayment Agreement contains the wording "the signatory understands that action may be taken against them personally to be liable under the agreements to repay the full amount of any *defaulted advance*" there is no primary liability but only a contingent liability upon default by the Corporate Defendant.

[24] The Plaintiff states that, taken as a whole, the Repayment Agreement leaves no doubt as to its character. Furthermore, at the time of signing by the Individual Defendants, the *AMPA* did not allow for a corporate producer to be eligible for a guaranteed advance unless each of the shareholders agreed in writing to be jointly and severally liable (s. 10(1)(d)(ii) *AMPA).*

[25] The Plaintiff cites *Dryco Building Supplies Inc. v Wasylishyn*, 2002 ABQB 676 at paras 37, 39 [*Dryco*] where the Court held:

> [37] A guarantee as contemplated by the *Guarantees Acknowledgement Act* or the *Statute of Frauds* is a conditional agreement in that it requires the act or default or omission of another before the obligation of the guarantor arises.
>
> […]
>
> [39] An indemnity is distinguishable from a guarantee in that it is a primary, direct obligation between parties which is not conditional on default by another. An indemnity is not within the jurisdiction of the *Guarantees Acknowledgement Act*.

[26] The Court in *Royal Bank of Canada v Swartout*, 2011 ABCA 362 at para 38 [*Swartout*] stated a similar principle:

> [38] The case authorities have held that if the language of the agreement does not make the obligation conditional upon failure of another, the obligation is direct and not a guarantee: 32262 *BC Ltd v Pataki Enterprises*, 1998 ABCA 90, 216 AR 78 at para 11. Nor is it the case that where individuals are jointly and severally liable with a corporation, the obligations are conditional. Similarly, in *Standard Trust v Steel*, (1991), 1991 ABCA 211 (CanLII), 117 AR 241, 83 DLR (4th) 130 at page 142, this court stated:
>
> > The appellant promised to perform. He did not promise to perform only if the corporation did not. As the trial judge stated, he cannot therefore rely upon the technical provisions of the Guarantees Acknowledgement Act to relieve him of the obligation to pay the debt.

[27] Where a contract uses clear language such as “joint and several liability”, “personally liable”, or “primarily liable” the *GAA* does not apply (*Knafelc v Fountain Tire Ltd*, 2009 ABQB 201 [*Knafelc*] at para 42). The Court has also stated that, even without these phrases, for the *GAA* to apply, there must be specific language in the contract stating that the liability of the guarantor only arises when the primary debtor defaults (*Knafelc* at para 43). Further, where the terms “guarantee” or “guarantor” are in a document, it is not determinative of the parties' obligations since the substance of the obligation, not the label determines if it is a guarantee (*Swartout* at para 45).

[28] The legislative history concerning section 10(1) of the *AMPA* provided by the Plaintiff also assists me. In short, the concept of a “guarantor” was absent from section 10(1)(d)(ii) when the Individual Defendants signed the Repayment Agreement in 2008. The version of section 10(1)(d)(ii) in force in 2008 is reproduced below:

> 10(1) For a producer to be eligible for a guarantee advance during a program year,

> (d) if the producer is a corporation with two or more shareholders, a partnership, a cooperative or another association of persons,
>
> (ii) each of the shareholders, partners or members, as the case may be, must agree in writing to be jointly and severally, or solidarily, liable to the administrator for any liability of the producer under section 22 and must provide any security for the repayment of the advance that the administrator may require.

[29] Section 10(1)(d)(ii) was amended and, as of February 27, 2015, it reads essentially the same but adds the concept of "guarantor" in sub-paragraph (ii) and it makes a further reference to the regulations which prescribes who can be a guarantor. The regulations create two categories of guarantor and it is worthy to note that those categories of guarantors are distinct from the concept of a shareholder.

[30] I agree that titles or labels are not determinative of how a document is to be read. The authorities cited by the Plaintiff are relevant and persuasive. I also agree that section 1.5 of the Repayment Agreement served as a notice to the Individual Defendants of the seriousness of what they were signing. Reading the Repayment Agreement and the covenant in question as a whole, rather than focusing solely on the word "guarantee", I find that it has the indicia of an indemnity rather than a guarantee. A guarantee would clearly indicate that the liability of the person signing it is contingent on recourse against the principal debtor. Here, all three parties signed the Repayment Agreement in their respective capacities as shareholders, officers, and individuals and all agreed to be jointly and severally liable for the amounts advanced.

[31] The legislative history of section 10(1)(d)(ii) of *AMPA* also assists the Court in making this determination.

[32] As such, I find that the Repayment Agreement is not a guarantee and there is no requirement to comply with the *GAA*.

VI. Conclusion

[33] The two questions for determination set forth in the Order of Madam Prothonotary Tabib are answered in the affirmative.

ORDER and REASONS in T-2095-18

THIS COURT ORDERS that:

1. The two questions posed to this Court pursuant to Rule 220(1)(c) are answered in the affirmative as follows:
    a. The Manitoba Pork Credit Corporation was an administrator within the meaning of subparagraph 2(1)(a) of the *Agricultural Marketing Programs Act*, SC 1997, C 20 when it made the agricultural advance payment (AAP) to the Defendants and in its subsequent dealings with the Minister of Agriculture and Agri-Food Canada.
    b. The instruments executed by the Defendants Claire John Talsma and Cheryl Benita Talsma resulted in personal liability on their part, in the absence of a certificate issued under s. 4 of Alberta's *Guarantees Acknowledgement Act*, RSA 2000, c.G-11.
2. In accordance with para 6 of the February 28, 2020 Order of Prothonotary Tabib, the parties shall, within 30 days of the determination of the questions and having consulted with each other, file submissions as to the next steps to be taken in this action.
3. There is no order for costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2095-18
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v TALSMA FARMS LTD., CLAIRE JOHN TALSMA AND CHERYL BENITA TALSMA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND SASKATOON, SASKATCHEWAN AND EDMONTON, ALBERTA
DATE OF HEARING:	NOVEMBER 3, 2020
ORDER AND REASONS:	FAVEL J.
DATED:	APRIL 22, 2021

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