

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20110316

Docket: A-81-10

Citation: 2011 FCA 101

**CORAM: LÉTOURNEAU J.A.
NADON J.A.
SEXTON J.A.**

BETWEEN:

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

Appellants

and

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

Respondents

Heard at Winnipeg, Manitoba, on February 24, 2011.

Judgment delivered at Ottawa, Ontario, on March 16, 2011.

REASONS FOR JUDGMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

NADON J.A.
SEXTON J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues on appeal

[1] This is an appeal against a decision of Russell J. of the Federal Court (the judge) whereby he dismissed an application for judicial review of the government's decision to issue a directive

regarding the election of directors to the Canadian Wheat Board (CWB): 2010 FC 104. The directive was contained in a ministerial letter dated July 23, 2008.

[2] The appellants seek a reversal of the judge's findings that:

- a) they did not have standing to bring an application for judicial review;
- b) the minister of Agriculture and Agri-Food and minister for the Canadian Wheat Board (the minister) had lawful authority to issue the directive; and
- c) the minister did not act contrary to the *Regulations Respecting the Election of Directors of the Canadian Wheat Board*, SOR/98-414 (the Regulations).

[3] At the hearing, counsel for the appellants requested that the name of Mr. Stewart Wells be removed from the style of cause as appellant because Mr. Wells is now an elected member of the CWB. I propose to accept the request and amend the style of cause accordingly.

The legislative provisions under review

[4] The minister relied on section 3.07 of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24 (the Act) for his authority to issue directives on the proper conducting and supervision of an election to the Board of Directors of the CWB.

[5] The Regulations were enacted pursuant to section 3.06 of the Act. The definitions of producer, actual producer and permit book in section 2 of the Act as well as the provision relating to entitlement to a permit book are also relevant to a determination of the issues on this appeal.

[6] Sections 5, 6, 7 and 8 of the Regulations deal with the right to vote at the election of the CWB members and the inclusion of eligible voters in the voters list.

[7] Finally, the issue of the personal standing of the appellants to challenge the minister's decision by way of judicial review is governed by subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[8] I reproduce these provisions:

Canadian Wheat Board Act, R.S., 1985, c. C-24

2. (1) In this Act,
...
“actual producer” means a producer actually engaged in the production of grain;
...
“permit book” means a Canadian Wheat Board delivery permit issued pursuant to this Act by the Corporation for a crop year;
...
“producer” includes, as well as an actual producer, any person entitled, as landlord, vendor or mortgagee, to the

2. (1) Les définitions qui suivent s'appliquent à la présente loi.
[...]
« carnet de livraison » Carnet de livraison délivré par la Commission pour une campagne agricole, conformément à la présente loi.
[...]
« 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.
[...]

grain grown by an actual producer or to any share therein;	« producteur-exploitant » Producteur se livrant en fait à la production de grains.
...	[...]
Regulations	Règlements
3.06 (1) <u>The Governor in Council may, on the recommendation of the Minister, make regulations respecting the election of directors.</u>	3.06 (1) <u>Sur la recommandation du ministre, le gouverneur en conseil peut, par règlement, régir l'élection des administrateurs.</u>
Limitation	Consultation du conseil
(2) After the date referred to in section 3.08, the Minister shall not make the recommendation referred to in subsection (1) unless he or she has consulted with the board, including consulting with respect to geographical representation on the board and the staggering of the terms of office of directors.	(2) À compter de la date mentionnée à l'article 3.08, la recommandation du ministre est subordonnée à la consultation du conseil sur le contenu éventuel des règlements à prendre notamment sur la représentation géographique des administrateurs et l'échelonnement dans le temps de leur mandat.
Administration of election	Mesures administratives
3.07 <u>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</u>	3.07 <u>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 :</u>
(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 administratif 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	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

incurred in the preparation, printing and distribution of material providing information on candidates.

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.

Regulations Respecting the Election of Directors of The Canadian Wheat Board, SOR/98-414

5. (1) A producer who is an individual may vote if they have attained the age of 18 years by the last day of the election period or, if under 18 years of age the producer has designated a cosignatory of a permit book who is at least 18 years old on that day and who has consented to vote on behalf of the producer.

5. (1) Le producteur qui est une personne physique peut voter s'il est âgé d'au moins 18 ans le dernier jour de la période d'élection ou, dans le cas contraire, s'il nomme à cette fin une autre personne âgée d'au moins 18 ans à ce jour qui a également signé le carnet de livraison et qui consent à voter en son nom.

