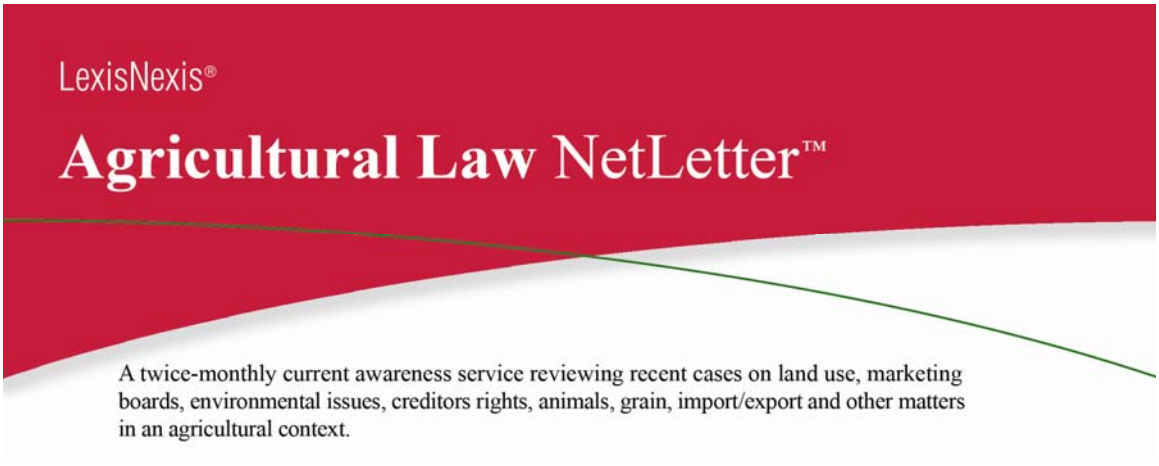

Thursday, December 2, 2010 - Issue 215

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

Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

* The Saskatchewan Court of Appeal has granted judgment for a farm debt against a farm wife, on the basis that the wife and her husband were partners in the farming operation. The debt was incurred in the husband's personal name. However, the husband and wife jointly owned their farm land and carried on their business through joint bank accounts. Although there was no written partnership agreement, the Court placed significant weight on the fact that the husband and wife had, for many years, filed income tax returns, and had made claims to CAIS and NISA, on the basis that their income and losses were split 50/50 and that these returns and claims stated that they were partners. The case contains a good review of the legal principles which apply in determining whether farming spouses who do not enter into formal agreements or file partnership declarations are nevertheless partners because they are carrying on a business in common, with a view to a profit. (The Prince Albert Co-opertive Assn. v. Rybka, CALN/2010-033, [2010] S.J. No. 682, Saskatchewan Court of Appeal)

**** NEW CASE LAW ****

The Prince Albert Co-opertive Assn. v. Rybka; CALN/2010-033, Full text: [2010] S.J. No. 682; 2010 SKCA 144, Saskatchewan Court of Appeal, J.G. Lane, G.A. Smith and R.K. Ottenbreit JJ.A., November 16, 2010.

Partnerships -- Factors in Determining Whether or not a Partnership Exists.

Facts: The Plaintiff, The Prince Albert Co-operative Association Limited (the "Co-op") obtained judgment for the sum of $53,088.75 against Paul Rybka ("Paul") for a debt owing as a result of goods supplied by the Co-op to Paul's farming operation during the period January 2003 to July of 2005.

During an Examination in Aid of Execution of Paul, the Co-op obtained information which lead it to believe that Paul was farming as a partner with his wife, Tina Rybka ("Tina").

The Co-op sued Tina on the basis that she was a partner and was thus responsible for the debt.

The trial Judge concluded that Tina was not a partner and dismissed the Co-op's claim. The Co-op appealed this decision to the Saskatchewan Court of Appeal.

The Rybkas owned 3 or 4 acres of land as joint tenants. They had been married for 26 years. Their bank accounts were joint quarters. Tina did the farm books and had signing authority on all accounts. She paid the bills and was aware of the indebtedness to the Co-op. Tina's income tax returns for the years 1998 to 2005 were prepared on the basis that she had a 50% interest in the farming operation as a partner with Paul. The returns showed gross income and losses from the farming operation, claims for farm capital cost allowance and farm program income benefits such as NISA and CAIS to be split basis. The tax returns indicated she had farmed for many years.

