Federal Court  Cour fédérale

Date: 20091103

Dockets: T-1070-08
T-1071-08

Citation: 2009 FC 1121

Ottawa, Ontario, November 3, 2009

PRESENT: The Honourable Mr. Justice Martineau

Docket: T-1070-08

BETWEEN:

CAISSE POPULAIRE DESJARDINS DES CHUTES MONTMORENCY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1071-08

AND BETWEEN:

CAISSE POPULAIRE DESJARDINS DU BAS-RICHELIEU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are disputing the legality of two decisions issued by the Canada Small Business Financing Program Directorate (the Program Directorate) dated June 17 and 22, 2008, respectively, confirming the decisions of Program officers to refuse to make a payment to the applicants because their claim was premature or ineligible under the *Canada Small Business Financing Act*, S.C. 1998, c. 36 (the Act).

[2] For the following reasons, the applications for judicial review must fail.

[3] The Court must first identify the appropriate standard of review. The applicants submit that the appropriate standard is correctness while the respondent argues that it is the reasonableness standard that applies in this case.

[4] This case deals with the requirement imposed on the applicants by the Program Directorate to realize on the blanket insurance policy that they hold with Desjardins Assurances Générales (the insurer) under which they are beneficiaries.

[5] The Program Directorate is responsible for the administration of the Act and the Regulations thereunder, the *Canada Small Business Financing Regulations*, SOR/99-141 (the Regulations).

[6] The applicants' rights and obligations with regard to reimbursement by the Crown for a loss sustained as a result of a registered loan under the Act are defined by the Act itself, including the

Regulations thereunder. Specifically, the Minister may only pay a lender if the requirements of the Act and the Regulations have been satisfied.

[7] Subsections 5(1) and 6(2) of the Act state:

5. (1) Subject to subsection (2), the Minister is liable to pay a lender any eligible loss, calculated in accordance with the regulations, sustained by it as a result of a loan in respect of which the requirements set out in this Act and the regulations have been satisfied.	**5.** (1) Sous réserve du paragraphe (2), le ministre est tenu d'indemniser les prêteurs de toute perte admissible — calculée conformément aux règlements — résultant d'un prêt conforme aux règles énoncées à la présente loi et à ses règlements.
6. . . .	**6.** […]
(2) The liability of the Minister to make any payment to a lender in respect of losses sustained by it as a result of loans made by it and registered by the Minister during each consecutive five-year period, starting with the period beginning on April 1, 1999, is limited to the total of	(2) Il n'est tenu d'indemniser le prêteur des pertes occasionnées à celui-ci par l'octroi de prêts enregistrés par le ministre, pour chacune des périodes quinquennales consécutives, la première débutant le 1er avril 1999, qu'à concurrence d'un montant qui n'excède pas le total de ce qui suit:
(*a*) 90%, or any prescribed lesser percentage, of that part of the aggregate principal amount of the loans made by it during that period that does not exceed $250,000,	*a*) 90 % — ou tout pourcentage réglementaire inférieur — de la tranche de principal allant jusqu'à 250 000 $;
(*b*) 50%, or any prescribed lesser percentage, of that part of the aggregate principal amount of the loans made by it during that period that exceeds $250,000 but does not exceed	*b*) 50 % — ou tout pourcentage réglementaire inférieur — de la tranche de principal allant de 250 000 $ à 500 000 $;

$500,000,	
(*c*) 10%, or any prescribed lesser percentage, of that part of the aggregate principal amount of the loans made by it before April 1, 2009 that exceeds $500,000, and	*c*)10 % — ou tout pourcentage réglementaire inférieur — de la tranche de principal des prêts consentis avant le 1er avril 2009 qui excède 500 000 $;
(*d*) 12%, or any prescribed lesser percentage, of that part of the aggregate principal amount of the loans made by it after March 31, 2009 that exceeds $500,000.	*d*) 12 % — ou tout pourcentage réglementaire inférieur — de la tranche de principal des prêts consentis après le 31 mars 2009 qui excède 500 000 $.

[8] That being said, sections 37 and 38 of the Regulations provide for certain terms and conditions that the lender must satisfy before submitting a claim to the Minister:

38. (1) A lender must take all of the measures described in subsection 37(3) that are applicable before submitting a claim to the Minister for loss sustained as a result of a loan.	**38.** (1) Le prêteur doit prendre les mesures applicables prévues au paragraphe 37(3) avant de présenter au ministre une réclamation pour la perte occasionnée par un prêt.
. . .	[…]
37. . . .	**37.** […]
(3) If the outstanding amount of the loan is not repaid within the period specified, the lender must take any of the following measures that will minimize the loss sustained by it in respect of the loan or that will maximize the amount recovered:	(3) Si le solde impayé du prêt n'est pas remboursé dans le délai précisé, le prêteur doit prendre celles des mesures suivantes qui réduiront au minimum la perte résultant du prêt ou permettront de recouvrer le montant maximal:
. . .	[…]

