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**** HIGHLIGHTS ****

* A Federal Court Justice has held that an Indian Band Council which chose not to renew an agricultural permit for a farmer had to give the farmer reasonable notice and an opportunity to be heard with respect to its decision. The Court quashed the decision of the Band Council for the Blood Indians First Nation and directed it to afford a hearing, on notice, to the farmer, as well as affected Band members. Band Council had entered into agreements with a number of Band members to request permits to be issued by the Minister of Indian Affairs for the farmer in question. Over 56,000 acres of land and over 500 Band members were involved. (Hengerer v. Blood Indians First Nation, CALN/2014-011, [2014] F.C.J. No. 259, Federal Court)

* The Ontario Court of Appeal has firmly rejected the proposition that the provisions of the Ontario Health Protection and Promotion Act and the Ontario Milk Act, which prohibit the consumption of unpasteurized milk and the operation of an unlicensed milk plant contravene s. 7 of the Charter of Rights and Freedoms. The Court distinguished case law involving the right to consume medical marijuana on the grounds that there was no scientific or medical evidence to support the alleged health benefits from consumption of unpasteurized milk. Lifestyle choices with respect to food are not protected by the Charter. The Court also dismissed the appeal and upheld the convictions against unpasteurized milk advocate Michael Schmidt. The Court also held that Schmidt's "cow share" arrangement, which did not transfer an ownership interest in particular cows to the participants of the arrangement, did not take his activities outside of public health legislation, and that the Courts have resisted schemes that purport to create "private enclaves" immune to the reach of public health legislation. (R. v. Schmidt, CALN/2014-012, [2014] O.J. No. 1074, Ontario Court of Appeal)

* The Federal Court of Canada has rejected a challenge by the Western Grain Elevator Association, and a number of its members, to an Order made by the Canada Grain Commission with respect to the maximum allowable moisture shrinkage allowance elevator operators can calculate when drying grain. The Court concluded that the Order which reduced the allowable shrinkage was

within the statutory authority of the Commission, notwithstanding that similar authority was also given to the Federal Cabinet. The Court also concluded that it had no authority to question the science or policy behind the Order. (Cargill Ltd. v. Canada (Attorney General), CALN/2014-013, [2014] F.C.J. No. 275, Federal Court)

**** NEW CASE LAW ****

Hengerer v. Blood Indians First Nation; CALN/2014-011, Full text: [2014] F.C.J. No. 259; 2014 FC 222, Federal Court, Russell J., March 6, 2014.

Agricultural Permits to Farm Indian Reserve Lands -- Termination and Non-Renewal -- Right to Judicial Review.

A farmer, Joachim Hengerer and Hengerer Farms Ltd. (collectively "Hengerer") and two members of the Blood Tribe, Charlene Fox and Lois Frank ("Fox" and "Frank") applied to the Federal Court of Canada for an Order quashing the decision of the Chief and Council of the Band of Blood Indians ("Band Council") not to request the renewal of agricultural permits which allowed Hengerer to farm lands on the Blood Indian Reserve in southern Alberta (the "Reserve"). Hengerer, Fox and Frank also sought an Order directing Band Council to cause agricultural permits to be issued to Hengerer pursuant to agreements entered into between Band members and Band Council.

Hengerer is a 63 year old farmer who had farmed land on the Reserve since 1981.

In 2013, Hengerer farmed approximately 56,000 acres of land on the Reserve on lands occupied by in excess of 500 Band members.

The Blood Reserve is the largest reserve in Canada at 518.5 square miles and a population of 11,500 members. The primary industry on the Reserve is agriculture.

Hengerer, Fox and Frank alleged that Band Council had entered into binding agreements with Band members pursuant to which Band Council had agreed with Band members to cause agricultural permits to be issued or renewed to Hengerer until 2015 and that Band Council's decision constituted a breach of legally binding contracts between Band Council and Band members.

In the late summer and fall of 2013, Hengerer had seeded approximately 4,000 acres of Reserve land to winter wheat and had sprayed and worked a portion of the land in the expectation that he would be farming it in 2014. He also expended approximately $16.2 million on the purchase of new farm equipment and had entered into contracts to sell canola in the fall of 2014 at fixed prices, in the expectation that the permits would be issued.

