

Date: 20090409

Docket: T-1153-08

Citation: 2009 FC 365

Vancouver, British Columbia, April 9, 2009

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

C.B. CONSTANTINI LTD.

Appellant

and

**JAMES NEULS and HER MAJESTY THE QUEEN
IN RIGHT OF CANADA, as represented by
the ATTORNEY-GENERAL OF CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] By order dated July 2, 2008 (order) the Canadian Grain Commission (Commission) ordered C.B. Constantini Ltd. (Constantini) to pay to James Neuls the sum of \$19,430.62. Constantini is a licensed grain dealer under Part III of the *Canada Grain Act*, R.S., 1985, c. G-10 (Act) and Mr. Neuls is a producer of western grain as that term is defined in the Act. The order was made pursuant to section 97 of the Act.

[2] Constantini has appealed the order. It argues that:

(a) The Commission exceeded its jurisdiction, or acted without jurisdiction, in ordering it to pay \$19,430.62 to Mr. Neuls.

(b) The Commission erred in law and in fact in finding that:

(i) Constantini made an improper deduction and failed to make payment for grain delivered by Mr. Neuls.

(ii) Constantini failed to provide a grain receipt to Mr. Neuls in the prescribed time and prescribed manner, thus violating subsection 81(1) of the Act.

(iii) In the result, Mr. Neuls suffered loss or damage in the amount of \$19,430.62.

[3] This appeal is dismissed because the Commission acted within its jurisdiction and its decision was reasonable.

The evidence before the Commission

[4] On November 13, 2007, Mr. Neuls made a complaint to the Commission concerning certified organic flaxseed he had delivered to Constantini. Mr. Neuls provided a number of documents to the Commission in support of his complaint. In sum, Mr. Neuls asserted that:

- (a) He made two deliveries of certified organic flaxseed to Constantini. The first delivery was made on September 12, 2007, the second was made on October 24, 2007.
- (b) The first delivery was made in accordance with an oral agreement between Mr. Neuls and Constantini made in September of 2007. In this agreement, Mr. Neuls agreed to deliver to Constantini one load of certified organic flaxseed at a price of \$16.00 per bushel. Mr. Neuls reached this agreement with David Smythe of the Constantini organization by telephone on September 7, 2007.
- (c) Prior to this, in June of 2007, Constantini had sent a written "Confirmation of Contract #12-11334" to Mr. Neuls that purported to require him to deliver four loads of certified organic flaxseed. One load was to be delivered in each of June, July, August and September, 2007. Mr. Neuls advised that he never agreed to provide four loads and he never signed or returned the "Confirmation of Contract" document to Constantini.
- (d) Constantini issued a document entitled "Settlement" in respect of the first delivery. This document confirmed to Mr. Neuls that the sum of \$20,304.50 was owing in respect of that delivery. Mr. Neuls was paid that amount for the first delivery.
- (e) A separate written agreement was concluded between Constantini and Mr. Neuls (Contract #12-11735) in October of 2007. By this agreement Mr. Neuls agreed to

deliver, in the month of October 2007, one load of certified organic flaxseed at a price of \$25.00 per bushel.

- (f) Pursuant to that agreement, on October 24, 2007, Mr. Neuls made the second delivery of certified organic flaxseed to Constantini.
- (g) As of November 13, 2007, Constantini had neither paid Mr. Neuls nor provided documentation of its receipt of the October 24, 2007 delivery.

[5] On November 14, 2007, a compliance officer with the Commission telephoned and then faxed a letter to Constantini. The letter reminded Constantini of its obligations under the Act. Specifically Constantini was advised that:

- Licensed grain dealers are required upon receipt of grain offered by a producer to issue either a grain receipt or a cash purchase ticket.
- A grain dealer is not entitled to set off payment against any alleged debt owed to the grain dealer by the producer without clear evidence of the producer's explicit consent.

[6] That same day, Constantini purported to write to Mr. Neuls complaining that he had only delivered two of the four loads he had "contracted" to deliver under Contract #12-11334. There was no evidence of any prior demand for compliance with Contract #12-11334, notwithstanding that it purported to have required deliveries in each of June, July, August and September of 2007.

[7] By letter dated January 17, 2008, the Commission requested that the parties provide any additional information or submissions to it.

