Date: 20090318

Docket: T-909-08

Citation: 2009 FC 281

Ottawa, Ontario, March 18, 2009

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

C.B. CONSTANTINI LTD.

Appellant

and

RANDALL PIERCE and HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by the ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] C. B. Constantini Ltd. (Appellant), a licensed grain dealer under Part III of the Canada Grain Act, R.S. 1985, c. G-10 (Act), appeals from a May 8, 2008 Order of the Canadian Grain Commission (Commission) in which the Commission ordered the Appellant to pay Randall Pierce (the producer) $17,500.00.

[2] On August 23, 2007, the Appellant and the producer entered into a written agreement entitled “Confirmation of Contract #12-11574 (the first contract) pursuant to which the producer agreed to supply the Appellant with a minimum of 4,100 bushels of Certified Organic Wheat to be shipped to the Appellant between September and October 2007. The agreed upon price was $9.50 per bushel, less dockage FOB, on “Net Cash” terms. The contract also provided that the Appellant was authorized to deduct from any amounts payable to the producer any amounts owing by the producer to the Appellant resulting from the producer’s breach or non-performance of any of his obligations under the contract.

[3] According to the Appellant, on September 6, 2007, the Appellant and the producer entered into a second contract pursuant to which it was agreed that the producer would supply the Appellant with a minimum of 10,000 bushels of Certified Organic Wheat to be shipped between October and December 2007 at a price of $11.25 per bushel, less dockage FOB, on “Net Cash” terms. The terms of the alleged second contract are found in a document entitled “Confirmation of Contract #12-11617”. This document contains the same provision as in the first contract permitting the deduction of amounts owing by the producer for a breach or the non-performance of an obligation.

[4] On September 10, 2007, the producer delivered 1,257 bushels of grain (first delivery) against the first contract. On September 18, 2007, the Appellant provided the producer with a document entitled “Settlement” in which the first delivery is acknowledged and shows an amount payable to the producer of $11, 947.97.

[5] On September 20 and October 2, 2007, the producer delivered a further 1,282 and 1,273 bushels of grain respectively (the second and third deliveries) against the first contract.

[6] On October 4, 2007, the Appellant provided the producer with a document entitled "Settlement" in which the second delivery and an amount due to the producer of $12,186.03 are acknowledged. As well, on October 4, 2007, the Appellant issued a cheque to the producer for $6,634.00 representing payment for the first two deliveries less a deduction of $17,500.

[7] On October 5, 2007, the Appellant issued a "Debit Note" to the producer for "the washout against Contract #12-11617" in the amount of $17,500. The Debit Note also states "Seller reneged on contract. Unwilling to execute. Contract bought in at a C$1.75/bu penalty to seller".

[8] Although the precise date is not known, at some point between October 11 and October 22, 2007, the producer lodged a complaint with the Commission regarding the Appellant's conduct and the deduction of the $17,500 from the amount due to him. In his complaint, the producer acknowledges receipt of the alleged second contract on September 22, 2007, but claims he threw it away without signing it because he had not been paid in full for grain that had already been delivered.

[9] On October 16, 2007, the Appellant paid the producer and his father the full amount due for the third delivery. On October 30, 2007, the Appellant issued a grain receipt for the third delivery.

[10] The Commission investigated the producer's complaint and on May 8, 2008 issued the decision and Order at issue in this proceeding. In its decision, the Commission concluded that the Appellant was in violation of subsection 81(1) of the Act for having failed to provide a cash purchase ticket or a grain receipt in connection with the purchase of grain from the producer. The Commission also found that the Appellant had failed to make payment for grain delivered resulting in a loss or damage to the producer of $17,500. The Commission ordered the Appellant to pay the producer, the amount of the loss.

[11] The Appellant frames the issues on this judicial review as follows:

a) Did the Commission err in law and fact in finding that:

   i. the Appellant failed to issue a proper grain receipt as required under section 8 (1) of the Act;

   ii. the Appellant failed to make payment for grain delivered; and,

   iii. the Respondent sustained loss or damage in the amount of $17,500.00 as a result of a contravention of or a failure to comply with any provision of the Act or any regulation within the meaning of section 97 of the Act; and,

b) Did the Commission exceed its jurisdiction or act without jurisdiction in ordering that the Appellant pay the Respondent $17,500.00.