On or about December 20 or 21, 2013, Hengerer received a letter from Band Council which advised him that all permits allowing him to farm on the Reserve would expire on March 31, 2014 and that no future permits would be issued.

Band Council's decision was based on a Committee report which alleged that he:

(a) disregarded directions from the Band's Land Management Department regarding the planting of winter wheat;

(b) disregarded survey markers;

(c) failed to report "Buck Shea" arrangements to Land Management;

(d) failed to submit a crop report to Land Management for 2013;

(e) failed to maintain fences in 2013;

(f) not remitted payment of crop rental fees for the invoice amounts in 2013;

(g) made racist remarks against Band members.

Hengerer had not been given notice of Band Council's December 17, 2013 meeting and was not given an opportunity to respond to these allegations.

Band Council did not provide Hengerer with the reasons for its decision until February 17, 2014, after judicial review proceedings were commenced.

Hengerer's Affidavit evidence denied all of these allegations.

The issues on the application were:

(a) Whether the Decision is subject to judicial review;

(b) If the Decision is reviewable, what is the standard of review;

(c) Was procedural fairness denied;

(d) If a reviewable error occurred, what relief should be granted?

Section 18(3)(b) of the Federal Court Act provides:

(3) On an application for judicial review, the Federal Court may...

(b) declare invalid or unlawful or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Section 2 of the Federal Court Act defines "federal board, commission or other tribunal", in part, as follows:

> "federal board, commission or other tribunal" means anybody, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown..."

Section 28 of the Indian Act provides that leases by which Bands and Band members permit non-Indians to occupy or use Reserve lands are void, but that the Minister may authorize permits:

> "28(1) Subject to any subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve."

Decision: Russell, J. [at p. 16 and 17] quashed the decision of Band Council and directed that if Band Council still intended to sever its relationship with Hengerer, Band Council must notify Hengerer in writing of its intention to do so, provide adequate reasons, convene a meeting of all Band members affected who will have an opportunity to address Band Council, provide evidence to Hengerer who will have an opportunity to address the evidence and elicit his own evidence, give Hengerer an opportunity to have legal counsel present and allow him to make submissions, and render a timely decision with adequate reasons.

Russell, J. considered the following issues:

1. Is the decision of Band Council subject to judicial review by the Federal Court?

Russell, J. observed [at para. 39] that Band Council took the position that it had severed a private business relationship with Hengerer with its inherent powers to contract and manage the use of lands on the Reserve, and that the Court had no jurisdiction to hear the matter.

Russell, J. concluded that Band Councils can act as a federal board and that, in this case, Band Council's actions had a source in federal law, were of a public nature, and were consequently reviewable by the Court, stating [at para. 40 to 50]:

> "[40] Section 18.1 of the Federal Courts Act allows for judicial review of a decision or order of a federal board or commission or other tribunal, and section 2 of that Act tells us that a federal board, commission or other tribunal "means anybody, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act

of Parliament..."

[41] We know that a band council can act as a federal board, commission or tribunal but that not all band council decisions are subject to judicial review. See Provost v. Canada (Minister of Indian Affairs and Northern Development), [2009] F.C.J. No. 1505 at para 34.

[42] We also know that reviewable actions must not only find their source in federal law but must also be of a public nature and that all of the circumstances of the case must be considered when determining if a federal board, commission or other tribunal is acting in a manner which brings it within the purview of public law (see Air Canada v. Toronto Port Authority, [2011], F.C.J. No. 1725 at para. 60. [Toronto Port Authority].

[43] In the present case, I am persuaded that, in making the Decision, Band Council exercised, or purported to exercise, jurisdiction and powers conferred by or under the Indian Act, and that it did so in such a way that brought Council within the purview of public law.

[44] The evidence before me shows that, in terminating the Band's relationship with Hengerer, Band Council regarded itself as acting under subsection 28(2) of the Indian Act and that, although the issuance of Permits is a power granted to the Minister and not Band Council, the de facto situation in this case is that Band Council controls who receives Permits by using its consent powers under subsection 28(2), and by refusing to request Permits or renewals if it decides to terminate a relationship with a farmer.