[8] In response, Mr. Neuls provided a six page summary and three documents provided to him by Constantini. Those documents were a document entitled "Confirmation of Washout #12-11334", a grain receipt issued to Mr. Neuls on January 2, 2008 in respect of the second delivery and a photocopy of a cheque and counterfoil showing payment to Mr. Neuls in the amount of \$8,522.54 in respect to the second delivery.

[9] The grain receipt showed a gross amount payable of \$27,986.71 in respect of the second delivery. The sum of \$19,430.62 was deducted from that total as a non-performance charge for the failure to deliver three truckloads of certified organic flaxseed pursuant to Contract #12-11334. Constantini had resiled from its earlier position that the second delivery had been made pursuant to Contract #12-11334. Instead, it now agreed that the second delivery had been made pursuant to Contract #12-11735.

[10] Constantini made no response to the Commission's letter.

[11] On February 20, 2008, the Commission again wrote to Mr. Neuls and Constantini. The letter set out the relevant facts as understood by the Commission. The Commission advised that it would contact each party by telephone by March 7, 2008. At that time each party should be prepared to advise whether it disputed any fact set out in the Commission's letter of February 20,

2008. The parties were advised that further oral or written submissions could be made to the Commission.

[12] Constantini responded that it had complied with the Act, that its dispute with Mr. Neuls was contractual in nature, that Mr. Neuls had explicitly and implicitly agreed to its right of set off, and that the Commission lacked jurisdiction to determine whether a producer or a grain dealer was in breach of contract. It was the position of Constantini that Mr. Neuls should seek relief in the courts. In its view, no subsequent telephone call was necessary.

[13] There followed further correspondence that debated the jurisdiction of the Commission.

The decision of the Commission

[14] After summarizing its decision and setting out the facts, the Commission addressed the statutory scheme governing the handling of grain delivered by grain producers to grain dealers. The Commission observed that the purchase and sale of grain is not only governed by the agreement between the parties. It is also governed by the Act. The Commission highlighted the importance of cash purchase tickets and grain receipts.

[15] Under subsection 45(1) of the Act, grain dealers are to give security to the Commission to cover any outstanding liabilities to producers who hold grain receipts or cash purchase tickets issued by a grain dealer. Any security given by the dealer entitles the holder of a cash purchase ticket or grain receipt to up to the full value of the grain delivered should the dealer be unable to pay.

[16] The security system is in place to protect producers and depends upon the use of grain receipts or cash purchase tickets as proof of claims against security given to the Commission by the grain dealer. The grain dealer has an obligation to make payment for the grain notwithstanding that the dealer may be of the view that a debt is owed from the producer to the dealer with respect to related or unrelated transactions.

[17] A grain producer may waive its statutory right and consent to a dealer deducting amounts from cash purchase tickets in relation to cash or supply advances as well as in respect of a failure to make subsequent deliveries of grain. The consent to deduction, or waiver of the right to full payment, need not be explicit, but can be inferred from the circumstances surrounding the transaction. The Commission acknowledged that courts have held that applying a deduction or set off in relation to grain is therefore permissible.

[18] The Commission further acknowledged that it has no authority to determine whether a party is in breach of a contract. However, it noted that it may examine the dealings between parties and the provisions of the contract in the course of determining whether there has been a violation of the Act or the Regulations.

[19] The Commission stated that there were two grain deliveries made by Mr. Neuls. With respect to the first, Constantini issued the proper documentation and paid Mr. Neuls \$20,304.50. With respect to the second delivery, Constantini reflected the value as being \$27,986.71 and then deducted an amount of \$19,464.17. In the result it paid the sum of \$8,522.54 to Mr. Neuls.

[20] The Commission concluded there was insufficient evidence that Mr. Neuls had agreed to Contract #12-11334, including insufficient evidence that Mr. Neuls verbally agreed to the contract, signed the contract, or returned the contract to Constantini.

[21] The Commission noted that Mr. Neuls took the position that he made the second delivery pursuant to the provisions of a contract that he verbally agreed to, signed, and returned to the Constantini (Contract #12-11735). Mr. Neuls further took the position that he fulfilled his obligations under the contract and was entitled to full payment for the grain delivered.

[22] The Commission concluded that Constantini violated subsection 81(1) of the Act in respect of the second delivery, in that it failed to provide a cash purchase ticket or grain receipt in the prescribed time and prescribed manner with respect to the purchase of western grain from a producer of that grain.

[23] The Commission also concluded that Constantini made an improper deduction on grain delivered which was not agreed to by Mr. Neuls.

