Federal Court Cour fédérale

Date: 20140404

Docket: T-239-11

Citation: 2014 FC 337

Ottawa, Ontario, April 4, 2014

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

WESTERN GRAIN ELEVATOR ASSOCIATION, CARGILL LIMITED, LOUIS DREYFUS CANADA LTD., PARRISH & HEIMBECKER LIMIATED, PATERSON GLOBAL FOODS INC., RICHARDSON INTERNATIONAL LIMITED, WEYBURN INLAND TERMINAL LTD., AND VITERRA INC.

Appellants

and

THE ATTORNEY GENERAL OF CANADA AND THE CANADIAN GRAIN COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] Western Grain Elevator Association, Cargill Limited, Louis Dreyfus Canada Ltd., Parrish & Heimbecker Limited, Paterson Globalfoods Inc., Richardson International Limited, Weyburn Inland Terminal Ltd., and Viterra Inc. (collectively the "Applicants") bring this application for judicial

review to challenge section 30 of the *Canada Grain Regulations*, C.R.C. c. 889 (the "Regulations") as being *ultra vires* the regulation-making authority of the Canadian Grain Commission (the "Commission") having regard to the *Canada Grain Act* R.S.C. 1985, c. G-5 (the "Act").

[2] The Commission is represented in this proceeding by the Attorney General of Canada (collectively the "Respondents"), pursuant to Rule 303 of the *Federal Court Rules*, SOR 198-106 (the "Rules").

II. THE EVIDENCE

[3] The Applicants filed the affidavits of Mr. Wade Sobkowich, sworn on February 25th, 2011 and of Mr. James B. McKerchar, sworn on February 27th, 2011.

[4] Mr. Sobkowich is the executive director of the Western Grain Elevator Association. In his affidavit he describes the function of his organization and its membership. He also addresses his perspective of the steps leading up to both the 2003 and 2011 amendments to the Regulations, including the communication and meetings between the Commission and his organization with respect to those amendments. Attached as exhibits to his affidavit are various communications between his organization and the Commission relating to the Regulations, as well as various amendments to the Regulations and a legal opinion from the Applicants' counsel relating to the 2011 amendments.

[5] Mr. McKerchar is the General Superintendent of the Applicant Parrish & Heimbecker Limited. In his affidavit he describes the process leading up to the 2011 amendments to the Regulations, from the point of view of his employer, and the grain industry in general. Much of his affidavit relates to the negative impact that section 30 of the Regulations will have on the Applicants. He also describes the nature of shrinkage in the grain industry and why it is unavoidable. Attached as exhibits to his affidavit are a number of documents in support of his position.

[6] The Respondents filed the affidavit of Catherine Lampkin, a legal assistant with the Department of Justice in Winnipeg. The body of her affidavit contains no evidence, but refers to attached exhibits that are copies of amendments to the Regulations from June 28th, 1990, as well as the 2011 amendments.

[7] The Respondents argue that parts of the Applicants' affidavits are inadmissible since they contain improper hearsay and opinion evidence.

[8] The Respondents objected to parts of the affidavit of Mr. McKerchar, filed by the Applicants, that they offend Rule 81 of the Rules because they contain material that is outside the personal knowledge of the deponent and is hearsay and opinion evidence that he is not qualified to give. Relying on the decision in *P.S. Partsource Inc. v. Canadian Tire Corp.* (2001), 267 N.R. 135 at paragraphs 13 to 14, the Respondents submit that there is no common law exception to the prohibition against hearsay that would allow consideration of this evidence. In

particular, the Respondents objected to the inclusion by Mr. McKerchar of certain articles that he did not write as exhibits to his affidavit. The Respondents argued that the articles and summaries in the affidavit are inadmissible hearsay evidence. Further, the opinions expressed in the articles are inadmissible because they have not been submitted by a Court - approved expert.

[9] For these reasons, the Respondents argue that paragraphs 25 and 28, as well as exhibits G and H of Mr. McKerchar's affidavit are inadmissible and should not be considered.

[10] In the result, I agree with the submissions of the Respondents about the impropriety of certain parts of the affidavit of Mr. McKerchar.

[11] Paragraphs 25 and 28, and exhibits G and H of the McKerchar affidavit are impermissible hearsay evidence and will not be considered.

III. BACKGROUND

[12] The Applicant Western Grain Elevator Association is an association composed of elevator operators, including the Applicants Cargill Limited, Louis Dreyfus Canada Ltd., Parrish & Heimbecker Limited, Paterson Globalfoods Inc., Richardson International Limited, Weyburn Inland Terminal Ltd., and Viterra Inc.

