

## LexisNexis® Agricultural Law NetLetter

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditor rights, animals, grain, import/export and other matters in an agricultural context.

**Thursday, May 31, 2012 - Issue 252**

Bi-weekly issues are added on Thursdays.

### **\*\* HIGHLIGHTS \*\***

- \* The Alberta Court of Appeal has dismissed the appeal of hog farmers who sought to amend their claim against a lender to allege breach of an alleged financing contract to provide expert agricultural advice. The Court held that a prior summary judgment application which allowed the lender to foreclose on security granted in connection with the financing agreement made the breach of contract claim res judicata. The hog farmers were permitted, however, to proceed with their negligence action. (*Alberta (Treasury Branches) v. Opsteen*, [CALN/2012-017](#), [\[2012\] A.J. No. 521](#), Alberta Court of Appeal)

### **\*\* NEW CASE LAW \*\***

*Alberta (Treasury Branches) v. Opsteen*; [CALN/2012-017](#), Full text: [\[2012\] A.J. No. 521](#); [2012 ABCA 153](#), Alberta Court of Appeal, E.I. Picard, M.S. Paperny and C.D. O'Brien JJ.A., May 24, 2012.

Contracts -- Financing Agreement -- Alleged Obligation to Provide Agricultural Advice -  
- Res Judicata Negligence -- Lenders -- Obligation to Provide and Disclose Agricultural Advice and Information.

Martien Opsteen and Anne Marie Opsteen (the "Opsteens") appealed to the Alberta Court of Appeal from a dismissal of their application to amend their Statement of Defence and Counterclaim in foreclosure proceedings brought against them by Alberta Treasury Branches ("ATB").

The Opsteens were hog farmers. Commencing in 1996, they borrowed monies from ATB to finance the construction of barns, and for operating expenses. The loans were secured by mortgages against their farm lands.

In 2002, ATB commenced foreclosure proceedings with respect to the farm lands.

The Opsteens filed a Statement of Defence and a Counterclaim which alleged misrepresentation and negligence.

In March of 2003, ATB applied for, and was granted, summary judgment including the sale of the mortgage lands. Legal counsel for the Opsteens argued at this application that the mortgages ought not to be enforced because ATB representatives had been negligent in advising the Opsteens with respect to the loans and in failing to disclose advice ATB had received from its consultants warning of the high risk nature of the loans. It was argued that this information should have been communicated to the Opsteens, and that ATB was negligent for failing to have done so.

Summary judgment was granted in favour of ATB on the ground that the claim in negligence was a "separate action". The lands were sold in the foreclosure proceedings and the proceeds paid the debt owing to ATB. The Opsteens were permitted to proceed with their counterclaim in a separate action.

On June 9, 2011, a case management Judge ruled that the Opsteens' counterclaim was not sufficiently broad to include a claim in contract and that the only issues were whether ATB was negligent in performing its management and advisory duties, including the approval of the Opsteens' financial packages, and the amount of damages, if ATB was negligent.

The Opsteens then applied to amend their Counterclaim. Their proposed amendments were as follows:

- "7. The Plaintiff breached its implied and express obligations including its express promise to provide the Defendants with operating funds or alternatively not unreasonably withdrawing such an operating loan, and its agreement to provide competitive farm financing and expert agriculture advice to the Defendants for a proposed farrow to finish hog operation.

...

- 14. As a result of the Defendant By Counterclaim's breach of its obligations to provide financing for a farrow to finish operation, and its negligent advice and conduct the Plaintiffs by Counterclaim suffered losses of business opportunity, loss of equity in their farm and suffered increased expenses and costs in maintaining their hog operation."

The case management Justice dismissed this application to amend on the grounds that because the Chambers Judge had enforced the financing contract between the parties by granting an Order for Foreclosure, this decision amounted to an adjudication of the contractual issues between the parties which determined all contractual issues. The case management Judge also held that the proposed amendments were barred by the Limitations Act.

Decision: The Alberta Court of Appeal (Picard, Piperny and O'Brien, J.J.A.) dismissed the appeal with respect to the proposed amendments [at para. 23], but allowed an amendment to increase the amount of the damage claim in the negligence action.

The Court did not address the limitations issue [at para. 14] as it was not necessary to do so, and because it agreed with the decision of the case management Judge that it sought to raise issues which are res judicata. The Court observed, at para. 16 that the contractual issues had already been resolved, stating:

"[16] The proposed amendments seek to place in issue whether ATB breached oral promises made during the course of negotiating the financing agreements which are inconsistent with its subsequent demand for repayment of the loans and enforcement of the mortgage security. The summary judgment granted by the chambers judge determined that the Opsteens were in default of their obligations, that demand had properly been made, and that ATB was entitled to enforce its security."

The Court relied on its earlier decision in 420093 B.C. Ltd. v. Bank of Montreal, [\[1995\] A.J. No. 862](#), 1995 CanLII 6246 (C.A.), [\[1996\] 1 WWR 561](#), 128 DLR (4th) 448, in which the Court held that a summary judgment against guarantors precluded the guarantors from subsequently raising claims based on allegations of breach of fiduciary duty and fraudulent misrepresentation.

Although the 2003 Order which granted ATB summary judgment also expressly permitted the continuation of the Counterclaim, the Order did not expressly preserve the Opsteens right to advance a claim based on contract [at para. 19].

---

### **\*\* CREDITS \*\***

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



For more information about the LexisNexis® Quicklaw® service, call 1-800-387-0899 or email [service@lexisnexis.ca](mailto:service@lexisnexis.ca).

For more information about LexisNexis products or services, visit [www.lexisnexis.ca](http://www.lexisnexis.ca).

Design and compilation © 2012 LexisNexis Canada Inc. All rights reserved. Unless otherwise stated, copyright in the content rests with the author(s). LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Quicklaw is a registered trademark and NetLetter is a trademark of LexisNexis Canada Inc. Other products or services may be trademarks, registered trademarks or service marks of their respective companies. Use of this NetLetter is subject to the LexisNexis Canada Inc. Terms and Conditions of Data File Usage.