[45] In particular, the Band Council resolution of March 19, 2013 requesting Permits for named individuals, including Hengerer, refers to Council's powers under the Indian Act and specifically bases the request upon subsection 28(2) of the Indian Act. Likewise, the letter from Council to Hengerer of December 18, 2013 specifically says that the Permits were issued "pursuant to section 28(2) of the Indian Act.

[46] It is telling that the wording of the MOUs suggests that it is the Band who grants the Permits. In law, this is not the case, but the Band's own documentation assumes de facto control over the issuance of Permits under the Indian Act.

[47] As regards the public dimension of the Decision, and bearing in mind the factors and guidance referred to by the Federal Court of Appeal in para 60 of Toronto Port Authority above, I am convinced that Band Council, in making this Decision, has brought itself within the purview of public law. In particular, I note that Council expressly engages subsection 28(2) of the Indian Act and exercises de facto control over the allocation of Permits. There is a large number of MOUs and the whole Permit system and the

> customary and traditional rights of band members are here brought into play in a way that affects the whole Blood Reserve community and, as the actions of Council in calling meetings has shown, has already affected the whole community. This is a situation that cannot be confined to the private and internal severing of a business relationship but needs to be dealt with by way of public law remedies.
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> [48] It is clear that the Applicants have been directly affected by the Decision. The evidence indicates that Hengerer will suffer severe financial prejudicial effects and Occupants have at least some rights - as evidences by the current Dispute Resolution Policy - that are prejudicially affected. The MOUs and the evidence of Charlene Fox indicate that, although Council may have the ultimate say over which farmer receives a Permit, it has been customary to allow Occupants to designate the farmer they want. In fact, the MOUs designating Hengerer for a three-year term from April 1, 2013 to March 31, 2016 are clearly intended to be contractual documents and not mere memoranda of understanding intended for purely internal purposes as alleged by Band Council. Band Council does not sign the MOUs (they are witnessed by a Land Management employee) but their terms are clearly endorsed and accepted by Council by way of resolution, so that, in effect, Council has agreed with the Occupants who designated Hengerer to exercise its powers under the Indian Act to request and acquire Permits for a term that runs until March 31, 2016.
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> [49] If Council wishes to avoid the contractual consequences of its own documentation, then Council should change that documentation to reflect the relationship it wants. It is not sufficient to tell the Court that Council has decided to interpret clear contract documents as not giving rise to contractual consideration.
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> [50] All in all, then, I think the Applicants have established that they have suffered prejudice (Hengerer obviously in a way that is different from Occupant Applicants) as the result of a Decision made, or purportedly made, by Council in accordance with powers under the Indian Act, and which has the kind of public dimension that lends itself to public law remedies. In other words, it is my view that the Court does have the jurisdiction to deal with this application."

2. Have any of the Applicants suffered breach of procedural fairness?

Russell, J. observed [at para. 52] that there is no statutory authority under the Indian Act to suggest that procedural fairness should not apply to the decision of Band Council; that with respect to procedural fairness, a standard of correctness applies, and no deference is allowed to the decision-maker, relying on Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 and Sketchley v. Canada (Attorney General), [2005] F.C.J. No. 2056, 2005 FCA 404.

With respect to Hengerer, Russell, J. concluded that Band Council had an obligation to provide him with adequate notice and an opportunity to be heard, stating [at para. 55 to 57]:

> "[55] When I apply the Baker factors to the present situation, it is clear to me that, as far as Hengerer is concerned, this Decision was of immense importance to his farming business and that he had legitimate expectations that Council would secure the Permits he needed to farm the Lands until March 31, 2016. The whole history if his long association with the Blood Tribe and the particular arrangements entered into to take the relationship to 2016 required Council to provide him with adequate notice of the case he had to answer before a decision was made not to seek renewal Permits for him, and to give him the opportunity to be heard by Council on the serious allegations that were made against him and which were set out in the Land Management Committee recommendation and accepted by Council and used as the reasons for terminating the relationship.
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> [56] This does not mean that Council's ultimate powers to determine who farms on Reserve Lands are curtailed in any way. Council might well wish to terminate even long-standing relationships from time to time for any number of legitimate reasons. But when, as in this case, Council decided to terminate the relationship with Hengerer for very specific reasons and to such drastic effect for Hengerer, Council should have provided Hengerer the opportunity to know the case against him and be heard.
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> [57] This does not mean, as counsel for the Band argues, that the system will be thrown into chaos by disgruntled farmers. Procedural fairness is contextual and case specific. All I am saying is that, on the facts of this case, Hengerer was not deal with in a procedurally fair way."