[12] The Appellant submits that the Commission's finding that it had not provided grain receipts for the grain received in the first and second deliveries is not supported by the evidence. The Appellant maintains that although the receipts it issued and supplied to the producer for the first and second deliveries were not on Form 1 of the Regulations, they provided all of the required information. The Appellant points out that the receipts a) stated the grade name, grade and dockage of the grain as required under section 81(1) of the Act; b) contained the material particulars listed on Form 1 of the Regulations; and, c) were issued within 15 days of the delivery.

[13] The Appellant also submits that the Commission erred in finding that it had failed to pay for the first and second deliveries. The Appellant characterizes this finding as, in effect, a determination as to whether the Appellant and the producer had entered into the second contract and a ruling on the Appellant's right to a set-off arising from the second contract. The Appellant submits that the Commission had no authority to consider the validity of the second contract. Further, relying on the decisions in *Saskatchewan Wheat Pool v. Feduk* (2003), 232 Sask. R. 161 (Sask. C.A.) (leave to appeal to S.C.C. dismissed) and *Pioneer Grain Co. v. Goy*, 2005 FC 530, the Appellant takes the position that the Act and the Regulations do not preclude a contractual set-off to be made between a licensed grain dealer and a purchaser. The Appellant argues that having regard to the loss it had sustained by reason of the producer's breach of the second contract, the Appellant was entitled to make a set-off as against the first and second deliveries. Accordingly, the producer was properly paid the amount due to him.

[14] The Appellant also argues that the Commission exceeded its jurisdiction in ordering the Appellant to pay damages to the producer. Although section 97 of the Act provides that the Commission may make an order requiring a licensee to pay compensation to any person for loss or damage sustained by reason of a contravention or failure to comply with any provisions of the Act or Regulations, in the present case, there had been no breach or failure to comply with any of the legislative or regulatory provisions.

[15] Alternatively, the Appellant argues that even if the Commission was correct in finding that the Appellant had violated the Act by failing to provide grain receipts, the producer did not suffer any damages as a result of the violation since the producer was paid in full pursuant to the terms of the first and second contract.

[16] The Respondent, the Attorney General of Canada, submits that the questions arising from the issues on appeal are ones of mixed fact and law. As such, as stated in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 53, the Commission's determinations on these questions should be reviewed against a reasonableness standard. The Respondent points out that although the Supreme Court of Canada decision in *Dunsmuir* dealt with judicial review, recent jurisprudence makes it clear that the principles articulated in that decision are equally applicable to statutory appeals from administrative tribunals: see, for example, *Whitney v. Shuniah*, [2008] O.J. No. 2823.

[17] Although the Appellant did not address the standard of review in its written submissions, in reply to the Respondent's submissions, the Appellant attempted to reformulate the issues as questions of law attracting a correctness standard. I reject these submissions. In my view, the issues raise questions of mixed fact and law reviewable on a reasonableness standard.

[18] At this point, it should be noted that the producer did not make written or oral submissions on this appeal.

[19] Before considering the issues raised by the Appellant, a brief overview of the relevant aspects of the legislation is useful. The Act establishes a statutory scheme that governs the handling of grain delivered by grain producers to licensed grain dealers. As a condition of being licensed, a grain dealer is required to post security with the Commission in an amount fixed by the Commission based on the dealer's "potential obligations for the payment of money" to grain producers. This security, available to a grain producer in the event that a grain dealer fails to make a payment for a grain delivery, is contingent upon the grain producer holding either a grain receipt or a cash purchase ticket.

[20] As to the Commission's role, section 13 of the Act states that it "… 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."

[21] To carry out its role, the Act empowers the Commission to conduct investigations and to hold hearings with respect to a number of matters including allegations concerning the failure of a licensed grain dealer to comply with the provisions of the Act. The Commission may also make orders for the payment of compensation by a licensed grain dealer to any person for loss or damage as a result of a contravention or a failure to comply with any provision of the Act.

[22] The first issue raised by the Appellant is whether the Commission erred in finding that it had failed to provide grain receipts to the producer. The statutory obligation imposed on a grain dealer to issue a grain receipt or a cash purchase ticket is found in subsection 81(1) of the Act. It reads:

81. (1) With respect to the purchase of western grain from a producer of that grain, every licensed grain dealer shall, at the prescribed time 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.	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 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.

