

Federal Court



Cour fédérale

Date: 20100129

Docket: T-1457-08

Citation: 2010 FC 104

Ottawa, Ontario, January 29, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**FRIENDS OF THE CANADIAN WHEAT BOARD,
HAROLD BELL, PAUL BEINGESSNER, ART HADLAND,
ART MACKLIN, KEN ESHPETER, LYNN JACOBSON,
TERRY BOEHM, LYLE SIMONSON, STEWART WELLS,
KEITH RYAN, WILF HARDER,
AND LAURENCE NICHOLSON**

Applicants

and

**THE ATTORNEY GENERAL OF CANADA
THE MINISTER OF AGRICULTURE AND AGRIFOOD
IN HIS CAPACITY AS MINISTER RESPONSIBLE
FOR THE CANADIAN WHEAT BOARD
MEYERS, NORRIS, PENNY LLP AND
THE CANADIAN WHEAT BOARD**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 for judicial review of certain directions of the Minister of Agriculture and Agri-Food (Minister) to

the Canadian Wheat Board (CWB) dated July 23, 2008 (Decision) changing the way the voters list is compiled for the election of directors of the CWB.

BACKGROUND

[2] At issue in this case is the validity of the Minister's Decision with regard to the compilation of the voters list for the 2008 election of CWB directors.

[3] According to the Respondents, the Decision of the Minister contained in his letter of July 23, 2008 to the CWB addressed the "promotion of voter eligibility awareness, the manner in which an initial voters list was to be prepared, and procedures by which eligible voters could have their name[s] added to the list if initially not listed thereon." The Applicants, however, characterize the Minister's letter as "direct[ing] the CWB to take certain steps so that others who were previously entitled to automatic inclusion on the Voters List... were to be removed from [the] Voters List and placed on a separate list."

[4] The Applicants contend that the Minister exceeded his lawful jurisdiction in directing such changes, and that the Decision is contrary to the *Regulations Respecting the Election of Directors of The Canadian Wheat Board*, SOR/98-414 (Regulations). Furthermore, the Applicants submit that the Minister's Decision was made in bad faith.

DECISION UNDER REVIEW

[5] The Minister attributes his authority to make the Decision to section 3.07 of the *Canadian Wheat Board Act*, R.S.C.1985, c. C-24 (Act). He notes that the measures contained within his Decision are “required for the proper conducting and supervision of the 2008 director election.”

[6] The Minister expressed his concern that there are producers who are eligible to vote but who are not aware of their eligibility. To resolve this issue, he directed that the election coordinator publicize the voter eligibility criteria.

[7] The Minister was also concerned that the statutory declaration process for a producer to add his or her name to the voters list is “both costly and time-consuming.” The solution directed by the Minister is that the election coordinator “develop an application form that will be made available to potential voters who would like to be added to the voters list.” In order to be able to vote, pursuant to section 8 of the Regulations, voters would be required to establish their eligibility by providing one of three documents: a) the producer’s production insurance contract from 2007 or 2008; b) the producer’s production insurance contract number along with authorization for an eligibility verification; or c) copies of grain receipts for one of the eligible grains for the 2007 or 2008 growing season.

[8] The Minister expressed further concern with regard to the number of people on the list of permit book holders who had not made any deliveries to the CWB “in recent years.” He noted that

“although these individuals may hold permit books, they have not clearly established that they are eligible producers.” The Minister directed as follows on this issue:

With respect to the list of permit book holders to be provided to the election coordinator, please ensure that the list identifies separately those who have not delivered to the CWB during the 2007-08 and 2008-09 crop years. These permit holders should not automatically be included on the voters list. Rather, they should be allowed to have their names added in the same manner as producers who do not hold permit books.

ISSUES

[9] The issues on this application can be summarized as follows:

1. Whether the Applicants have standing to bring the application before the Court;
2. Whether the Minister had lawful authority to make the Decision;
3. Whether the Decision is contrary to the Regulations;
4. Whether the Minister made the Decision in bad faith;

STATUTORY PROVISIONS

[10] The following provisions of the Act are applicable to these proceedings:

2. (1) In this Act, “actual producer” means a producer actually engaged in the production of grain;

2. (1) Les définitions qui suivent s’appliquent à la présente loi.
« arrêté » Tout arrêté pris par la Commission sous le régime de la présente loi; y sont assimilées les « instructions aux commerçants » qu’elle

publie.