With respect to Frank and Fox, Russell, J. stated that the procedural fairness owed to Band members could not be separated from the procedural fairness owed to Hengerer, stating at para. 58:

> "[58] As for the Occupants Applicants, the Baker factors I think require a different result. The impact of the Decision falls mainly on Hengerer. The Occupants were deprived of the opportunity to have their designated farmer as permitee. But they are not likely to suffer economic consequences and I think the system and the community at the Reserve recognize that, although in the usual case Council will endorse their chosen permittee, Council must have ultimate say in this matter because Council is fixed with the ultimate power and responsibility of ensuring that Reserve lands are managed for the economic and other benefits of the community as a collective. It seems to me that whatever procedural fairness is owed to Occupants cannot be separated from the fairness that might be owed to the designated farmer in each case. In the present case, I don't think the Applicant Occupants, or indeed other Occupants who designated Hengerer

> to farm the Reserve lands they occupied, could expect more than that Hengerer be afforded procedural fairness before a decision was made to terminate the relationship with him."

With respect to the question of whether Hengerer had to name all 500 or so occupants who had designated him as their farmer in the agreements they had signed, Russell, J. observed that it was not necessary to strictly comply with Rule 303(1)(a) of the Federal Rules of Court which would have required naming all affected parties and that given the exigencies on both sides, Federal Court Rule 3 allowed the Court to remedy this non-compliance [at para. 59].

3. What remedy?

Russell, J. held that Band Council should have the ultimate power to decide who should farm Reserve lands, but that Hengerer ought to have an opportunity to make representations before the decision was made [at para. 60]. Given the permits entered into with Band members, however, Band Council must have sufficient justification not to follow through with their obligations and the expectations thereunder.

R. v. Schmidt; CALN/2014-012, Full text: [2014] O.J. No. 1074; 2014 ONCA 188, Ontario Court of Appeal, K.M. Weiler, R.J. Sharpe and R.A. Blair JJ.A., March 11, 2014.

Unpasteurized Milk -- Cow Share Arrangements -- Charter Protection for Unpasteurized Milk.

Michael Schmidt ("Schmidt") appealed to the Ontario Court of Appeal from convictions for selling and distributing unpasteurized milk and cheese contrary to the Health Protection and Promotion Act, R.S.O. 1990, c. H.7 ("HPPA"); for operating an unlicensed milk plant contrary to the Milk Act, R.S.O. 1990, c. M.12 (the "Milk Act"), and for failing to obey the Order of the Public Health Inspector. He was convicted on 13 counts and imposed fines of $9,150.00 and a one year probation.

Schmidt was convicted by a Justice of the Ontario Court of Justice on appeal from the decision of a Justice of the Peace who had acquitted him.

Schmidt is an experienced organic farmer with a deeply committed belief in the benefits of unpasteurized milk.

Schmidt attempted to comply with HPPA through a cow share program pursuant to which cow share members paid Schmidt between $300.00 and $1,200.00 and were required to pay a per litre charge for services involved in keeping the cow, milking the cow and bottling and transporting the milk. The capital sum was said to give each member a one quarter interest in a cow, however the herd consisted of 24 cows and there were approximately 150 cow share members.

The cow share agreements were all oral. Members were given a card but the cards did not contain the name of the cow and there was no evidence that the name of the cow in which

the member had a share was ever communicated. Nor was there any evidence of a formal transfer of ownership of the cow to the member.

Schmidt did not have a license to operate a plant pursuant to the Milk Act, and was subject to a 1994 cease and desist Order issued by the Public Health Inspector forbidding him from storing and displaying unpasteurized milk and milk products.

The Crown lead evidence as to the health risks and benefits of consuming unpasteurized milk. Schmidt also lead evidence with respect to the alleged potential health benefits from the consumption of unpasteurized milk.

Section 18 of HPPA prohibits the sale, delivery and distribution of unpasteurized milk and milk products.