[23] In addition to requiring the inclusion of the grade name, grade and dockage of the grain in a grain receipt and that it be provided immediately to the producer upon being issued, subsection 81(1) also requires the licensed grain dealer to issue the grain receipt "at the prescribed time and in the prescribed manner." Subsection 45(2) of the *Canada Grain Regulations*, C.R.C., c.889 sets out the time and the manner for the issuance of a grain receipt. It provides:

45. (2) A grain receipt or a cash purchase ticket that is required by subsection 81(1) of the Act to be issued by a licensed grain dealer shall be issued on receipt of western grain delivered by a producer or on being entitled to western grain delivered to an elevator by a producer, and shall be in Form 1 or Form 6 of Schedule 4, as appropriate.	45. (2) L'accusé de réception ou le bon de paiement à établir par le négociant en grains titulaire d'une licence aux termes du paragraphe 81(1) de la Loi sur réception de grain de l'Ouest livré par le producteur ou sur l'établissement d'un droit sur du grain de l'Ouest livré à une installation par le producteur doit être conforme à la formule 1 ou à la formule 6 de l'annexe 4, selon le cas.

[24] The Appellant concedes that the “Settlement” documents are not in the form contemplated by the Regulations. However, the Appellant argues that a grain receipt does not have to be in Form 1 of Schedule 4 provided that the information required by subsection 81(1) of the Act is included in the receipt. The Appellant points out that the Form 1 provided in Schedule 4 of the Regulations states that it is an “example” only.

[25] While the Form found in the Regulations indicates that it is an “example”, it is clear that it is an example in the sense of being a “sample layout” as stated in the Form. There is nothing in the Form to indicate that any of the content is optional or not required.

[26] While I am prepared to accept that it is not essential for the purpose of compliance with the legislation that a grain receipt must conform to the Form 1 layout, having regard to the mandatory language of the relevant provisions and the significance of a grain receipt within the statutory scheme, a grain receipt must contain all of the information required by Form 1. In the present case,

it is evident from a comparison of the “Settlement” documents and the form of grain receipt found in the regulations that the Settlement documents do not contain the requisite information. Accordingly, the Commission did not err in finding that the Appellant had not provided the requisite grain receipts to the producer.

[27] As an aside, as noted earlier, the Appellant also stated that it had provided the receipts to the producer within fifteen days of the grain deliveries. At the hearing, counsel for the Appellant acknowledged that neither the Act nor the Regulations give the grain dealer fifteen days within which to issue a grain receipt.

[28] The Appellant’s argument on the second issue, namely, that the Commission erred in finding that it had failed to pay for delivered grain is premised on its characterization of the decision as being a determination by the Commission regarding the validity of the second contract and the Appellant’s entitlement to a set-off. This characterization is incorrect. The Commission did not make a finding with respect to the validity of the second contract.

[29] It is evident from the Commission’s reasons that it was fully aware that it did not have the authority to determine the validity of a contract nor did it have the authority to determine whether there had been a breach of contract by one of the parties. It was also cognizant of the jurisprudence in which the Courts have held that a deduction or a set-off in relation to a payment for grain is permissible. The Commission found, however, that there was no evidence of the existence of either a verbal or written second contract.

[30] There is no dispute between the parties that the value of the grain in the first two deliveries was $24,134.00. Given that the Appellant only paid the producer $6,634.00 for these deliveries and there was no evidence of an entitlement to a set-off, the Commission did not err in finding that the Appellant had failed to pay for grain.

[31] Finally, on the question as to whether the loss of $17,500.00 was sustained as a result of a violation of subsection 81(1), the Appellant had a statutory obligation to issue grain receipts for the first two deliveries. Had the grain receipts been issued, the producer could have made a claim against the statutory security. Without the grain receipts, the producer's only recourse would have been to commence an action in contract against the Appellant. In these circumstances, the finding that the loss was sustained as a result of a violation of the Act was reasonable. Further, in making the Order pursuant to subsection 97(1) the Commission was acting within its statutory authority and enforcement mandate.

[32] For the above reasons, the appeal will be dismissed. As the Respondent did not request costs, no costs will be ordered.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the appeal is dismissed without costs.

"Dolores M. Hansen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-909-08
STYLE OF CAUSE:	C.B.CONSTANTINI LTD. v. RANDALL PIERCE and HMQ IN RIGHT OF CANADA, as represented by the AGC
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