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**** HIGHLIGHTS ****

* A Justice of the Nova Scotia Supreme Court has held that herbicide spray drift is an "other disturbance" within the meaning of s. 10 of the Nova Scotia Farm Practices Act. Consequently, the Act requires plaintiffs who allege they have been damaged by herbicide spray drift on the grounds of a farmer's negligence or on the grounds of nuisance to first bring an application to the Farm Practices Board to determine whether the agricultural operation complied with "normal farm practices". The Board's finding on this point (which is subject to a right of appeal) binds the plaintiff, who can only bring an action if the Board concludes that the farmer did not comply with "normal farm practice". [Editor's note: The Court indicated that this was the first Canadian case in which this issue was considered. The Court reviews herbicide spray drift decisions from other provinces.]. (Nauss v. Waalderbos, CALN/2014-025, [2014] N.S.J. No. 397, Nova Scotia Supreme Court)

* The Ontario Court of Appeal has set aside a lower Court decision which ruled that all-terrain vehicles used by farmers are a "self-propelled implement of husbandry" which are not required to be insured under Ontario's compulsory insurance regime. ATVs are not specifically manufactured, designed, redesigned, converted or reconstructed for a specific use in farming. They are specifically defined as off-road vehicles under Ontario's compulsory insurance regime must, therefore, be insured. As a consequence, an Ontario farmer who was seriously injured while driving his ATV on a public highway was barred from recovering from the driver of a vehicle who was convicted of careless driving, and the driver's insurer. (Matheson v. Lewis, CALN/2014-026, [2014] O.J. No. 3304, Ontario Court of Appeal)

**** NEW CASE LAW ****

Nauss v. Waalderbos; CALN/2014-025, Full text: [2014] N.S.J. No. 397; 2014 NSSC 245, Nova Scotia Supreme Court, J.D. Murphy J., July 18, 2014.

Right to Farm Legislation -- Herbicide Spray Claims -- Farm Practices Board Determination that the Spraying is not a "Normal Farm Practice" a Precondition to Negligence Actions in Nova Scotia.

The Plaintiffs, John and Linda Nauss ("Nauss") operated an organic farm in Shinimicas, Nova Scotia, across the road from a farm operated by the Defendants, John Waalderbos and Viking Crest Farm Ltd. ("Waalderbos"). The Nauss' alleged that on May 15, 2007, Waalderbos sprayed his lands with herbicide that drifted onto their property, causing crops to be damaged, 4 horses to miscarry and significant health issues to Mrs. Nauss - allegedly as a result of exposure to herbicide "overspray".

The Nauss' also alleged that ditching activities on the Waalderbos farm contaminated water runoff that caused loss and damage.

The Nauss' contacted the Nova Scotia Department of the Environment concerning Waalderbos' activities and were advised that they could bring their concerns before the Farm Practices Board (the "Board") pursuant to the Farm Practices Act, S.N.S. 2000, (the "Act"). The Nauss' did not do so but instead commenced an action for damages based in negligence.

Section 10(1) of the Act prohibits the commencement of civil actions for nuisance or negligence resulting from an agricultural operation unless the Board finds that the operation does not comply with normal farm practices or a farmer fails to comply with an Order of the Board. Section 10 provides:

> Prohibition of certain civil proceedings
>
> 10(1) Subject to subsection (2), no person shall
>
> (a) commence a civil action in nuisance, negligence or otherwise, for any odour, noise, dust, vibration, light, smoke or other disturbance resulting from an agricultural operation; or
>
> (b) apply for an injunction or other order of a court preventing or restricting the carrying on of an agricultural operation because it causes any odour, noise, dust, vibration, light, smoke or other disturbance.
>
> (2) Subsection (1) does not apply
>
> (a) to an agricultural operation that is found by the Board not to comply with normal farm practices; or
>
> (b) where a farmer fails to comply with an order of the Board. 2000, c. 3, s. 10.

Section 3(g) defines "normal farm practice" as follows:

> (g) "normal farm practice" means a practice that is conducted as part of an agricultural operation
>
> (i) in accordance with an approved code of practice,
>
> (ii) in accordance with a directive, guideline or policy statement set by the Minister with respect to an agricultural operation or normal farm practice, or
>
> (iii) in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances, including the use of innovative technology used with advanced management practices;

On October 4, 2011, an order was made granting a stay of proceedings by the Nauss' to allow them to bring an application to the Farm Practices Board. The Order provided that the stay would be lifted if the Board concluded the conduct falls under s. 10(2) of the Act, but that the action would be dismissed if the Nauss' did not bring this application. In this decision the Court commented as follows concerning s. 9 and 10 of the Act:

> [11] Section 10 is mandatory in that there is a prerequisite to go to the Board before commencing a civil action for the sort of relief claimed by the Plaintiffs.
>
> [12] Section 9 of the Act, on the other hand, is not mandatory. It says:
>
> Any person may apply in writing for determination to the Board.
>
> [13] Applying is not mandatory, but as I noted during argument it is a prerequisite. Going to the Board is a prerequisite to commencing a civil proceeding. That is consistent with the intent and the spirit of the wording of the Act, which is to have a s. 10(2) determination by the board before starting a civil proceeding of the type identified in s. 10, and that is what we are dealing with in this case.
>
> [14] The Plaintiffs take the position at the conclusion of their brief that the Court should not ascribe to the legislature the intention to condone a farmer's dangerous practice to the detriment of neighbours by leaving no legal recourse to the neighbours through the courts. In my view, that is not what the legislature has done here. The legislature established a mechanism. It established a Board to address what constitutes a proper agricultural practice or a normal farm practice. That determination is made

> a prerequisite to commencing an action, but that does not ascribe to the legislature the intention to condone dangerous practices. Indeed, it provides a mechanism short of lawsuits to address dangerous farm practices.

The Nauss' made an application to the Board. On January 30, 2013, the Board provided a written decision wherein it ruled that Waalderbos did not act in a manner inconsistent with "normal farm practices" and the Board's mandate did not extend to a consideration of Mrs. Nauss' health or the horses' health. The Nauss' appealed the Board's decision to the Supreme Court of Nova Scotia. The appeal was dismissed on August 28, 2013.

The Nauss' applied to the Court for an Order to have the stay lifted and to permit the action to proceed, because the Board did not have the mandate to consider issues related to Mrs. Nauss' health and the health of the horses. Waalderbos applied to have the claim dismissed.

Decision: Murphy, J. dismissed the Nauss' action [at para. 21].

Murphy, J. observed [at para. 14] the issues related to Mrs. Nauss' health and the horses' health related to damages, which would be adjudicated only after a determination of liabliity based solely on negligence [at para. 14].

Murphy, J. also considered whether herbicidal drift was an "other disturbance" under the Act. He noted that the issue had not been addressed in any reported decision in Nova Scotia, or in any other provinces stating, at para. 16:

> [16] ...the issue has not been addressed in any reported decision in this province. There is case law in other provinces dealing with actions for damages caused by herbicidal drift (see Fondrick v. Gross, 2003 SKQB 307 (CanLII), 2003 SKQB 307, Rioux v. Reutter, 2004 MBQB 148 (CanLII), 2004 MBQB 148, H & H Lockery Farms 1997 Ltd. v. Hayer, 2006 OJ No. 1, and Kacsmarik v. Demeulenaere, 2002 PESCTD 12 (CanLII), 2002 PESCTD 12). However, none of those decisions considered whether herbicidal drift was an "other disturbance" contemplated by provincial right-to-farm legislation. In Fondrick v. Gross, supra, liability was found on the basis of the doctrine of strict liability, not nuisance or negligence. In Rioux v. Reutter, supra, the defendant conceded liability, leaving only damages to be determined. In Kacsmarik v. Demeulenaere, supra, liability was found in negligence, and the Farm Practices Act, RSPEI 1988, c. F-4.1, unlike the Nova Scotia legislation, protected farmers against claims in nuisance only.

Murphy, J. concluded [at para 17]:

> [17] Absent contrary authority, I remain of the view that the activities the plaintiffs allege occurred, herbicidal overspray or drift and contaminated run-off from ditching are "other disturbances" resulting from an agricultural operation as contemplated by section 10(1)(a) of the Act.

Murphy, J. concluded that the Plaintiffs' claim must be dismissed [at para. 18] as it was based entirely upon allegations of negligence from spraying and ditching [at para. 19]. Murphy, J. concluded [at para. 19 and 20]:

> [19] ...A farmer's immunity pursuant to sections 9 and 10 of the Act from a negligence or nuisance action stemming from an agricultural operation is contingent upon a finding by the Board that he or she complied with normal farm practice. This is consistent with the purpose of the legislation set out in section 2 of the Act (previously quoted in para. 5).
>
> [20] Justice Scanlan's decision confirming the Board's finding that the defendants complied with normal farm practices constitutes a determination that the defendants have met the appropriate standard of care; it should not be revisited in addressing the current motions. Accordingly, the plaintiffs' claim cannot succeed.