...

...

“producer” includes, as well as an actual producer, any person entitled, as landlord, vendor or mortgagee, to the grain grown by an actual producer or to any share therein;

« producteur » Outre le producteur-exploitant, toute personne ayant droit, à titre de propriétaire, de vendeur ou de créancier hypothécaire, à tout ou partie des grains cultivés par celui-ci.

...

...

3.07 Subject to the regulations, the Corporation shall take any measures that the Minister may determine for the proper conduct and supervision of an election of directors, including

3.07 Sous réserve des règlements, la Commission prend les mesures administratives que le ministre juge indiquées relativement à l'organisation de l'élection et à la surveillance de son déroulement, notamment :

(a) employing the persons necessary to conduct or manage the election and the payment of any fees, costs, allowances and expenses of any person so employed, that the Minister may determine; and

a) l'embauchage du personnel administrative nécessaire à la tenue de l'élection et le versement de la rémunération et des indemnités que fixe le ministre;

(b) paying the costs of the election incurred by or on behalf of the Corporation, including the costs incurred in the preparation, printing and distribution of material providing information on candidates.

b) le paiement des frais afférents à la tenue de l'élection qu'elle a engagés ou qui l'ont été en son nom, y compris les frais qu'elle a autorisés quant à la préparation, l'impression et la diffusion de la documentation électorale destinée à faire connaître les candidats.

...

26(4) No permit book shall be issued to any person other than a producer.

...

26(4) Les carnets de livraison ne sont délivrés qu'aux producteurs.

[11] The following provisions of the Regulations are also applicable to these proceedings:

6. (1) Subject to subsection (2), every producer is entitled to be included in the voters list in respect of the electoral district in which they produce grain.

6. (1) Sous réserve du paragraphe (2), tout producteur a le droit d'être inscrit sur la liste des électeurs pour la circonscription électorale dans laquelle il se livre à la production de grain.

(2) A producer who produces grain in more than one electoral district may only be included in one voters list, which is chosen by the producer.

(2) Le producteur qui se livre à la production de grain dans plus d'une circonscription électorale est inscrit sur une seule liste d'électeurs de son choix.

...

7. (1) Not later than 60 days before the last day of the election period, the Corporation shall provide the election coordinator with a list of producers who are named in a permit book on the day the list is sent or who were named in a permit book during the previous crop year.

...

7. (1) Au plus tard soixante jours avant le dernier jour de la période d'élection, la Commission fournit au coordonnateur d'élection la liste des producteurs dont le nom figure dans un carnet de livraison à cette date ou y figurait au cours de la dernière campagne agricole.

(2) The election coordinator shall, not less than 30 days before the last day of the

(2) Au plus tard 30 jours avant le dernier jour de la période d'élection, le coordonnateur

election period,	d'élection :
(a) make publicly available a list of the names of the voters in each electoral district; and	a) rend publique la liste des noms des électeurs de chaque circonscription électorale;
(b) send to each candidate a list of the names and addresses of the voters in the candidate's electoral district.	b) transmet à chaque candidat la liste des noms et adresses des électeurs de sa circonscription électorale.
8. Any producer whose name is not included on the voters list may, at least fourteen days before the last day of the election period, request the election coordinator to add the name of the producer to the voters list, if the producer provides proof of their identity and eligibility.	8. Au plus tard 14 jours avant le dernier jour de la période d'élection, le producteur dont le nom n'est pas inscrit sur la liste des électeurs peut demander au coordonnateur d'élection d'y ajouter son nom, s'il établit qu'il a droit d'y être inscrit et fournit une preuve de son identité.

STANDARD OF REVIEW

[12] Whether or not a Minister has exceeded his or her jurisdiction and acted in a way that is *ultra vires* a statute is an issue that should be determined on a standard of correctness. Indeed, this is a “true question of jurisdiction or *vires*.” See *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 59. As such, correctness will be used to consider whether the Minister had lawful authority to make the July 23, 2008 Decision.