Section 15 of the Milk Act prohibits the operation of a plant without a license.

The Ontario Court of Appeal considered, among other things, the following issues:

1. Did the appeal judge err in his interpretation of the HPPA and the Milk Act and in failing to give due recognition to the cow-share plan?

2. Did the appeal judge err in concluding that neither the HPPA nor the Milk Act violated s. 7 of the Charter of Rights and Freedoms?

Decision: Sharpe, J.A. (Weiler and Blair JJ.A concurring) dismissed the appeal [at para. 48].

Sharpe, J.A. considered the following issues:

1. Whether the appeal Judge erred in interpreting HPPA and the Milk Act, and in failing to give due recognition to the cow-share plan?

Sharpe, J.A. observed that one of the purposes of HPPA is to prevent the spread of disease and to protect health, and that one of the purposes of the Milk Act is to control and regulate the quality of milk and milk products [at para. 18].

Sharpe, J.A. observed that the substantial body of scientific evidence indicates that pasteurization kills pathogens which can cause serious illnesses, and that even Schmidt's experts conceded that their view that unpasteurized milk was safe represents a minority view with the scientific community [at para. 20].

Sharpe, J.A. rejected the submission that Schmidt was not a "distributor" under the Milk Act; held that his transactions involving unpasteurized milk fell within the ordinary meaning of the words "sale" and "distribute", and held that his operation fell within the more ordinary meaning of "plant" and "premises in which milk or cream products are processed" [at para. 24].

Sharpe, J.A. rejected Schmidt's submissions that the cow share arrangements took his activities outside of the reach of HPPA and the Milk Act stating, at para. 25 to 27:

> "[25] ...The oral cow-share agreements do not transfer an ownership interest in a particular cow or in the herd as a whole. The member does not acquire or exercise the rights that ordinarily attach to ownership. The member is not involved in the acquisition, disposition or care of any cow or of the herd. The cow-share member acquires a right of access to the milk produced by the appellant's dairy farm, a right that is not derived from an ownership interest in any cow or cows. As the appeal judge put it, at para. 51, "the cow-share arrangement approximates membership in a 'big box' store that requires a fee to be paid in order to gain access to the products located therein." This court has resisted schemes that purport to create "private" enclaves immune to the reach of public health legislation and has insisted that public health legislation not be crippled by a narrow interpretation that would defeat its objective of protecting the public from risks to health: Kennedy v. Leeds, Grenville and Lanark District Health Unit, 2009 ONCA 685 (CanLII), [2009] O.J. No. 3957 at paras. 45-47.
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> [26] Within the limits of the production capacity of the appellant's dairy farm, any member of the public can acquire unpasteurized milk by becoming a cow-share member. In my view, the cow-share arrangement is nothing more than a marketing and distribution scheme that is offered to the public at large by the appellant. I accordingly cannot accept the Justice of the Peace's interpretation that the cow-share arrangement constitutes a private arrangement to which s. 18 was not intended to apply.
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> [27] For similar reasons, I cannot accept the appellant's submission that the Milk Act licence requirement does not apply to the appellant's operation. The Milk Act makes no exception for "private" operations. Even if it did, the appellant operates a plant from which any member of the public can procure unpasteurized milk."

2. Did the Appeal Judge err in concluding that neither HPPA nor the Milk Act violated s. 7 of the Charter of Rights and Freedoms?

Sharpe, J.A. rejected Schmidt's contention that by banning the sale and distribution of unpasteurized milk, and thereby depriving cow share members of the right to acquire a product they deemed beneficial to their health, the HPPA violates their right to security of the person.

Sharpe, J.A. held that a violation of s. 7 cannot be established on the basis of an individual's subjective belief. It must be established based on scientific and medical evidence. He stated at para. 35:

> [35] ...The impugned legislation prohibits the appellant from selling or distributing a product that certain individuals think beneficial to their

> health. As this court held in R. v. Mernagh, 2013 ONCA 67 (CanLII), [2013] O.J. No. 440 at paras. 66 to 74, dealing with the consumption of marijuana, a s. 7 violation cannot be made out on the basis of an individuals's subjective belief that a banned substance would benefit his or her health. There is no scientific or medical evidence of the kind contemplated in Mernagh to support the proposition that consumption of unpasteurized milk would benefit the health of any cow-share member. This case is readily distinguished from R. v. Parker 2000 CanLII 5762 (ON CA), (2000), 49 O.R. (3d) 481 (C.A.) where there was medical evidence to substantiate the claim that the health of the right's claimant would improve if he were allowed to consume marijuana."

