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**** HIGHLIGHTS ****

- * A Justice of the Saskatchewan Court of Queen's Bench has upheld a decision of the Saskatchewan Farm Land Security Board which directed the sale of Saskatchewan farm land subject to a complex series of financing transactions. The Board described the transactions as an attempt to get around the Saskatchewan Farm Security Act by allowing non-Canadian entities the opportunity to profit and derive income from the increasing value of Saskatchewan farm land and to control the operation of Saskatchewan farm land. The financing operations involved issuing derivatives which increased or decreased in value with farm land held by the entities involved. The decision concluded that the "reasonableness" standard of review applied to the Board's decision. (*Skyline Agriculture Financial Corp. v Farm Land Security Board*, [CALN/2015-010](#), [\[2015\] S.J. No. 167](#), Saskatchewan Court of Queen's Bench)

**** NEW CASE LAW ****

Skyline Agriculture Financial Corp. v Farm Land Security Board; [CALN/2015-010](#), Full text: [\[2015\] S.J. No. 167](#); [2015 SKQB 82](#), Saskatchewan Court of Queen's Bench, Layh J., March 26, 2015.

Foreign Ownership Farm Land -- Saskatchewan Farm Security Act -- Standard of Review on Appeal.

Skyline Agriculture Financial Corp., Skyline Agriculture Lending Corp., Skyline Agriculturestream Corp. and Skyline Agriculture Capital Corp. (collectively "Skyline") appealed to the Saskatchewan Court of Appeal from a decision of the Saskatchewan Farm Land Security Board (the "Board") from a decision that transactions involving Skyline did not satisfy the residency requirements for persons entitled to have a "land holding" under s. 76(e) of the Saskatchewan Farm Security Act, SS 1988-90, c S-17.1 ("SFSA").

Skyline was involved in a series of complicated transactions described in detail (with flow charts) at para. 2 to 16 of the decision. In summary:

1. Skyline Agriculture Financial Corp. obtained an investment from institutional investors through private share offerings. These investments provided financing to its subsidiaries, Skyline Agriculture Lending Corp., Skyline Agriculturestream Corp. and Skyline Agriculture Capital Corp. The financing was used by the subsidiaries to provide financing for Saskatchewan farm operations owned by Canadian or Canadian owned entities ("Loans").
2. These entities then purchased Saskatchewan farm land.
3. The purchased lands were owned by Canadian operating companies ("Op Co's"). The shares in these companies were owned by a Canadian management company ("Management Co").
4. The Loans used to purchase the Saskatchewan farm land was secured by a mortgage was due and payable if the land was sold or on default. The Loan was also supported by a guarantee and a general security agreement from Management Co.
5. The next level of transactions were a "swap" agreement under which the landowner paid to "Skyline Stream" a monthly payment of a percentage of its gross farming revenues during the preceding month in exchange for a payment from Skyline Stream equal to the interest payment that the landowner had to pay Skyline Lending under the mortgage.
6. The next level of transactions was a derivative agreement between the Management Co. and Skyline Capital. The derivative is based on an index based on a basket of Saskatchewan farm land, including the land owned by subsidiary operating companies of the Management Co. The index rose in value if the aggregate value of farm land in the basket rose and decreased if the value decreases. If at the end of the derivative's term index increases in value, the Management Co. receives a payment from Skyline Capital. Conversely if the index decreases in value, Skyline Capital receives a payment.

On August 29, 2014, the Board made a decision which found that Skyline held a "land holding" as defined by s. 76(e) of the SFSA and directed that Skyline dispose of its interest in the land by December 31, 2014.

Skyline appealed the order on October 23, 2014 and the Court directed that the Board reconsider its decision.

On December 11, 2014, the Board made a new order which again ordered Skyline to reduce the land order.

Skyline appealed this order to the Court.

The issues before the Court were:

1. What standard of review identify in assessing the Board's decision - reasonableness or correctness?
2. Does the decision of the Board withstand the application of the appropriate standard?

The main issue in the appeal involved the Board's interpretation of the term "land holding" which prescribes the nature of restricted interests in Saskatchewan farm land. Section 76(e) of the SFSA defines a "land holding", in part, as follows:

(e) "land holding" includes:

- (i) farm land;
- (ii) any interest in farm land held under an agreement to purchase or lease;
- (iii) any interest in farm land held under any agreement that may directly or indirectly:
 - (A) result in vesting of title to farm land;
 - (B) confer the right to possession of farm land; or
 - (C) confer any right or control ordinarily accruing to the owner of farm land;

- (vi) any interest in farm land other than that described in subclauses (i) to (v);

Decision: Layh, J. dismissed Skyline's appeal [at para. 84].