(2) No producer may vote more than once in an election.

(2) Nul producteur ne peut voter plus d'une fois à une élection.

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

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

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.

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

(a) make publicly available a list of the names of the voters in each electoral district; and

(b) send to each candidate a list of the names and addresses of the voters in the candidate's electoral district.

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.

producteurs dont le nom figure dans un carnet de livraison à cette date ou y figurait au cours de la dernière campagne agricole.

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

a) rend publique la liste des noms des électeurs de chaque circonscription électorale;

b) transmet à chaque candidat la liste des noms et adresses des électeurs de sa circonscription électorale.

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.

Federal Courts Act, R.S.C. 1985, c. F-7

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[Emphasis added]

The minister's directive

[9] The minister's directive addressed a certain number of concerns he had regarding the process in place for the election of CWB directors: see appeal book, at page 61, the letter sent to the President and CEO of the CWB. The one at issue in the present proceedings relates to the integrity of the voters list prepared for the election.

[10] The minister was of the view that individuals who may hold permit books might not have clearly established that they were producers eligible to vote at the election because they had made no delivery of grains to the CWB in recent years: *ibidem*, at page 63.

[11] The minister's request to the CWB was to ensure that the permit book holders who had not delivered to the CWB during the 2007-08 and 2008-09 crop years would 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": *ibidem*.

[12] In effect, the minister's directive meant that these permit book holders by being denied automatic inclusion in the voters list would be deprived of the right to automatically receive a voting package and ballot: see the affidavit of Robert Roehle, appeal book, tab 5.

[13] The CWB complied with the minister's directive: see appeal book, at page 60, the letter from the General Counsel for the CWB.

The decision of the Federal Court

a) Personal standing of the appellants

[14] The judge analyzed only the issue of personal standing of the appellants. He was not satisfied that the appellants, although they had argued that a broader public interest was at stake, were seeking to obtain public interest standing.

[15] He concluded that no evidence had been provided to him that the appellants had been directly affected, or might be directly affected, by the minister's directive. He based his conclusion on the fact that, except for Mr. Ryan, the appellants all appeared on the voters list. He found that there was no evidence that their right to vote in the directors' election of 2008 was affected: see reasons for judgment at paragraph 49.

[16] As for Mr. Ryan, the judge's view was that while Mr. Ryan may not have been included on the initial voters list, his right to vote was not affected because he could follow the procedure set forth in the Regulations and ensure that his name be put on the list: *ibidem*.

[17] The judge found that the real purpose behind the appellants' challenge of the minister's directive had "nothing to do with how the Decision affected [their] rights": *ibidem*, at paragraph 52.

He concluded his consideration of the appellants' standing at paragraph 52 with the following statement:

This application is brought as part of a political debate by the 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.

In the judge's view, only the CWB was affected by the minister's decision.

b) The merits of the case

[18] In case it could be found that his decision on the issue of standing was erroneous, the judge proceeded to adjudicate on the merits of the application for judicial review: *ibidem*, at paragraph 54.

[19] Essentially, the judge ruled that the impact of the minister's directive did not affect the right to vote, but merely the way the voters list is compiled: *ibidem*, at paragraph 57.

[20] Furthermore, his interpretation of the definition of "producer" and "actual producer" in section 2 of the Act led him to conclude that the holder of a permit book is not a producer if he is not actually engaged in the production of grain: *ibidem*, at paragraph 65. Hence, he found that the minister's directive accorded with both the Act and the Regulations. It was a "measure intended to ensure the integrity of the voters list" and such a measure "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”: *ibidem*, at paragraph 69.

Analysis of the decision and the parties’ submissions

a) Personal and public interest standing

[21] With respect, I think the judge took too narrow a view of the concept of “directly affected” required to obtain personal standing. For a person 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. Odynsky*, 2008 FC 732, at paragraph 24; *League for Human Rights of B’Nai Brith Canada v. R.*, 2010 FCA 307, at paragraph 58. The fact that ultimately the appellants’ right to vote at the election was not affected does not mean that the minister’s directive had no prejudicial effect on some of their rights associated with the right to vote.

[22] Prior to the minister’s directive, all persons named in a permit book in the past two years were entitled to be automatically included on the initial voters list. After the directive, only those persons named in a permit book who had delivered grain to the CWB in the past two years were entitled to be listed on the initial voters list. Thus the directive changed the rights that attached to holding a permit book and so directly affected all of the appellants, except for the Friends of the Canadian Wheat Board which is not a permit book holder.