Matheson v. Lewis; CALN/2014-026, Full text: [2014] O.J. No. 3304; 2014 ONCA 542, Ontario Court of Appeal, R.G. Juriansz, M.H. Tulloch and G.R. Strathy JJ.A., July 11, 2014.

Farm Vehicles -- Compulsory Insurance -- ATVs.

A farmer, Arthur Matheson ("Matheson") was seriously injured while he was driving a 1986 model TRX 200 SX all-terrain vehicle ("ATV") on a public highway. He was struck from behind by a vehicle driven by Gary Wayne Lewis ("Lewis") which was leased from GMAC Leasco Limited ("GMAC") and insured by Lanark Mutual Insurance Company ("Lanark"). Lewis left the scene of the accident and was subsequently convicted of careless driving, obstruction of justice and breach of probation.

The ATV was uninsured. Lewis, GMAC and Lanark brought an application for a declaration that Matheson's personal injury claim was barred by the provisions of the Ontario Insurance Act, which provide that a person is not entitled to recover damages for bodily injury or death arising from the use or operation of an automobile if, at the time of the incident, the automobile was not insured.

The motions Judge found that the ATV was a self-propelled implement of husbandry and therefore excluded from Ontario's compulsory insurance regime. Lewis, GMAC and Lanark appealed.

Decision: Juriansz, J.A. (Tulloch and Strathy, JJ.A. concurring) allowed the appeal and ordered that Matheson's action was statute barred by the operation of s. 267.6(1) of the Insurance Act and s. 30(1)(a) of the Statutory Accident Benefits Schedule [at para. 47].

Juriansz, J.A. observed that the motions Judge had proceeded on the basis that the ATV was a "self-propelled implement of animal husbandry" and that s. 1 of the Ontario Highway Traffic Act excludes a "self-propelled implement of husbandry" from the broad definition of a "motor vehicle". The Highway Traffic Act defines a self-propelled

implement of husbandry" as a "self-propelled vehicle manufactured, designed, redesigned, converted or reconstructed for a specific use in farming".

However, Juriansz, J.A. observed that the ATV had not been designed or manufactured for a specific use in farming used for farming purposes. It was in the same state as when it came off the assembly line and had not been redesigned, converted or reconstructed [at para. 15].

The motions Judge considered evidence introduced by Matheson concerning the evolving nature of the use of ATVs for farming operations, and expressed the opinion that statutory and regulatory definitions had not kept pace [at para. 17 and 18].

Juriansz, J.A. observed that the motions Judge strayed outside the role of the Court, which is to interpret and apply the laws enacted by the legislature [at para. 23].

Juriansz, J.A. observed [at para. 24]:

> [24] In this case, a regulation under the Off Road Vehicles Act, R.R.O. 1990, c. O.4, explicitly classifies the Honda ATV model TRX 200 as an "off-road vehicle": R.R.O. 1990, Reg: 863, s. 3, para. 3. Mr. Matheson has not argued that his Honda TRX 200 SX does not come within this provision. In any case, s. 3 of Reg. 863 also classifies all-terrain vehicles generally as off-road vehicles, so long as they have steering handlebars and a seat designed to be straddled by the driver: para. 1.1 The Off-Road Vehicles Act, s. 15, prohibits a person from driving an off-road vehicle on land not occupied by the owner of the vehicle unless it is insured under a motor vehicle liability policy in accordance with the Insurance Act. As well, a regulation under the Highway Traffic Act, O. Reg. 316/03, provides that an off-road vehicle shall not be operated on a highway unless it is insured in accordance with s. 2 of the Compulsory Automobile Insurance Act and s. 15 of the Off-Road Vehicles Act.

and at para. 27:

> [27] Reg. 863 could not make clearer the legislative intent that a Honda ATV model TRX 200 is an off-road vehicle and not a self-propelled implement of husbandry".

Juriansz, J.A. concluded [at para. 28]:

> [28] ...The legislature has carefully struck a balance between the needs of farmers and the protection of the public. The legislature, in the Off-Road Vehicles Act, recognizes and specially accommodates the use of off-road vehicles by farmers. Section 2(2)(b)(i) of the Act allows a farmer who is a licensed driver to operate an off-road vehicle on a highway if the vehicle is designed to travel on more than two wheels and the vehicle bears a slow moving vehicle sign. An ordinary member of the public is not allowed to operate an off-road vehicle on a highway, except when crossing it. However, to protect the public, the Act requires that off-road vehicles be

insured when they are operated off the property of the owner. A farmer driving an off-road vehicle on a highway as permitted by s. 2(2)(b)(i) must still comply with the requirement in s. 15 that the vehicle be insured.

** CREDITS **

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