[13] The determination of whether the Minister's Decision was contrary to the Regulations is a question of law. Based on *Dunsmuir*, matters of law may be reviewed on either a standard of

reasonableness or correctness, based on an examination factors enumerated in paragraphs 55 and 60 of *Dunsmuir*. These factors include the existence (or lack) of a privative clause, the area of expertise of the decision maker, as well as the nature of the question of law at issue.

[14] There is no privative clause within the Act to instruct the Court to give deference to the Minister's Decision. This factor militates in favour of judicial review on a standard of correctness. On the other hand, the directions made by the Minister in his Decision may be said to be within his specialized area of expertise, which militates towards a reviewing the Decision with a standard of reasonableness. As such, the determinative factor is whether or not this legal question is of central importance to the legal system. I believe that the Minister's ability to create directives to affect the conduct and supervision of an election is indeed of central importance to the legal system. Accordingly, correctness will be the standard when considering whether the Minister's directions in his Decision were contrary to the Regulations.

[15] The Applicants have also alleged that the Decision was made in bad faith. This is a matter to be considered on a standard of reasonableness. See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 51.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47). Put

another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicants

Who is a Producer?

[17] The Applicants say that the jurisdiction granted to the Minister under section 3.07 of the Act allows him to give instructions to the CWB on a limited number of matters. The Applicants submit that to be legally valid, instructions issued by the Minister must be consistent with the intent of the Act and must not violate the Regulations.

[18] The definition of “producer” used in the Act does not contemplate factors such as the delivery of grain to either the CWB or to the non-board market as considered by the Minister. Rather, based on the Regulations, a permit book holder is a producer. Accordingly, the Minister is not entitled to give instructions which have the effect of removing permit book holders from the voters list.

[19] According to subsection 2(1) of the Act, a producer includes “as well as an actual producer, any person entitled, as landlord, vendor or mortgagee, to the grain grown by an actual producer or to any share within.” An “actual producer” is defined as a producer actually engaged in the production

of grain. The Applicants use these definitions to demonstrate that the definition of “producer” clearly encompasses more than simply “actual producers” of grain.

[20] Moreover, while section 3.07 of the Act gives the Minister the ability to issue instructions with regard to the conduct and supervision of an election, it does not entitle the Minister to restrict the meaning of “producer” in the Act.

[21] Both sections 6 and 7 of the Regulations require that all producers be included on the voters list. As such, it is vital to determine who is and who is not a “producer” as defined by the Act. It is not the Minister’s prerogative to alter this definition or to alter the requirement of who may or may not be included on the voters list. The Act specifies no time frame within which a producer must produce grain in order to maintain this status.

Minister’s Scope of Authority

[22] The Applicants contend that the measures which the Minister is authorized to make pursuant to section 3.07 “[are] somewhat general within a distinct and readily ascertainable category of matters which are clearly administrative in nature.” Section 3.07 of the Act provides as follows:

3.07 Subject to the regulations, the Corporation shall take any measures that the Minister may determine for the proper conduct and supervision of an election of directors, including

3.07 Sous réserve des règlements, la Commission prend les mesures administratives que le ministre juge indiquées relativement à l’organisation de l’élection et à la surveillance de son déroulement, notamment :

(a) employing the persons necessary to conduct or manage the election and the payment of any fees, costs, allowances and expenses of any person so employed, that the Minister may determine; and

a) l'embauchage du personnel administrative nécessaire à la tenue de l'élection et le versement de la rémunération et des indemnités que fixe le ministre;

(b) paying the costs of the election incurred by or on behalf of the Corporation, including the costs incurred in the preparation, printing and distribution of material providing information on candidates.

b) le paiement des frais afférents à la tenue de l'élection qu'elle a engagés ou qui l'ont été en son nom, y compris les frais qu'elle a autorisés quant à la préparation, l'impression et la diffusion de la documentation électorale destinée à faire connaître les candidats.

This provision must be properly interpreted to determine the scope of the Minister's authority.

While the phrase "any measures" seems to imply a broad scope of authority, this authority is then limited to that which is necessary "for the proper conduct and supervision of an election of directors." Consequently, any matters outside of the conduct and supervision of the election are beyond the Minister's authority. The Applicants suggest that a plain-meaning interpretation of the phrase "conduct and supervision" demonstrates that Parliament intended that the Minister be limited to administrative measures only in his directions to the CWB. Accordingly, substantive measures are outside of his scope of his authority.