(*c*) realize on any insurance policy under which the lender is the beneficiary;	*c*) la réalisation des polices d'assurance dont le prêteur est le bénéficiaire;
. . .	[…]
(my emphasis)	(non souligné dans l'original)

[9] It is within this particular legislative and regulatory framework that the applicants had the onus of justifying their claims, which they were unable to do. Essentially, the officers, then the Program Directorate, based their refusal to allow the applicants' claims for payment on subsection 38(1) and paragraph 37(3)(*c*) of the Regulations. The Program Directorate's refusal to pay the applicants raises a question of mixed fact and law.

[10] In this case, neither the Act nor the Regulations contain a privative clause, which favours less deference. With respect to the administrative scheme and the expertise of the decision makers, the goal of the Program is to improve access to loans for small businesses by reducing the potential financial risk for participating lenders.

[11] That said, the Guidelines for the Program establish an appeal process to the Program Directorate (a process that the applicants availed themselves of), which reflects the considerable flexibility of the Program.

[12] In my view, the reasonableness standard of review applies. Given that the Court is in as good a position as the Program officers or Directorate to interpret the Act and the Regulations, at this level, there is no deference owed to the administrative decision maker.

[13] In this case, was it reasonable to find that the applicants did not take all the steps required under the Regulations before submitting their claim for payment?

[14] In docket T-1070-08, the lender claimed a loss of $254,748.07 from the Program as a result of lending $250,000 to the borrower, while in docket T-1071-08, the lender claimed a loss of $48,459.55 as a result of loaning $83,700 to the borrower. In both cases, the loans were registered in accordance with the Act and the Regulations.

[15] In this case, it is common ground that in docket T-1070-08, the borrower and its representative were engaged in cheque kiting and that in docket T-1071-08, the trailer given as security to the lender was no longer in the borrower's possession as the result of a theft and that the borrower never transferred the registration of the trailer.

[16] The applicants admit that this type of risk is normally covered by the blanket insurance policy (chapter D – Falsification – Contrefaçon) under which they are the beneficiaries but submit, first, that paragraph 37(3)(*c*) of the Regulations is not directed to this type of insurance. Moreover, again the insured must, *inter alia*, prove to the satisfaction of their insurer that "all **available**

remedies of any kind have been exhausted and any amounts recovered have been deducted from the amount", which is not the case here, according to the applicants.

[17] It appears to me that these grounds are without merit for the following reasons.

[18] First, the applicants concede that paragraph 37(3)(*c*) of the Regulations includes any policy taken out by the borrower covering the property that the lender has taken as security: in the event that an insurable loss occurs before a claim for payment is submitted and compensation would be payable, the lender must realize on the policy before applying to the Program. This is also the case where the lender is a beneficiary under a life or disability insurance policy.

[19] The applicants contend, however, that the blanket insurance is what is known in the banking world as a "banker's blanket". The purpose of this type of insurance is not to pay lenders in cases of registration with the Program. Otherwise, why pay premiums of $5,000 (docket T-1070-08) and $1,674 (docket T-1071-08) to the Government if it can exculpate itself after the fact by relying on this type of insurance?

[20] In my view, the applicants' position is unreasonable and, moreover, is untenable in law.

[21] Under the Act, the Minister is liable to pay a lender any eligible loss sustained by it as a result of a loan in respect of which the requirements set out in the Act and the Regulations have been satisfied (subsection 5(1)). Ultimately, it is therefore the Canadian taxpayer who pays the bill.

Sections 37 and 38 of the Regulations set out certain terms and conditions that must be complied with before an application for a claim is submitted. This stems primarily from Parliament's concern to ensure recovery of the costs associated with the Program while attaining its objective of supporting small businesses.

[22] The goal of the requirements under sections 37 and 38 of the Regulations is, in fact, to force the lender to minimize the loss sustained by it and to maximize the amount recovered before looking to the Program for payment.

[23] It is true that neither the Act nor the Regulations require that the lender have insurance. On the other hand, under paragraph 37(3)(*c*) of the Regulations, the lender clearly must realize on any insurance policy under which it is the beneficiary. This provision is worded very generally and does not contain any exceptions. It is not specified that the insurance in question must be insurance on the property covered by the loan or on the borrower's life. The wording of the Regulations is clear. It states "realize on <u>any</u> insurance policy under which the lender is the beneficiary" and "la réalisation <u>des</u> polices d'assurance dont le prêteur est le bénéficiaire" (emphasis added) (paragraph 37(3)(*c*) of the Regulations).

[24] The blanket insurance that the applicants took out with Desjardins Assurances Générales clearly falls within the ambit of the Regulations.