[13] The facts set out below are drawn from the affidavits filed by the parties.

[14] The challenged Regulation came into force following amendments to the Regulations in 2011. Section 30 addresses "grain shrinkage" and the allowance made in the Regulations to compensate for that shrinkage.

[15] Shrinkage is defined in section 2 of the Act as the loss in weight of grain resulting from the handling or treatment of grain. It can be caused by several factors, including drying, transportation and dust. It is generally accepted as an unavoidable circumstance in the grain industry. Comprehensive shrinkage refers to shrinkage that occurs during the handling and transportation of grain. Moisture shrinkage refers to the shrinkage caused by the drying of grain received from grain producers.

[16] Pursuant to the Act, upon receipt of grain by an elevator from a grain producer, the grain must be graded and weighed, and a receipt is issued to the grain producer recording this information. Upon delivery of grain from the elevator to a terminal or other destination, it must arrive at the same grade and weight shown on the receipt issued to the grain producer.

[17] The Commission has long allowed elevators to adjust the weight of grain received from a producer, shown on the receipt, to compensate for future shrinkage. These are referred to as shrinkage allowances. They have been regulated by a provision in the Regulations setting a maximum shrinkage allowance. There are different types of elevators, and maximum allowances were fixed at different levels to accommodate different types of elevators.

[18] In 2001, the Commission decided to consider reform of the shrinkage allowance system, and issued a Discussion Paper exploring options for the future of the shrinkage allowance system. These options included maintenance of the status quo, deregulation of shrinkage allowances entirely, and setting the maximum shrinkage allowance at zero.

[19] On November 19th, 2001 the Western Grain Elevator Association responded to the Commission's discussion paper and set out its position that setting the maximum shrinkage allowance at zero was arbitrary and unfair, as it would require only elevator operators to bear the costs of shrinkage.

[20] On August 1st, 2003 the Commission amended the Regulations to set the maximum shrinkage allowance for primary elevators at zero. On July 20th, 2009 the Commission issued another Discussion Paper, this time stating its intention to set the maximum shrinkage allowance at zero for transfer and process elevators. On October 29th, 2009 the Western Grain Elevator Association again responded to this Discussion Paper, and offered to work with the Commission to implement a study to determine a process for setting the appropriate shrinkage allowance. This offer was not accepted.

[21] On February 8th, 2010, the Commission advised the Western Grain Elevator Association by letter that it would be amending the Regulations to set shrinkage allowances for all elevators at zero. In amendments that took effect on March 19th, 2011, the Commission set the maximum shrinkage allowance at zero. The change was set out in section 30 of Regulations.

[22] The Applicants filed a notice of application challenging the *vires* of section 30 of the Regulations on February 11th, 2011. The notice of application was amended on July 5th, 2012 to reflect the proper wording of the challenged Regulations.

IV. ISSUES

[23] The Applicants' principal issue is the legality of section 30 of the Regulations. They submit that the Commission and the Governor in Council lack the authority under the Act to enact this provision. Insofar as reliance is placed on paragraph 116(1)(f) of the Act, the Applicants argue that this provision only allows the establishment of a maximum allowance, not the elimination of such an allowance.

[24] They submit that the power to regulate is not equivalent to a power to prohibit, relying in this regard on the decision in *Reference Re Bill 30, an Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at paragraph 55.

[25] Further, the Applicants argue that if section 30 was enacted pursuant to valid statutory authority, it falls outside that power because it was made for an improper purpose and was based on irrelevant factors, thereby yielding an absurd result. They submit that a regulation that is made for reasons unrelated to carrying out the intent and purposes of the Act may be found to be unreasonable, relying in that regard on the decision in *Montreal (City) v. Montreal Port Authority*, [2010] 1 S.C.R. 427 at paragraphs 32-33 and 38.

[26] The Respondents argue that paragraph 116(1)(f) of the Act authorizes the Commission to fix the maximum grain shrinkage allowance at elevators and that the Act does not impose constraints in the exercise of that provision. Since the provision is permissive the Commission has discretion to set, or not set, the maximum shrinkage allowance as it sees fit.

[27] In response to the Applicants' second argument the Respondents submit that the Act does not prescribe how the shrinkage allowances are to be fixed, nor how the discretion to set those allowances must be exercised.