Sharpe, J.A. also rejected Schmidt's argument that the legislation infringed the liberty interest by limiting his right of freedom to contract and the freedom of the cow share members to make a decision of fundamental personal importance, stating [at para. 38 and 39] that the freedom of contract, and the right to engage in the economic activity of one's choice, was not protected by s. 7 of the Charter, relying on Siemens v. Manitoba (Attorney General), 2003 SCC 3 (CanLII), [2002] S.C.J. No. 69 and R. v. Edwards Books and Art Ltd., 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713.

Sharpe, J.A. also held, at para. 40:

> "[40] ...that preventing an individual from drinking unpasteurized milk does not fall within the "irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": Godbout v. Longueuil (City), 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844 at para. 66. In my view, the appellant's argument to the contrary cannot be accepted in the face of the holding in R. v. Malmo-Levine, 2003 SCC 74 (CanLII), [2003] S.C.J. No. 79, at para. 86, that "the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle." Lifestyle choices as to food or substances to be consumed do not attract Charter protection as "[a] society that extended constitutional protection to any and all such lifestyles would be ungovernable." Such choices, held the court, citing Godbout at para. 66, are not "basic choices going to the core of what it means to enjoy the individual dignity and independence."

Finally, Sharpe, J.A. rejected Schmidt's submissions that the HPPA and the Milk Act violate the principles of fundamental justice because they are arbitrary and overbroad. Sharpe, J.A. commented at para. 46:

> "[46]" ...The scientific evidence that I have already mentioned easily reaches the standard of "sufficient evidence to give rise to a reasoned apprehension of harm to permit the legislature to act": Cochrane v. Ontario (Attorney General), 2008 ONCA 718 (CanLII), [2008] O.J. No 4165, at para. 29, leave to appeal refused [2009] SCCA No. 105; R. v. Malmo-Levine at para. 133. The law does not offend the overbreadth principle by

> targeting all unpasteurized milk. There is no evidence to suggest that the legislature could somehow narrow the reach of the legislation and still achieve its purpose of protecting public health."

Cargill Ltd. v. Canada (Attorney General); CALN/2014-013, Full text: [2014] F.C.J. No. 275; 2014 FC 243, Federal Court, Heneghan J., March 12, 2014.

Grain Marketing -- Moisture Allowances -- Validity of Grain Commission Orders.

Cargill Limited, Louis Dreyfus Canada Ltd., Parrish & Heimbecker Limited, Paterson Global Foods Inc., Richardson International Limited, Weyburn Inland Terminal Ltd., Viterra Inc., and Western Grain Elevator Association (collectively the "Grain Elevator Association") applied to the Federal Court to quash a decision made by the Canadian Grain Commission (the "Commission") on August 1, 2010 (the "Order") which fixed the maximum allowable moisture shrinkage allowance elevator operators can calculate when drying grain. The Grain Elevator Association argued that the Order was ultra vires the regulation-making authority granted to the Commission under the Canada Grain Act, R.S.C. 1985, c. G-10 (the "Act").

Affidavit evidence was submitted by both parties to the Court. The Court summarized the evidence [at para. 32 to 42]. In summary:

1. The moisture content of grain determines grade and quality. The Commission has established the maximum allowable moisture content for each class of grain. The higher the moisture content, the less valuable the grain is.

2. Grain producers may request elevators dry grain for them upon delivery, so that it may be assigned a higher grade by the Commission. Drying decreases the weight of the grain, and is referred to as "moisture shrinkage".

3. Because elevator operators must forward the same grade and quantity of grain to a terminal that is received from the producer, when a grain producer requests grain to be dried, the elevator operator must calculate the moisture shrinkage that will occur during drying. The elevator operator then deducts this from the amount received from the grain producer which is known as a "moisture shrinkage allowance". The anticipated weight of the dried grain is recorded on the receipt and the grain producer is paid according to the recorded receipt.