[23] The Applicants submit that their interpretation is supported by the examples of the Minister's authority contained in 3.07 (a) and (b). In its express provision of examples of measures

that may be taken by the Minister, Parliament has limited the Minister's authority to the measures enumerated in subsections 3.07 (a) and (b), or measures similar in nature, pursuant to the operation of the *expressio unius est exclusio alterius* principle. Measures similar in nature would include those that are purely administrative or procedural. Furthermore, restricting the Minister's scope of authority in this way is consistent with the structure of the Act itself which contemplates that substantive matters with regard to the conduct of elections are dealt with in the Regulations or the Act.

[24] In *R. v. Charles*, 2005 SKCA 59, [2006] 1 W.W.R. 637, the Saskatchewan Court of Appeal found that the Minister of National Revenue had exceeded his authority by giving orders that would result in altering the effects of the relevant regulations. The Applicants believe that the circumstances at hand are similar to those in *Charles*.

Voters List

[25] Section 7(1) of the Regulations requires that the CWB provide the election coordinator with a list of producers who: a) are in a permit book on the day the list is sent; or b) were named in a permit book the previous crop year. The election coordinator is required to make the list of voters publicly available. The Applicants submit that, within the context of the Regulations and the Act, it is clear that the voters list is to be comprised of both the producers who are named in a permit book on the day the list is sent as well as those who were named in a book during the previous crop year.

[26] Any definition of what constitutes the voters list under the Regulations must be consistent with the definition in the Act. The Act regulates to whom a permit book may be issued. Because subsection 26(4) of the Act provides that no permit book will be issued to any person other than a producer, it follows that the holder of a permit book must be a producer under the Act. The Applicants submit that the Act and the Regulations provide a circumstantial guarantee that a list of permit book holders is a list of producers, and that any deviation from this would have to be addressed by an amendment to the Act or the Regulations.

[27] The logical interpretation of section 7 of the Regulations is that the initial voters list is a list of producers entitled to hold permit books who, consequently, are entitled to remain on the voters list and automatically receive a ballot. The Minister's attempt to remove certain individuals from the voters list is in conflict with the Regulations and is outside the scope of his authority.

Improper Purpose

[28] Statutory powers, even if lawful, are not entirely beyond judicial review. The Applicants suggest that such decisions are reviewable in "egregious cases." Although the Applicants concede that this is a high threshold to overcome, they submit that this threshold is met by the facts of this case.

[29] The judicial review at hand arises from the *ultra vires* exercise of Ministerial power which – unlike almost all other statutes, regulations or directions – was not publicized. The Decision resulted

in the disenfranchisement of many producers who, in effect, lost a right granted to them by Parliament.

The Respondents

[30] The Respondents submit that none of the Applicants have standing to bring this application and it should be summarily dismissed.

[31] The right or ability to bring an application for judicial review is given to anyone directly affected by the matter for which relief is being sought. In order for a party to be directly affected, “the decision at issue must be one which directly affects the party’s rights, imposes legal obligations on it, or prejudicially affects it directly.” See *League for Human Rights of B’nai Brith Canada v. Canada*, 2008 FC 732, 334 F.T.R. 63 at paragraph 24 (*B’nai Brith*).

[32] All of the Applicants but one were named in a permit book and had made deliveries to the CWB within the time period contained in the Decision. As a result, these individuals were on the voters list and were not adversely affected by the Minister’s Decision. The other Applicant, Mr. Ryan, was in the same position as any other potential elector who was not included on the initial voters list. Accordingly, he could have submitted evidence of his status as a producer pursuant to the process established by the election coordinator in order to become a voter.

[33] The evidence before the Court suggests that no producer or eligible voter has standing to seek judicial review of the Minister's Decision because of a lack of adverse or prejudicial effects on any individual's rights.