[28] Further, the reasonableness of a regulation is not a determining factor in assessing the *vires* of such regulation. In this regard the Respondents rely on the decision of the Federal Court of Appeal in *Li v. Canada (Citizenship and Immigration)*, [2012] 4 F.C.R. 479.

V. DISCUSSION AND DISPOSITION

[29] The first matter to be considered is the standard of review that applies in this proceeding. Since the dispositive issue is a question of *vires*, the applicable standard of review is correctness. I refer to the decision in *Canada (Wheat Board) v. Canada (Attorney General)*, [2010] 3 F.C.R. 374 at paragraph 36 where the Federal Court of Appeal said the following:

> Turning first to the *vires* issue, the Court must determine on a standard of correctness whether the Direction Order was authorized

> by the power delegated to the Governor in Council pursuant to subsection 18(1) of the Act.

[30] The question in this application is whether section 30 of the Regulations is authorized by the Act. Section 30 of the Regulations provides as follows:

SHRINKAGE ALLOWANCE	MARGE DE PERTE DE POIDS
30. The maximum shrinkage allowance that may be made on the delivery of grain to any licensed elevator is zero.	30. La marge maximale de perte de poids qui peut être déduite du grain livré à toute installation agréée est de zéro.

[31] The authority to enact section 30 of the Regulations is found at Paragraph 116(1)(f) of the Act and provides as follows:

Regulations	Règlements
116. (1) The Commission may, with the approval of the Governor in Council, make regulations	116. (1) Avec l'approbation du gouverneur en conseil, la Commission peut, par règlement :
…	…
(*f*) fixing the maximum shrinkage allowance that may be made on the delivery of grain to an elevator;	*f*) fixer la marge maximale de perte de poids qui peut être calculée lors de la livraison de grain à une installation;

[32] The analytical framework for considering the *vires* of subordinate legislation is set out in *Canada (Wheat Board), supra* at paragraph 46, as follows:

> The first step in a *vires* analysis is to identify the scope and purpose of the statutory authority pursuant to which the impugned order was made. This requires that subsection 18(1) be considered in the context of the Act read as a whole. The second step is to ask whether the grant of statutory authority permits this particular delegated legislation.

[33] In my opinion, paragraph 116(1)(f) of the Act clearly authorizes the establishment of a maximum shrinkage allowance, without any restrictions on the exercise of the regulation-making power. The statutory authority in paragraph 116(1)(f) is broad enough to allow for the maximum shrinkage allowance to be set at zero. There is nothing in the Act limiting the values at which the maximum shrinkage allowance may be set.

[34] The Act does not contain a purpose section. It does, however, contain a section setting out the objects of the Commission. Those objects are set out in section 13 as follows:

Objects	Mission
13. Subject to this Act and any directions to the Commission issued from time to time under this Act by the Governor in Council or the Minister, the Commission shall, in the interests of the grain producers, establish and maintain standards of quality for Canadian grain and regulate grain handling in Canada, to ensure a dependable commodity for domestic and export markets	13. Sous réserve des autres dispositions de la présente loi et des instructions que peuvent lui donner le gouverneur en conseil ou le ministre, la Commission a pour mission de fixer et de faire respecter, au profit des producteurs de grain, des normes de qualité pour le grain canadien et de régir la manutention des grains au pays afin d’en assurer la fiabilité sur les marchés intérieur et extérieur.

[35] There is no evidence that section 30 is inconsistent with these objects and the Applicants submissions in that regard must fail.

[36] The further arguments of the Applicants concerning the unreasonableness of section 30 are likewise doomed to failure insofar as this argument is based upon a challenge to the merits of the policy behind the Regulations.

[37] The jurisprudence clearly directs that the underlying policy choices at issue in legislation, including regulations, are beyond review by the Courts; see the decision in *Jafari v. Canada (Minister of Employment and Immigration)* (1995), 180 N.R. 330 at paragraph 14.

[38] In the result, the application for judicial review is dismissed with costs to the Respondents.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to the Respondents.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-239-11
STYLE OF CAUSE:	WESTERN GRAIN ELEVATOR ASSOCIATION, CARGILL LIMITED, LOUIS DREYFUS CANADA LTD., PARRISH & HEIMBECKER LIMIATED, PATERSON GLOBAL FOODS INC., RICHARDSON INTERNATIONAL LIMITED, WEYBURN INLAND TERMINAL LTD., AND VITERRA INC. v THE ATTORNEY GENERAL OF CANADA AND THE CANADIAN GRAIN COMMISSION
PLACE OF HEARING:	WINNIPEG, MANITOBA
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