[24] The Commission held that these failures resulted in loss or damage to Mr. Neuls in the amount of \$19,430.62. Consequently, pursuant to section 97 of the Act, the Commission ordered Constantini to pay Mr. Neuls \$19,430.62.

The alleged jurisdictional error

[25] Constantini argues that its dispute with Mr. Neuls was contractual in nature. As a result, Constantini asserts that the Commission lacked jurisdiction to make any determination with respect to the complaint and lacked jurisdiction to order that it pay "damages" to Mr. Neuls. This is characterized to be a jurisdictional error which is reviewable on the standard of correctness.

[26] Constantini acknowledges that in a recent decision rendered by my colleague Justice Hansen, reported as *C.B. Constantini v. Pierce*, 2009 FC 281 (*Constantini* #1), this Court upheld a decision of the Commission which found that Constantini had failed to make payment for grain delivered to it because it had improperly asserted a set off. This case is said to be distinguishable from the one now before the Court because there the Commission found "no evidence" of the existence of the contract relied upon by Constantini to justify its set off. In the present case, the Commission found "insufficient" evidence. According to Constantini, the Commission may make orders where the facts are not in dispute or where there is no document which purports to allow a set off. Where, however, there exists evidence of a *bona fide* dispute, the Commission lacks jurisdiction to make an order.

[27] I see no merit in this submission. In my view, this submission is based upon a mischaracterization of the Commission's decision. The Commission made no finding as to whether Mr. Neuls had entered into Contract #12-11334 with Constantini and thereby agreed to deliver four loads of certified organic flaxseed. Indeed, the Commission stated:

The Commission has no authority to determine whether one party is in breach of a contract. It may, however, examine the dealings between the parties and the provisions of a contract in the course of determining whether there has been a violation of the Act or the Regulations.

[28] The Commission was careful to make no finding with respect to the existence of Contract #12-11334. Rather, the Commission referred to the "insufficiency" of the evidence of agreement. There remains an issue as to the unfulfilled obligations, if any, of Mr. Neuls under Contract #12-11334 that Constantini may pursue in the appropriate court.

[29] What the Commission did find was that with respect to the second delivery of grain, Constantini violated subsection 81(1) of the Act by failing to provide a grain receipt in the prescribed time and the prescribed manner. The Commission went on to find that Mr. Neuls suffered loss or damage as a result of that violation.

[30] This was a decision within the jurisdiction of the Commission.

[31] In this regard, the section 13 of the Act mandates the Commission to "in the interests of the grain producers ... regulate grain handling in Canada." Part VI of the Act deals with "Enforcement and Enforcement procedures." Sections 91 and 97 of the Act are found in Part VI of the Act and are relevant to this appeal. Subsection 91(g) of the Act authorizes the Commission to investigate the failure of a licensed grain dealer to comply with any provision of the Act or its associated regulations. Subsection 97(a) of the Act allows the Commission, after an investigation under section 91 of the Act and after affording all interested parties a full opportunity to be heard, to make

an order "for the payment, by any [...] licensee [...] of compensation to any person for loss or damage sustained by that person resulting from a contravention of or failure to comply with any provision of the Act or any regulation [...]."

[32] There is nothing in the language of the statute which suggests, as submitted by Constantini, that the Commission's investigation must not proceed when disputed facts are encountered.

[33] Indeed, such a conclusion is contrary to the decision of this Court in *Pioneer Grain Co. v. Goy*, [2005] 4 F.C.R. 687. There, my colleague Justice Snider considered whether the Commission had authority to determine set off amounts. After reviewing the applicable legislation, she wrote as follows, concerning the powers of the Commission:

24 Although not clearly articulated, it appears that the Commission concluded that it did not have the jurisdiction to assess amounts of set-off. In its decision, the Commission asserted that the Commission has no authority to determine the validity of a contract or to interpret or enforce the provisions of a valid contract. It also stated that they have "neither the training nor the expertise to make determinations with respect to the complexities of contract law". And, later in the decision, the Commission states that it "is not equipped to make decisions with respect to the law of set-off".

25 A tribunal, as a creature of statute, has only the powers given it by the statute. This, of course, does not mean that every action of a tribunal must be explicitly listed in the words of the statute. Rather, it means that the action in question must either be contained in the explicit words of the enabling legislation or be necessarily incidental to the mandate expressed in the statute. It follows that the exercise of a broad mandate, by necessity, will almost always bestow a number of incidental powers upon the tribunal. Otherwise, it would be unable to carry out its statutorily-mandated functions.