Layh, J. considered the following issues;

(a) Standard of Review

Following a lengthy review of the law [at para. 20 to 68], Layh, J. concluded [at para. 68] that:

[68] Given the principle of deference allowed a tribunal in the

interpretation of its home statute as stated in *Dunsmuir*, and nudged by Justice Moldaver in *McLean* from a principle to a presumption, I find the presumption has not been rebutted and, accordingly, the standard of reasonableness applies.

(b) Whether the Board had met the standard of reasonableness?

Layh, J. concluded [at para. 74] that since he had found that the reasonableness standard of review applied, Skyline cannot simply show that it offers a more compelling interpretation of "land holding". It must show the Board's interpretation was unreasonable - that the decision lacks "justification, transparency and intelligibility".

Layh, J. also relied on the analysis in *Affinity Credit Union v. United Food and Commercial Workers, Local 1400*, [2015 SKCA 14](#) (CanLII) that the Board's interpretation of its governing statutory provision is "reasonable and within the range of possible acceptable outcomes which are defensible in respect to both the facts and the law."

Layh, J. observed [at para. 76] that the SFSA considered the broad definition of an interest in land which was not restricted to juris prudence respecting the Land Titles Act, but which included other interests referred to in s. 76(e)(i) to (v) and (vi) and that land holdings could include corporate shares. Layh, J. noted [at para. 79] that the Board defined "land holding" in a manner which met the "objects and scheme of the SFSA" as "illuminated by a historical review of the legislation". Layh, J. concluded [at para. 80 to 83 as follows:

[80] The FLSB provides a detailed analysis of its reasons for concluding that a "land holding" cannot be as restrictively defined as Skyline suggests. Among its reasons, the FLSB finds that the totality of the proposed structure between Skyline Entities and Farm Land Entities, in the words of s. 76(e)(iii), "direct or indirectly ... confer[s] [upon Skyline Entities a] right or control ordinarily accruing to the owner of farm land." The FLSB anchored its definition of "land holding" in a purposive way, citing Bruce Ziff's *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) which, in turn, quoted Professor A.M. Honore's conception of seven elements of property:

Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the duty to prevent harm, liability to execution, and the incident of residuary.

[81] From this framework of property rights, the FLSB gave primacy to the substance of the Skyline Structure, not to its form. The FLSB found that the combination of the Mortgage, Loan, Swap, Derivative, Index and other

agreements gave to Skyline Entities many of the rights and controls respecting Saskatchewan farm land that the SFSA does not countenance them to receive, most particularly, but not limited to, the benefit of any increase in the capital value of Saskatchewan farm land under the Derivative and the right to enjoy the income from the farm land under the Swap. At para. 52 of its reasons, the FLSB offered a summary of its findings:

52. ...the Skyline Structure divides the "farmer" into three entities and involved four entities on the Skyline side. Skyline Lending provides 100% purchase financing and takes the mortgage on the farm; Skyline Stream has the right to control operation and management of the farm and takes 18% of the gross revenue; Skyline Capital gets the benefit of any capital appreciation of the land. Each of these Skyline Entities are wholly owned subsidiaries of Skyline ParentCo. The Board does not accept that distribution of the rights and control, ordinarily accruing to the owner among the three commonly owned Skyline Entities means that the Board cannot consider such rights and control as a whole.

[82] On the other side of the corporate ledger, respecting those corporations included in the Farm Land Entities, the FLSB found disfavour with the minimal rights left to the "putative farmer" comparing its position to a "tenant under a crop share arrangement". The FLSB concluded at para. 59:

59. The Board concludes that the true effect of the Skyline Structure is to transfer the bulk of the bundle of rights associated with land ownership from OpCo to the Skyline Entities in a piecemeal fashion. The Skyline Structure is a series of agreements that confers upon the Skyline Entities rights and controls which normally accrue to a land owner, which collectively constitute a land holding within the meaning of section 76(e) of the SFSA. Upon careful examination, it becomes clear that Skyline Structure is an attempt to get around the SFSA and allow non-Canadian entities the opportunity to profit and derive income from the increasing value of Saskatchewan farm land and to control operation thereof.

[83] I agree with the sentiment of Skyline's counsel that Skyline Entities' efforts should not be characterized as attempting to "get around the SFSA", when an equally apt and more magnanimous characterization allows that Skyline Entities has attempted to comply with the legislation, as seems

apparent from its repeated contacts with the FLSB and its willing disclosure of agreements. Nonetheless, I cannot find fault with the reasonableness of the decision.

**** CREDITS ****

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