Federal Court Cour fédérale

Date: 20130812

Docket: T-1525-12

Citation: 2013 FC 857

Ottawa, Ontario, August 12, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

RIVER ROAD HUTTERIAN BRETHREN AND
RIVER ROAD EQUIPMENT CO LTD

Applicants

and

ATTORNEY GENERAL OF CANADA
REPRESENTING THE MINISTER OF
AGRICULTURE AND AGRI-FOOD CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 for judicial review of the decision of the Administration of the AgriInvest Program, Farm Income Program Directorate, Agriculture and Agri-Food Canada, to combine the Applicants, River Road Hutterian Brethren [River Road] and River Road Equipment Co [River Road Equipment] such that they are treated as a single entity for application of the prescribed Allowable Net Sales [ANS] cap,

pursuant to clause 5.13 of the Growing Forward Agreement and clause 4.5 of the AgriInvest Program Guidelines.

[2] By combining the two entities, the benefits of the program are thereby restricted and the two Applicants only receive the benefit of a single tax entity.

I. Issues

[3] The issues raised in the present application are as follows:

a) Are the combining provisions set out in the Growing Forward Agreement and the Guidelines subject to judicial review?

b) Are the combining provisions set out in clause 4.5 of the AgriInvest Program Guidelines based on purposes irrelevant or extraneous to the AgriInvest Agreement?

c) Was the decision to combine the Applicants for purposes of eligibility in AgriInvest fair and reasonable?

II. Standard of review

[4] The parties are agreed that the standard of review is reasonableness, *Dunsmuir v New Brunswick*, 2008 SCC 9.

III. Background

[5] The Applicants consist of a colony of Hutterite farmers based in Milk River, Alberta and their related equipment company [the Colony]. The Colony consists of 87 individuals including 52 members and 22 family units. The Applicants also represent 151 other Hutterite colonies, which are

similarly-sized and have the same two-tiered corporate structure. The Applicants are separate taxable entities, but their farming operations take place on the same land-base.

[6] Pursuant to the *Farm Income Protection Act*, SC 1991, c 22, the Minister of Agriculture and Agri-Food Canada entered into the Agreement with the provinces and territories on July 10, 2008. Broadly speaking, the purpose of the Agreement is to provide income protection for farmers. The Agreement created several programs, including the two programs in issue, AgriInvest and AgriStability, which offer different forms of income protection for farmers.

[7] AgriStability is a program designed to protect farmers against drops in income by providing financial assistance for annual losses which are greater than a set percentage of an established historical reference income. The maximum allowable contribution under this program for one participant is $3 million.

[8] AgriInvest is a matching contribution program where farmers can contribute 1.5% (as of 2013 this has been decreased to 1%) of their ANS to a savings account. These contributions are then matched by the Minister. The program caps the amount of ANS at $1.5 million, resulting in a contribution limit by the Minister of $22,500 for each participant in the program.

[9] Participant eligibility for these programs is chiefly defined in clause 2.1.1 of Annex A of the Agreement. Participants are eligible to participate in either or both programs if they "…have reported farm income for the purposes of the Income Tax Act."

[10] Clause 3.17 of Annex A of the Agreement is applicable only to AgriStability and describes the potential need to combine multiple participants in a farming operation who are related persons within the meaning of the *Income Tax Act*.

[11] Clause 5.13 of Annex A of the Agreement is applicable only to AgriInvest and provides authority for the Guidelines to limit the ANS of multiple participants to prevent evasion. Pursuant to clause 5.13, clause 4.5 of the Guidelines gives the Respondent discretion to treat multiple participants as one if the effect of their business structure avoids application of the prescribed ANS cap.

[12] The Colony, under the guidance of the consulting company MNP, entered into a business re-organization which involved the incorporation of the River Road Equipment Co on January 1, 2009, as a separate entity from River Road. In 2010, MNP met with the Respondent to discuss the effect of this re-organization. Both the Applicants and the Respondent agree that this re-organization was undertaken for legitimate business reasons, unrelated to eligibility in the AgriInvest program.

IV. Analysis

A. *Are the Combining Provisions Set Out in the Growing Forward Agreement and the Guidelines Subject to Judicial Review?*

[13] The Respondent argues that the creation of a benefit program such as AgriInvest by the governments involves a policy decision and should not be a matter for judicial review. The Respondent refers to several cases in support of the position that it is not the Court’s function to review actual policy adopted by a Minister, but rather individual decisions made under the policy.

[14] In this case, however, the decision to combine the Applicants for purposes of the AgriInvest program was made by the Respondent pursuant to the Agreement, which gave the authority to the Respondent to act and to combine the Applicants. It was not a policy choice made pursuant to a broad statutory authority by the Minister itself.

[15] I therefore find that the application of the provisions in question is subject to judicial review.

B. *Are the Combining Provisions Set Out in Clause 4.5 of the AgriInvest Program Guidelines Based on Purposes Irrelevant or Extraneous to the AgriInvest Agreement?*

[16] While the policy decision of the Minister may also be reviewable if there has been an exercise of bad faith, the parties agree that no bad faith is present in this case. It is also conceded by the Applicants that the purpose of this application is not a constitutional challenge, nor is it a policy challenge of the Growing Forward Program.

[17] In my view, the combining provisions are not irrelevant or extraneous to the AgriInvest Agreement.