[23] Moreover, the directive imposed on the appellants and other persons falling in the same category the obligation of establishing their eligibility through the newly created application form process if they were not included in the initial voters list. While the right to vote itself was not directly affected by the directive, rights related to the right to vote, such as the rights to be automatically included in the voters list and to automatically receive a ballot without having to make a declaration to obtain it, were directly affected. In my view, these direct effects gave the appellants standing.

[24] At the very least, the appellant Mr. Ryan was named in a permit book and not included on the initial voters list because he had not delivered grain to the CWB in the relevant years. His right to be included on the initial voters list because he held a permit book was directly affected by the directive.

[25] The respondents argued that all except one of the individuals appealing were named in the permit book and had made deliveries within the time frame set out by the minister's directive. Thus they were not directly affected by the directive and consequently they had no standing to challenge it.

[26] This contention finds its answer in the decision of our Court in *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2006 FCA 144. The objection to the appellants' standing in that case

rested on the fact that the policy, whose validity was challenged on jurisdictional grounds, had not been applied to them in an adverse manner.

[27] Our colleague, Pelletier J.A. writing for the Court, at paragraph 17, asserted that while “standing is a device used by courts to discourage litigation by officious inter-meddlers, it is not intended to be a pre-emptive determination that a litigant has no valid cause of action”. “There is”, he said, “a distinction to be drawn between one’s entitlement to a remedy and one’s right to raise a justiciable issue”:

[28] He then went on to address the issue of an eventual as opposed to an actual prejudicial effect suffered by the appellants. At paragraphs 16, 19 and 21, he wrote:

[16] I do not agree that the appellants lack standing to raise the question as to whether the 2,500 user-days/nights policy is *ultra vires* simply because they cannot show that the Haida Allocation Policy has been applied against them in an adverse manner. The evidence discloses that the Haida Allocation Policy is intended to limit the growth of individual operators to the point where they could unfairly monopolize park resources to the detriment of other operators, and ultimately to the detriment of the range of services available within the park reserve boundaries. The appellants are clearly within the intendment of the Haida Allocation Policy. They do not have to wait until it causes them a loss to challenge it on jurisdictional grounds.

...

[19] It is clear that the appellants are within the intendment of the policies which they challenge, even if those policies have no application to them at the moment. They raise a question which is suitable for judicial determination and in respect of which they have an interest of “the required nature and extent”.

...

[21] To the extent that he is someone who is subject to the Haida Allocation Policy, in the sense that it could eventually result in the curtailment of his quota, he has, in my view, the necessary standing to challenge the Haida Allocation Policy. Whether he can succeed in that challenge is another matter.

[Emphasis added]

[29] As in the *Moresby* case, the appellants in the present instance challenge the *vires* of the directive issued by the minister. The fact that some or all of them may not have been affected at this past election does not deprive them of the standing to challenge the minister's directive in anticipation of the coming election. To paraphrase Pelletier J.A., they do not have to wait until it causes them a loss.

[30] Finally, I think that all the appellants in the present instance who are producers have a direct interest in ensuring that the election of members of the CWB is conducted and held according to the law. Thus they have personal standing to challenge the *vires* of the minister's directive. I am comforted in this view by the fact that they are compelled to market their crop with the CWB and that the minister's directive has an effect on the composition of the initial voters list. A similar directive issued for the 2006 election resulted in the disenfranchisement of some 16,577 producers with the following effect. Of the producers who automatically received a ballot, 49.9% responded. With respect to the 16,577 producers who had to apply for ballots, only 1,618 ballots were cast, showing then a turnout of less than 10%: see appeal book, tab 7, at page 119, the affidavit of Robert Roehle. There is no doubt that the directive changed the dynamic of the election.

[31] I am left to examine the legal status of the Friends of the Canadian Wheat Board which is an unincorporated association. It is not readily discernable from the record who the members of this organization are and what the nature and extent of their direct interest is for the purpose of determining whether the organization as such has personal standing to bring the *vires* issue to court.

[32] It could be argued that the organization deserves to be granted public interest standing. In view, however, of the conclusion that I have reached on the personal standing of the other appellants as well as on the merits of the appeal hereafter discussed, it is not necessary to address the public interest standing issue.

[33] In conclusion, I find that the judge made an error in denying the appellants, except for the Friends of the Canadian Wheat Board, personal standing to bring an application for judicial review.

b) The merits of the appeal

[34] Skillfully and with great clarity, counsel for the appellants exposed the effects of the minister's directive on some of the producers' rights regarding the election of board members. While this undertaking was necessary on the issue of standing, it is common understanding that the resulting determination on standing is not a determination on the merits of the case.