4. The Commission conducts an inspection of grain when it leaves the elevator for transfer to terminals. The Commission also measures moisture content and if the maximum moisture content exceeds the content described on the receipt, the elevator operator

is penalized and the grain is downgraded.

5. The process of drying grain is difficult and can cause problems for terminal operators.

6. To allow for these variables, the Commission allows elevator operators a margin of error of a certain percent when measuring moisture content of grain. The Commission also fixes a maximum moisture shrinkage allowance according to a prescribed formula, part of which is the maximum moisture content, presented as a percentage which may be used. The Commission had previously fixed this percentage as 1.1% below the moisture content required for what is known as "tough grade" grain.

7. On July 20, 2009, the Commission issued a proposal to lower the percentage used to calculate the moisture shrinkage allowance to 0.1% lower than the moisture content required for tough grade grain.

8. The Grain Elevator Association objected to this proposal.

9. On February 8, 2010, the Commission advised the Grain Elevator Association that it would proceed with the change, and it did so pursuant to the Order on August 1, 2010.

Decision: Madam Justice Heneghan dismissed the application for judicial review [at para. 72].

Heneghan, J. concluded that as the application involved a question of vires, the standard of review is correctness [at para. 56]. Heneghan, J. then reviewed the following issues:

1. Whether the Order is ultra vires?

Heneghan, J. observed that s. 118(h) of the Grain Act provides as follows:

"Orders of the Commission

118. The Commission may make orders

(h) constituting directives to the trade."

Section 116(1)(f) of the Act, however, provides as follows with respect to regulations which may be passed by the Governor in Council:

"Regulations

116(1) The Commission may, with the approval of the Governor in

Council, make regulations

...

(f) fixing the maximum shrinkage allowance that may be made on the delivery of grain to an elevator"

Heneghan, J. concluded that the Order fell within the powers of the Commission, stating at para. 63 to 66:

> "[63] Subsection 14(1) of the Act sets out a number of functions of the Commission, including the establishment of grades of grain, standards and procedures to regulate the handling, transportation and storage of grain, together with the promotion of research relative to grain and grain products, and otherwise oversee the grain trade in Canada.
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> [64] Having regard to the power to issue orders under subsection 118(h), as well as the objects and functions of the Commission pursuant to sections 13 and 14 of the Act, it follows, in my view, that subsection 118(h) allows the Commission to issue orders that are directives to the trade, for the purpose of maintaining standards of quality for Canadian grain and regulating grain handling, storage and transportation. These powers are to be exercised with regard to the interests of grain producers.
>
> [65] In my opinion, the challenged Order falls squarely within the statutory authority outlined above. The Order is directive, providing instructions as to how moisture shrinkage is to be calculated. It is directed at the grain trade since it applies to grain producers and primary elevators. The Order regulates the storage and handling of grain in the interests of grain producers, in compliance with section 13 and subsection 14(1) of the Act, as noted above. The Order falls within the statutory authority granted by subsection 118(h) and is not ultra vires.
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> [66] The Applicants' argument that the Order impermissibly does something that can only be done by regulation cannot succeed. As the Respondents note, subsection 116(1) is permissive, not mandatory. Paragraph 116(1)(f) provides that the Commission may make regulations with the approval of the Governor in Council setting a maximum shrinkage allowance. At the same time, there are no provisions in the Act prohibiting the Commission from issuing an order pursuant to subsection 118(h) that has the same effect that is setting a maximum shrinkage allowance. Subsection 118(h) is the statutory authority for the challenged Order and contrary to the submissions of the Applicants, there is nothing in the Act preventing an order from being issued that addresses the same subjects as those listed under subsection 116(1)."

2. Whether the Grain Commission could challenge the Order based on science and policy?

Heneghan, J. also rejected the Grain Elevator Association's argument that the Commission acted outside its authority because the Order was not based on sound science or policy [at para. 69]. Heneghan, J. observed that there is little scope for a reviewing Court to comment on the choice of science relied upon by regulatory authorities, and that it is not for the Court to assess the merits of challenged subordinate legislation on judicial review. Court challenges are restricted to an assessment of whether the challenged provisions fall within the authority of the enabling statute [at para. 70 to 71].

** CREDITS **

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.