26 The mandate of the Commission is very broad; as set out in s. 13, "the Commission shall, in the interests of the grain producers . . . regulate grain handling in Canada, to ensure a dependable commodity for domestic and export markets." Under s. 97, the Commission may make an order for the payment of damages for a contravention of the Grain Act. It follows that Parliament must have intended the Commission to make findings of fact and law necessary to determine whether there has been a contravention of the Grain Act. Such

determinations are necessarily incidental to its broad jurisdiction. In my view, the Commission may - and, in fact, is obliged to - consider whether any amount claimed is actually owing. If this involves interpreting certain provisions of a contract, this is completely within the realm of the Commission's jurisdiction.

27 A major concern of the Commission was an alleged lack of expertise in the area of contract law. This is an irrelevant consideration. The Commission's mandate is to determine whether an operator has acted properly in issuing a "cash purchase ticket" for the delivery of grain to it. If the law allows set-off in calculation of the "purchase price", it is up to the Commission to address whatever it must to carry out its mandate under the Grain Act. This may require, from time to time, that the Commission or its expert staff carry out some analysis of underlying contracts. I do not see this as requiring extraordinary resources. There may well be procedures that could be put in place to assist the Commission. Specifically, I note that the Commission has the ability, pursuant to s. 12 of the Grain Act, to "make by-laws respecting . . . the regulation of its proceedings and generally for the conduct of its activities." Through its by-laws, the Commission could, for example, set out filing requirements in cases involving a claim to set off.

28 In any event, the problems described by the Commission do not exist in this case, since Mr. Goy is not disputing the amount he owes to Pioneer. Speculation about future problems that may or may not arise and concern for lack of expertise are not sufficient reasons for the Commission to decline to exercise its jurisdiction in this case.

29 I conclude that the Commission, in investigating a complaint under the Grain Act, has the authority to examine underlying contracts as necessary to determine whether there has been a contravention of the Grain Act. [emphasis added]

[34] There is nothing in this language that is consistent with the limitation asserted by Constantini. Such a limitation would also be inconsistent with the provisions discussed below which exist in order to afford payment protection to individual grain producers.

[35] Having disposed of the jurisdictional argument, I now turn to the other errors asserted by Constantini on this appeal.

Standard of review

[36] In oral argument counsel for Constantini conceded that the Commission's finding that Constantini had failed to provide a grain receipt in the prescribed time and prescribed manner raised a question of mixed fact and law that is reviewable on the standard of reasonableness. I agree. Reasonableness is also the standard of review to be applied to the Commission's finding that Mr. Neuls suffered a loss in the amount of \$19,430.62 as a result of a violation of the Act.

[37] These conclusions with respect to the applicable standard of review are consistent with Justice Hansen's determination in *Constantini #1* at paragraph 17. They are also in accordance with the teachings of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraphs 53 and 54.

Application of the standard of review

[38] As noted by the Commission in its decision, in order to be licensed as a grain dealer an applicant dealer must pledge security fixed in an amount that "has regard to the applicant's potential obligations for the payment of money" to grain producers holding cash purchase tickets or grain receipts issued under the Act. See: paragraph 45(1)(b) of the Act. A grain producer may have recourse to this security if a grain dealer fails to pay for the delivery of grain. In order to have access to that security, the grain producer must hold a grain receipt or a cash purchase ticket. Key to producer protection is subsection 81(1) of the Act which provides:

<p>81.(1) With respect to the purchase of western grain from a producer of that grain, every licensed grain dealer shall, at the <i>prescribed time</i></p>	<p>81.(1) Tout négociant en grains titulaire de licence établit, pour l'achat de grain de l'Ouest auprès du producteur de celui-ci, selon</p>
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and in the prescribed manner,
issue a grain receipt or cash
purchase ticket stating the grade
name, grade and dockage of the
grain, and immediately provide it
to the producer. [emphasis added]

les modalités de temps et autres
modalités réglementaires, un
accusé de réception ou un bon de
paiement faisant état du grade du
grain, de son appellation de grade
et des impuretés qu'il contient et
le délivre sans délai au
producteur.