[35] In *Canadian Wheat Board v. Canada (Attorney General)*, 2009 FCA 214, at paragraph 46, our Court expressed in the following terms the approach to be taken when analyzing a *vires* issue:

[46] 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 [the provision] 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 (*Jafari v. Canada (Minister of Employment & Immigration)*, [1995] 2 F.C. 595 (Fed. C.A.), para. 14).

[36] The judge followed this approach. He looked at sections 6, 7 and 8 of the Regulations which entitle producers to be included in the voters list in respect of the electoral district in which they produce grain, ensure that, no later than 60 days before the last day of the election period, the election coordinator is provided 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 and, finally, provide for a mechanism by which someone whose name does not appear on the list can be added if he meets the eligibility conditions (emphasis added).

[37] He looked at the definition of producer and actual producer found in section 2 of the Act. He analyzed the relationship between the two definitions and, rightly so in my view, concluded that, while the term “producer” is more encompassing than the term “actual producer” in that it includes a landlord, a vendor or a mortgagee, these persons fit the expanded definition of producer if they are entitled “to the grain grown by an actual producer or to any share therein” (emphasis added). An “actual producer” is a producer actually engaged in the production of grain (emphasis added).

[38] Thus a producer is either someone actually engaged in the production of grain or a landlord, vendor or mortgagee who is entitled to the grain or a share of the grain grown by an actual producer.

In other words, in order to be a producer, there has to be an actual engagement in the production of grain: see the definitions of “producer” and “actual producer” in section 2 of the Act.

[39] At paragraph 60 of his reasons for judgment, he expressed his views in the following terms:

[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.

[40] A joint reading in context of sections 6, 7 and 8 of the Regulations shows that these provisions are procedural in nature and impose time and territorial limits as well as requirements of grain production and voting eligibility.

[41] Thus section 6 limits the entitlement of producers to be included in the voters list to the voters list of the electoral district in which they produce grain. If a producer produces grain in more than one electoral district, he may choose the district in which he wants to be included in the voters list.

[42] Section 7 delimits both the time within which the voters list is to be provided to the election coordinator and the time at which the name of a producer must appear in a permit book in order to be on the list.

[43] Section 8 contains requirements of producers' identity and eligibility to be included in the voters list for those whose name does not appear on that list.

[44] The minister's directive was issued pursuant to section 3.07 of the Act which enables the minister to take measures "for the proper conduct and supervision of an election of directors": see section 3.07, *supra*. As previously mentioned, the minister had concerns about the integrity of the voters list required to be prepared and provided to the election coordinator by sections 6 and 7 of the Regulations.

[45] The minister wanted to make sure that only producers within the meaning of the Act would appear on the voters list, i.e. producers actually engaged in the production of grain (actual producer) and any person entitled, as landlord, vendor or mortgagee, to the grain grown by an actual producer or to any share therein (emphasis added). In other words, as the directive shows, the minister wanted to ensure that only producers eligible to vote at the election would appear on the voters list.

[46] As a result of the minister's directive, only those producers who had delivered grain to the CWB during the 2007-08 and 2008-09 crop years would automatically appear on the voters list. Proof of actual delivery by a permit holder is proof of actual production by that permit holder. Others would have to establish, according to the procedure set forth in the Regulations, that they are producers within the meaning of the Act in order to be on the voters list. The directive provided a means for facilitating the proof that a permit holder is a producer eligible to vote at the election.

I agree with the judge that 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”: see reasons for judgment at paragraph 69.

Conclusion

[47] For these reasons, I would allow the appeal in part and declare that the appellants, except for the Friends of the Canadian Wheat Board, had personal standing to bring the application for judicial review. I would dismiss the appeal on the merits of the application for judicial review. The success being divided except for the Canadian Wheat Board, I would make the appellants and the respondents bear their own costs of the appeal. I would allow costs to the Canadian Wheat Board payable by the other respondents.

[48] I would amend the style of cause of the judgment and reasons for judgment so as to delete the name of Mr. Stewart Wells as appellant.

“Gilles Létourneau”

J.A.

“I agree
M. Nadon J.A.”

“I agree
J. Edgar Sexton J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-81-10

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CONCURRED IN BY: NADON J.A.
SEXTON J.A.

DATED: March 16, 2011

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