[18] In support of their argument, the Applicants cite disparities in the eligibility requirements for AgriStability and AgriInvest. Chief among these points is that AgriStability specifically addresses combining related entities, in clause 3.17 of the Agreement, whereas there are no equivalent provisions for the AgriInvest program. AgriInvest, unlike AgriStability, is not a whole farm program that is specifically concerned with combining related entities. In contrast, AgriInvest is concerned only with possible tax evasion tactics as the rationale, or basis, for combining entities.

The parties agree that the Applicants' restructuring into two entities was in no way intended to avoid application of the prescribed ANS cap. Likewise, there are references in the 2007, 2009 and 2010 application forms to combining entities in relation to AgriStability, but not AgriInvest. Finally, the General Eligibility Guidelines make reference to the fact that participants in AgriInvest can include partners, a provision that is argued would be inconsistent with a whole farm approach.

[19] The other main issue raised by the Applicants is that clause 4.5 of the Guidelines is not consistent with clause 5.13 of the Agreement. This alleged inconsistency is due to clause 4.5's broad, discretionary wording. Furthermore, the Applicants argue that clause 4.5 is not a true evasion provision, as evasion necessitates intention. In sum, the Applicants argue that any objectionable business structures for AgriInvest ought to have been set out in the Agreement and that the Respondent cannot define ineligible participants at its discretion, without any defining criteria.

[20] While acknowledging that not all policies need to have guidelines specified in their enacting legislation, the Applicants rely on *Sander Holdings Ltd v Canada*, 2005 FCA 9, for the proposition that discretionary guidelines need to be within the scope of the power granted by that legislation.

[21] The Applicants also challenge the reasonableness of the application of clause 4.5. The Applicants acknowledge that while there is no inherent entitlement to farm income support, once created, it must be fairly administered. The Applicants cite the Agreement principles of equity and efficiency in support of this argument.

[22] The Respondent argues that policy matters are only reviewable in circumstances where the decision relied upon considerations irrelevant or extraneous to the statutory purpose. The Respondent argues that AgriInvest is an income support program, which provides income protection. The analysis is based on taxable entity status, not the whole farm concept. Some form of restriction or limitation on costs must be necessary to achieve that purpose. It is therefore reasonable and appropriate to consider the effect of the Applicants' business structure in avoiding application of the prescribed ANS cap. While acknowledging that the administration of such programs can carry elements of arbitrariness and unfairness, it is not the role of the courts to dictate whether the policy is the most fair or optimally implemented (*Carpenter Fishing Corp v Canada*, [1998] 2 FC 548 at paras 39, 41).

[23] While I am sympathetic to the Applicants' concern with the lack of certainty or clear articulated criteria in applying clause 4.5, I must agree with the Respondent.

[24] My role is not to substitute my decision even if I would have decided differently from the AgriInvest Administration, but whether their decision was defensible as being reasonable in the circumstances. The decision to combine the Applicants was reasonable. The Applicants were formerly one business entity: they reorganized to become two taxable entities, and the Respondent restricted the benefits the Applicants received under the AgriInvest program to what they received prior to reorganization. Such an outcome cannot be said to be unreasonable.

[25] Clause 5.13 of the Agreement allows for the Guidelines to "…set out circumstances" in which the Respondent may limit the combined ANS of multiple participants. While clause 4.5 of

the Guidelines provides a broad discretion to combine participants if the effect is to avoid the ANS cap, the Agreement's wording in clause 5.13 is likewise broad: to "set out circumstances" cannot be read so narrowly as to suggest that clause 4.5 is unreasonable.

[26] Clause 5.13 of the Agreement delegates broad authority for the Respondent to create guidelines regarding the combining of program participants. Clause 4.5 of the Guidelines is indicative of that delegation. These clauses reflect a policy choice made by the Minister, and it is not the place of the court to second-guess legislative choices, poorly executed or unintentionally arbitrary as they might be.

[27] I do not find that the decision to combine the Applicants for the purposes of the AgriInvest program relied on irrelevant or extraneous considerations to the statutory purposes of the Agreement (*Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 at para 8).

C. *Was the Decision to Combine the Applicants For Purposes of Eligibility In AgriInvest Fair and Reasonable?*

[28] As stated above, I find that the decision was both fair and reasonable. A summary of the salient facts is:

a) Prior to the January 1, 2009 reorganization, all farming operations were conducted by River Road. River Road was eligible to participate in the AgriIvest program, although it was subject to the $1.5 million dollar cap in respect of ANS.

b) After January 1, 2009, farming operations were conducted by two entities, River Road and River Road Equipment. Both entities were eligible to apply for and participate in the AgriInvest Program.

c) However, the reorganization led to the situation where, in respect of the exact same farming operation, two entities were now applying for the AgriInvest benefit, whereas before there had been only one entity. The effect was to avoid the ANS cap for a single entity, even if the restructuring was done in good faith and for legitimate business reasons.

[29] While the AgriInvest Administration does not have a system to ensure the application of clause 4.5 is applied fairly to all applicants, the decision to combine the Applicants in this case cannot be said to be unfair or unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed;

2. Given the acknowledgment that the AgriInvest Administration does not have a system in place to ensure the rule regarding combining is being fairly applied, and that the Applicants restructured their business operations for legitimate business reasons, not to evade the ANS cap, no costs are awarded.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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