[39] Subsection 45(2) of the *Canada Grain Regulations*, C.R.C., c. 889 (Regulations) prescribes the form of grain receipt and requires a grain receipt or cash purchase ticket to be "issued on receipt of western grain delivered by a producer."

[40] The Act and the Regulations therefore require a grain dealer to provide a grain receipt or cash purchase ticket to a producer contemporaneously with the delivery of grain.

[41] Constantini did not provide either document to Mr. Neuls when he made the October 24, 2007 delivery. Constantini only delivered a grain receipt to Mr. Neuls in respect of that delivery on January 2, 2008.

[42] The Commission's decision that Constantini failed to provide a grain receipt in the prescribed time was reasonable as that term is described by the Supreme Court of Canada in *Dunsmuir* at paragraph 47.

[43] The Commission also found that the grain receipt was not issued in the prescribed manner. As I read the preantepenultimate and the antepenultimate paragraphs of the Commission's reasons,

the finding of a non-prescribed manner related to the Commission's conclusion that Constantini made an improper payment deduction in respect of grain delivered to it, which deduction was not agreed to by Mr. Neuls.

[44] As set out above, Mr. Neuls advised the Commission that he never agreed to sell four truckloads of certified organic flaxseed to Constantini and he never signed Contract #12-11334. Mr. Neuls advised that in a telephone conversation with David Smythe of Constantini on September 7, 2007, he orally agreed to deliver one load of certified organic flaxseed at a cost of \$16.00 per bushel. Constantini provided no information from Mr. Smythe denying Mr. Neuls' assertion.

[45] In order to determine that the set off made by Constantini was proper, the Commission would have to have been satisfied that:

- The parties entered into Contract #12-11334 and this agreement required delivery of four loads of certified organic flaxseed.
- This agreement was breached when Mr. Neuls delivered only one load.
- The breach resulted in a loss to Constantini of \$19,430.62.
- It was a term of this agreement that any amounts owing as a result of a breach of that agreement could be deducted from monies owing pursuant to Contract #12-11735.

[46] Given the state of the information before it, it was not unreasonable for the Commission to conclude that it had insufficient material on which to find that Mr. Neuls had agreed to provide four loads of certified organic flaxseed as alleged by Constantini and agreed to the right of set off. That finding was justified on the evidence and the Commission's reasons were transparent and intelligible. The decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The decision is, therefore, reasonable.

[47] The final issue that requires consideration is the Commission's finding that Constantini's violation of subsection 81(1) of the Act resulted in Mr. Neuls suffering loss or damage in the amount of \$19,430.62.

[48] Constantini had a statutory obligation to issue a grain receipt on October 24, 2007 in the proper amount. Once the Commission found that there was insufficient evidence to justify the purported set off, it followed that Mr. Neuls suffered a loss or damage because of Constantini's failure to provide a grain receipt to him on October 24, 2007 in the proper amount. Without such a grain receipt, Mr. Neuls' only recourse would have been to sue Constantini in contract. The Commission's finding that Mr. Neuls suffered a loss as a result of a violation of the Act was reasonable.

[49] It follows that the appeal should be dismissed.

Costs

[50] Mr. Neuls seeks costs. The Attorney General of Canada does not. There is no reason to depart from the general principle that costs follow the event.

[51] Mr. Neuls seeks costs at an elevated level. Relying upon *Constantini #1* and two decisions of the Commission involving Constantini (provided to the Court by Constantini) he argues that Constantini has engaged in a pattern of conduct in which it fails to make full payment to producers.

[52] I am not satisfied of improper conduct on the part of Constantini to the degree required to justify an aggravated or extraordinary award of costs. I can see no improper or vexatious conduct in the prosecution of this appeal. This is a case of average complexity and there is no reason to depart from the principle that Column III of Tariff B to the *Federal Courts Rules* reflects appropriate compensation for a case of usual complexity.

[53] The appellant will therefore pay to the respondent Neuls costs, which I fix in the amount of \$3,000.00. This approximates an assessment based on the top of Column III, inclusive of disbursements.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The appeal is dismissed.
2. C.B. Constantini Ltd. shall pay to James Neuls costs fixed in the amount of \$3,000.00, inclusive of disbursements.

“Eleanor R. Dawson”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1153-08

STYLE OF CAUSE: C.B. CONSTANTINI LTD. V. JAMES NEULS AND
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GENERAL OF CANADA

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 3, 2009

REASONS FOR JUDGMENT: DAWSON J.

DATED: April 9, 2009

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