[34] While the Applicants sought to stay the Minister's Decision in 2008, Justice O'Reilly refused the request for a stay, finding that "the rules are essentially the same in this election as in 2006. The Applicants have not provided any evidence that anyone lost the right to vote in 2006 or had his or her rights otherwise interfered with." *Friends of the Canadian Wheat Board v. Attorney General of Canada* (24 October 2008), T-1457-08 (FC) (*FCWB v. AG*). As had been previously determined by Justice O'Reilly, there is nothing in the Minister's Decision that denies any eligible voter the right to vote in the election.

[35] The only entity that was directly affected by the Minister's Decision was the CWB. However, the CWB itself has not challenged the Minister's Decision.

Vires

[36] A two-part test must be applied to determine whether the Minister had authority to make the Decision. First, the scope and purpose of the statutory authority must be examined. Second, the Decision must be examined to determine whether it comes within the scope of the authorizing statute. See *Canada (Canadian Wheat Board) v. Canada (Attorney General)*, 2009 FCA 214, 392 N.R. 149 at paragraph 46.

[37] The scope of section 3.07 of the Act is broad and allows the Minister to take “any measures” with regard to the proper conduct and supervision of an election of directors. The Respondents agree with the Applicants that the Minister’s directions must be restricted to administrative measures. However, provided that the any directions do not offend the Regulations, the Minister may exercise a wide range of discretion with regard to administrative and procedural matters within the scope of the conduct and supervisions of director elections.

[38] The Minister’s Decision falls within section 3.07 of the Act and simply serves to advise the CWB of administrative and procedural measures to be implemented in terms of the conduct and supervision of the election of directors.

[39] Moreover, the Applicants have erred by alleging that the statutory interpretation principle of *expressio unius est exclusio alterius* applies in this case. While this principle may be applicable in cases where a statute sets out specific exceptions, it does not apply to the provision at hand that is framed to allow “any measures,” as well as including some specific examples. See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, 2008) at 243-252.

Improper Purpose

[40] The purpose of the Minister’s Decision is clearly based on the letter sent to the CWB: to give directions with regard to the conduct of the 2008 election of CWB directors. The Applicants’ allegation that the purpose of the Decision was to disenfranchise a certain group of eligible voters

does not correspond with a reading of the Decision as a whole. Furthermore, such a view of the Decision disregards the fact that it had no effect on the rights of any potential voter to vote.

Regulations

[41] The Applicants' allegation that the Minister's Decision is inconsistent with the Regulations is based on the faulty assumption that being named in a permit book is conclusive proof of an individual's status as a producer. While a permit book gives the holder the right to undertake a particular activity, it does not guarantee that the permit book holder will actually undertake the activity.

[42] A similar issue was considered in *Re: Lanser* (2008), 60 Alta. L.R. (2d) 257, 90 A.R. 218, in which it was determined that a bankrupt farmer who had: a) moved from his farm to the city; b) sold his farming machinery; and c) had his land disposed of, was not "actually engaged" in the production of grain, despite the fact that he retained his permit book.

ANALYSIS

Style of Cause

[43] The Court was advised by counsel for the Applicants that since this application was commenced, Mr. Paul Beingessner has died, and a request was made that his name be removed

from the Style of Cause. There being no objection to this, the Court agrees that the Style of Cause will be amended to remove Mr. Beingessner's name.

Standing

[44] There are two ways in which an applicant can establish standing in a judicial review application. Section 18.1(1) of the *Federal Courts Act* allows an application to be brought by “anyone directly affected by the matter in respect of which the relief is sought.” However, the wording of section 18.1(1) has been held to be broad enough to encompass applicants who are not directly affected so long as they meet the test for public interest standing. See *Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General)*, [2006] 1 F.C.R. 53.

[45] In the present case, the Applicants have proceeded on the basis of personal standing although, at the hearing, they raised arguments which suggested that there is a strong public interest element behind their making this application. However, no formal attempt has been made to acquire public interest standing and the Court has nothing before it to suggest that the Applicants could meet the criteria for public interest standing. See *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

[46] This being the case, at the hearing of this matter, the Applicants based their application upon personal standing, even though they indicated that there is a broader public interest at stake.

[47] This means that my assessment of standing will be confined to personal standing under section 18.1(1) of the *Federal Courts Act*.