[25] Second, the applicants argue that they have no obligation to realize on their guarantee under the blanket insurance policy since it quite simply does not apply because of the insurer's limited warranty.

[26] In this case, the applicants assert that the blanket insurance policy requires the insured to exhaust all "available remedies". This requirement includes "remedies against the debtor or the guarantors, the realization of collateral, actions for damages against third parties liable in whole or in part for the loss, including any professional who acted, for instance, under mandate from the insured, and including, without restricting the generality of the foregoing, lawyers, accountants and appraisers."

[27] The applicants did attempt to make an argument to the Program Directorate about the limited warranty clause. However, the Directorate decided that [TRANSLATION] ". . . the insurance policy is a private contract between the lender and the insurer and that the Crown is therefore not a party to the insurance policy and that, consequently, it is not bound by the conditions in the said policy".

[28] The applicants are now criticizing the Program Directorate for not ruling on the applicability of the limited warranty clause, other than to respond that the Crown is not a party to the insurance contract and therefore is not bound by the private insurance contract: [TRANSLATION] "If the lender and the insurer have a dispute about the correct interpretation of the insurance contract, they must resolve the dispute between themselves".

[29] The Directorate's position does not appear unreasonable to me in the circumstances.

[30] Based on the evidence in the record, the applicants did notify their insurer that there had been certain fraudulent practices. At the time that the impugned decisions were issued, the insurer had not and, as of today's date, still has not, according to the evidence in the record, formally notified the applicants of its refusal to pay them under the limited warranty clause in the blanket insurance policy.

[31] In any event, the applicants argue that there is currently no dispute between the lenders and their insurer. Jacques Pelletier, the insurer's special advisor, states in his affidavit, which is subsequent to the impugned decisions, that the guarantee offered by the insurance policy only comes into play when all available remedies against the "guarantors" have been exhausted, which, according to his interpretation of the insurance contract, includes remedies against the Minister. He likens the Program to a "guaranty" offered by the federal government to protect financial institutions who lend to small businesses in accordance with the terms and conditions of the Act and the Regulations.

[32] I am far from persuaded that the interpretation proposed by the applicants and the insurer's special advisor is accurate and reasonable.

[33] Even if it is true that the Minister is liable to pay the lender if the conditions in the Act and the Regulations have been met, he is not indebted to the borrower. The Government of Canada has

only promised to pay the lender where the lender's debt is lost; this is a type of insurance protection for the lending institution (*Caisse populaire Desjardins de Saint-Eustache/Deux-Montagnes v. 9030-0120 Québec inc.*, [2002] J.Q. No. 219 (QL)). Accordingly, the Minister cannot be equated here with a "guarantor" in the civil sense of the term as the applicants and their own insurer would like to do under the blanket insurance contract.

[34] Ultimately, if there is a conflict between the Regulations and the blanket insurance contract, the regulatory requirements must take precedence over any inconsistent provision in the private contract between the lender and the insurer. As the respondent submits, under the interpretation proposed by the applicants and their insurer, lenders who wish to claim the benefits of the Program would be permitted to avoid their prior obligations under the Act and the Regulations.

[35] In this case, there is a clear regulatory requirement to realize on any insurance policy before submitting a claim to the Program. Thus, it is completely contrary to the Act and its objectives to allow the applicants or their insurer to rely on the interpretation of the blanket insurance contract to avoid this prior obligation.

[36] The conclusion by the Program Directorate and their officers that the applicants must realize on the insurance policy under which they are the beneficiaries before submitting their claim for payment is reasonable. Their refusal to accept the applicants' claims on the ground that they are

premature appears to me to be reasonable in all respects based on the law and the facts in the record.

[37] This application for judicial review must therefore be dismissed with costs.

JUDGMENT

THE COURT DECLARES, ORDERS AND ADJUDGES that the applicants' applications for judicial review in dockets T-1070-08 and T-1071-08 are dismissed with costs.

"Luc Martineau"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1070-08
STYLE OF CAUSE:	**CAISSE POPULAIRE DESJARDINS DES CHUTES MONTMORENCY v. ATTORNEY GENERAL OF CANADA**
DOCKET:	T-1071-08
STYLE OF CAUSE:	**CAISSE POPULAIRE DESJARDINS DU BAS-RICHELIEU v. ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	QUEBEC, QUEBEC
DATE OF HEARING:	OCTOBER 26, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	MR. JUSTICE MARTINEAU
DATE OF REASONS AND JUDGMENT:	NOVEMBER 3, 2009

APPEARANCES:

Claude Ouellet Antoine Pinard Beaudoin	FOR THE APPLICANTS
Stéphane Dion	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stein Monast s.e.n.c.r.l. Quebec, Quebec	FOR THE APPLICANTS
John H. Sims, Q.C. Attorney General of Canada	FOR THE RESPONDENT