[48] As Justice Dawson recently pointed out in *B’Nai Brith* at paragraph 24, “for a party to be considered to be ‘directly affected,’ the decision at issue must be one which directly affects the party’s rights, imposes legal obligations on it, or prejudicially affects it directly.”

[49] There is no evidence before me that the Applicants have been directly affected, or might be directly affected, by the Decision in the way that our jurisprudence requires for personal standing. In fact, the evidence is to the contrary. There is no evidence that the Applicants’ right to vote in the director’s election of 2008 was affected. Except for Mr. Ryan, the Applicants all appeared on the initial voters list. In Mr. Ryan’s case, he may not have been included on the initial voters list, but his right to vote was not affected and he may even have voted in the election. All that can be said is that Mr. Ryan may have had to follow the procedure set forth in the Decision to get his name on the voters list. This change of procedure did not affect his substantive right to vote, assuming he was an eligible producer.

[50] As Justice O’Reilly pointed out when he heard the interlocutory motion on this application “the applicants have not provided any evidence that anyone lost the right to vote in 2006 or had his or her rights otherwise interfered with.” See *FCWB v. AG*, above. Nothing has changed before me.

[51] In any event, it was clear at the hearing of this matter before me that the Applicants' purpose in making this application is to take issue with the Decision because they feel it has an adverse impact upon the democratic process for the election of CWB directors and because they believe the Minister has an ulterior motive. This matter was also addressed by Justice O'Reilly at the interlocutory stages at page 5 of his decision, above:

The applicants also believe that the Minister's intent is to move toward a system of broader marketing choice for grain growers. The applicants suggest that the Minister's hope may be that directors sympathetic to the Minister's position will be elected this fall and begin steering the Board in that direction. Again, this is speculation, not evidence of irreparable harm.

[52] It seems to me that the real purpose behind this application has nothing to do with how the Decision has directly affected the rights of the Applicants. Their concern is to ensure that the Minister does not change the procedure for compiling the voters list for CWB director elections in a way that may result in changes to the way the CWB does business or to the way that grain is marketed in this country. But there is no evidence before me to connect these speculative fears with the Minister's Decision and, even if there were, any personal impact upon the Applicants would remain highly tenuous. The Applicants say they want to ensure that CWB director elections function in a democratic way. This is a public and a political concern and is not a matter which, on our present jurisprudence, means that the Applicants are directly affected. This application is brought as part of a political debate by Applicants whose personal rights have not been affected and who have not demonstrated any prejudicial effect to them, or the imposition of a legal obligation upon them as a result of the Decision.

[53] As the Respondents point out, the only entity directly affected by the Decision is the CWB which has not challenged the Decision and which has apparently complied with the Minister's Decision on the basis that the directions it contains are lawful.

[54] This being the case, I cannot accept that the Applicants have personal standing to bring this application as our jurisprudence defines personal standing. The application should be dismissed on this ground alone. However, in the event it is determined I am wrong on the issue of standing, I will also consider the merits of the application.

Merits

[55] The measures set forth in the Minister's letter of July 23, 2008 deal with a number of issues surrounding: (1) producer awareness of voter eligibility criteria for CWB director elections; (2) the difficulty non-permit book holders face in having their names added to the voters list; and (3) the integrity of the voters list itself.

[56] The matters raised in this application relate to the measures implemented by the Minister to address the integrity of the voters list:

3. Integrity of the Voters List

Lastly, I am concerned about the number of individuals on the list of permit book holders who have had zero deliveries to the CWB in recent years. Although these individuals may hold permit books, they have not clearly established that they are eligible producers. Therefore, with respect to the list of permit book holders to be provided to the election coordinator, please ensure that the list

identifies separately those who have not delivered to the CWB during the 2007-08 and 2008-09 crop years. These permit book holders should not automatically be included on the voters list. Rather, they should be allowed to have their names added in the same manner as producers who do not hold permit books.

[57] Clearly, these measures do not impact the right to vote which is given to “producers” under the Act and the Regulations. Their impact is to remove some permit book holders from the initial voters list that is compiled under section 7 of the Regulations. Those producers who have not delivered to the CWB during the relevant period will fall under section 8 of the Regulations and will have to apply to have their names added to the voters list by providing proof of their identity and eligibility. They will be in the same position as those producers who do not have permit books. What is affected by the Decision is not the right to vote, but the way the voters list is compiled.

[58] The Minister’s concerns arise from the fact that some permit book holders may not be eligible producers as defined by the Act. In order to off-set the concern that permit book holders who are not producers will be allowed to vote, the Minister has directed that only those permit book holders who have actually delivered to CWB during the relevant period will go on the initial voters list compiled under section 7 of the Regulations. Those who have not delivered during the relevant period will be left to apply to have their names added to the list in the same manner as producers who do not hold permit books.

[59] The Applicants object to this change in the system used to establish the overall voters list because it means that permit book holders who do not deliver to CWB in the relevant period will not appear on the initial list of producers established under section 7 of the Regulations; those

persons will now have to apply to be put on the voters list. In other words, the Applicants say that permit book holders should automatically qualify as eligible producer voters. In fact, they say that section 26 of the Act enacts this into law:

26. (1) Subject to this Act, a producer may require the Corporation to issue a permit book authorizing delivery of grain produced on the land comprising the farm of the producer.

(2) The actual producer of grain on any land has the prior right to possession of the permit book in which the land is described but shall make the permit book available to any other producer entitled to deliver grain thereunder on the request of that producer.

(3) Not more than one permit book shall be issued in respect of land comprising any farm or group of farms operated as a unit.

(4) No permit book shall be issued to any person other than a producer.

26. (1) Sous réserve des autres dispositions de la présente loi, tout producteur peut demander à la Commission la délivrance d'un carnet de livraison l'autorisant à livrer du grain produit sur les terres de son exploitation agricole.

(2) Le producteur-exploitant du grain cultivé sur les terres mentionnées au carnet de livraison a un droit prioritaire à la possession de celui-ci, mais il est tenu, sur demande, de le mettre à la disposition de tout autre producteur ayant droit de livrer du grain au titre du carnet.

(3) Il n'est délivré qu'un seul carnet de livraison pour toutes les terres d'une même exploitation agricole ou de plusieurs exploitations agricoles mises en valeur comme une seule unité.

(4) Les carnets de livraison ne sont délivrés qu'aux producteurs.

[60] Under section 2(1) of the Act, a “‘producer’ includes, as well as an actual producer, any person entitled, as landlord, vendor or mortgagee, to the grain grown by an actual producer or to any

share therein.” This definition leads back to the definition of an “actual producer” who is “a producer actually engaged in the production of grain.” So a producer is someone who is actually engaged in the production (though not necessarily the delivery) of grain, or a related landlord, vendor, or mortgagee who is entitled to the grain grown by the actual producer. This means that an actual producer is someone who grows grain.

[61] If someone is a producer with a permit book who does not deliver grain to CWB then, under the pre-2006 system, he or she would automatically appear on the list compiled under section 7(1) of the Regulations. Under the new system, the same producer does not have to deliver to CWB during the relevant period but, if he or she does not, they will not automatically appear on the voters list under section 7 and will have to apply to be placed on the list. So voting eligibility has not changed; what has changed is the way the voting list of producers is compiled and the extra steps that someone with a permit book who does not deliver will have to take to get on the voters list.

[62] If someone has a permit book but is not a producer then, under the old system, they would automatically appear on the voters list and would be able to vote even though not eligible to vote under the governing legislation. Under the new system, such a person would not get to vote because they would not be able to establish their eligibility to vote if they apply to be placed on the voters list.

[63] The concern under the old system was that non-producers might get to vote. Under the new system, they will be flushed out because if they do not deliver to CWB they will have to establish that they are producers as defined by the Act.

[64] There are several reasons why the Applicants object to this change. First, they say there are no time-limits attached to the definition of “producer” in the Act. Someone might not grow grain in a particular year, so surely they should not be deprived of the right to vote in director elections in the relevant year when they do not deliver and they should not be removed from the initial voters list compiled under section 7 of the Regulations.

[65] It seems to me that anyone who obtains a permit book but who does not engage in the production of grain during the relevant period is not a producer. This follows from the definition of an “actual producer” who is “a producer actually engaged in the production of grain.” Someone who has engaged in the production of grain in the past, or who might engage in the production of grain in the future, is not “actually engaged in the production of grain.” If this were not the case then there would be no limits on how long someone with a permit book might not produce grain and still continue to be eligible to vote.

[66] The other reason why the relevant time period, in my view, has to affect who is a producer for purposes of the Act and the Regulations is that, under section 26 of the Act, only a producer may require the CWB to issue a permit book authorizing delivery of grain produced and, under section 26(4), no permit book shall be issued to any person other than a producer.

[67] The Applicants seek to rely upon this provision to support their assertion that anyone with a permit book is a producer. But a producer is either a producer actually engaged in the production of grain or someone entitled to the grain grown by an actual producer. Possession of a permit book does not, per se, ensure that the holder is actually engaged in the production of grain during the relevant period. In fact, this is the very situation that the Minister's Decision is intended to remedy.

[68] Regulation 7 itself also shows that a permit book holder is not necessarily a producer. Regulation 7(1) requires the corporation to provide a list "of producers who are named in a permit book ...". The provision does not state that the corporation can simply provide a list of permit book holders. The list must include persons who (a) are named in a permit book, and (b) are producers. And herein lies the problem that the Minister's Decision attempts to solve: How can the CWB know that someone named in a permit book is also a producer within the meaning of the Act? One way is to limit the initial list under Regulation 7(1) to persons who deliver to the CWB, and to leave those persons who do not deliver to establish their eligibility in other ways under section 8.

[69] In my view, the Minister's Decision is an attempt to ensure that only producers get onto the voters list and vote for directors. This is precisely what the Act says must occur. Section 3.02(1) says that "Ten directors are elected by producers in accordance with sections 3.06 to 3.08 and the regulations." Consequently, it seems to me that the Minister's Decision is in accordance with both the Act and the Regulations. A measure intended to ensure the integrity of the voters list is a measure that determines the proper conduct and supervision of an election of directors within the meaning of section 3.07 of the Regulations.

[70] The Applicants argue that such a measure has, and will, result in extreme voter suppression, since those producers who do not appear on the initial list compiled under section 7 of the Regulations are unlikely to go to the trouble of applying to register themselves as voters.

[71] The Minister's initiatives to ensure the integrity of the voters list have been accompanied by educational measures aimed at ensuring that everyone involved understands the new approach to compiling the list, and so that no producer who wishes to vote need be left off the list. There may have been some confusion and resistance at first because producers were used to the previous method. But any producer who wishes to vote is ensured of the right to do so. Measures aimed at ensuring the integrity of the voters list do not curtail the rights of producers. If producers who do not deliver choose not to have themselves placed on the list, then that is their choice. It may have been easier in the past when permit book holders were simply presented with a ballot, but that method did not ensure the integrity of the system or allow the corporation to ensure that only producers were voting. The Minister cannot be faulted for saying that integrity must trump mere convenience and there is little before me that establishes that voter suppression will be a continuing problem under the new approach to compiling the voters list.

[72] There are also suggestions from the Applicants that, behind the Minister's Decision, lies some devious ploy to load the board of CWB with directors who will be sympathetic to new ways of grain marketing. As was the case before Justice O'Reilly when he heard the interlocutory application, there is simply no evidence of underhandedness or bad faith on the part of the Minister before me. The Applicants' concerns are speculative. The Decision, when read as a whole, includes

measures to ensure that everyone concerned understands the voter eligibility criteria, the reasons for the new approach, and the streamlining of the process whereby those producers and permit book holders who do not appear on the initial list compiled under section 7 of the Regulations, are given every opportunity to register as voters under section 8. No one loses the right to vote. Those producers who have not delivered grain during the relevant period merely need to ensure that, if they wish to participate in the election, they provide the information that will get them on the voters list. If confusion or unfairness results then the Minister will presumably ensure that it is dealt with so that the integrity of the system is maintained.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The style of cause is amended to remove Mr. Paul Beingessner as an Applicant.
2. The Application is dismissed.
3. The Respondents shall have the costs of this Application.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1457-08

STYLE OF CAUSE: FRIENDS OF THE CANADIAN WHEAT BOARD et al.
v.
AGC

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: January 20, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** RUSSELL J.

DATED: January 29, 2010

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