Tina's evidence was that the information was included in her tax returns without her knowledge and that there never was a partnership; after 2005 tax returns were prepared differently; that there was never any discussion or mention of a partnership relationship; that Paul was the owner of all of the farm machinery; that Paul leased the farm lands and Tina was never a party to the leases; and that the permit books with respect to grain were all in Paul's name.

The trial Judge concluded that there was no partnership because all leases and contracts, including the dealings with the Co-op, were in Paul's name; there was never a business name registered for the partnership; Tina's evidence that there was no partnership; the income tax returns were based on tax advice which was inappropriate; owning joint farm land itself did not create a partnership; Tina's receipt of a share of profits was not prima facie evidence of a partnership; there was no written partnership agreement; and all profits and losses respecting the farm operation were solely Paul's.

Decision: Ottenbreit, JA (Smith and Lane JJ.A. concurring) allowed the appeal and granted the Co-op judgment against Tina for the amount claimed including costs [at para. 37].

Ottenbreit, JA concluded [at para. 17] that the trial Judge erred in not clearly stating the legal indicia of a partnership and in relying only on s. 4 of the Partnership Act, R.S.S. 1978, c. P-3 (the "Act"). Ottenbreit, JA summarized indicia and the elements of a partnership as follows, at para. 18 to 20:

> [18] In Backman v. Canada, 2001 SCC 10, [2001] 1 S.C.R. 367, the

Supreme Court established that, although the legal definition of "partnership" is derived from common law and equity, it has now been codified in various provincial statutes. The trial judge failed to note s. 3(1) of the Act which reads as follows:

> 3(1) Partnership is the relation that subsists between persons carrying on a business in common with a view of profit.

[19] A partnership must therefore have three "essential elements":

> (a) a business;
>
> (b) carried on in common; and
>
> (c) with a view of profit.

These are the touchstones with which to evaluate the evidence.

[20] The trial judge recognized that s. 4 of the Act contains rules that are to be used as guides in determining whether the essential elements of a partnership exist, but s. 4 does not in itself contain the test of the existence of a partnership. The relevant portions of s. 4 read as follows:

> 4 In determining whether a partnership does or does not exist, regard shall be had to the following rules:
>
> 1 Joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;
>
> 2 The sharing of gross returns does not of itself create a partnership, whether the persons sharing the returns have or have not a joint or common interest in the property from which or from the use of which the returns are derived;
>
> 3 The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business.

The trial judge failed to identify s. 3 of the Act as the starting point for his analysis and never articulated the three essential elements of a partnership

> against which the evidence must be assessed. In this he erred.

After concluding that the farming operation was a "business", Ottenbreit, JA considered the following issues:

1. Was the Farming Operation Carried on in Common?

Ottenbreit, JA summarized the law as to whether or not persons are carrying on business in common as follows [at para. 23 to 25]:

> [23] The words "in common" mean that the persons who are alleged to be partners are carrying on the business together, based on some kind of agreement. The agreement may be written, oral or implied: see J. Anthony VanDuzer, The Law of Partnerships and Corporations, 3rd ed. (Toronto: Irwin Law, 2009) at p. 36.
>
> [24] Whether an agreement exists is an objective question, and as a result, persons may be partners without their knowledge or even contrary to their express intention if the objective circumstances fit within a partnership relationship. Whether a partnership exists will depend on the behaviour of the alleged partners evidencing some agreement. In Robert Porter & Sons Limited v. Armstrong, [1926] S.C.R. 328, the Supreme Court of Canada at p. 329 held as follows:
>
> > Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing. It is not sufficient there should be community of interest; there must be contract.
>
> [25] In Backman, supra, the Supreme Court enunciated a long-standing principle:
>
> > [25] As adopted in Continental Bank, supra, at para. 23, and stated in Lindley & Banks on Partnership, supra, at p. 73: "in determining the existence of a partnership . regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case". In other words, to ascertain the existence of a partnership the courts must inquire into whether the objective, documentary evidence and the surrounding facts, including what the parties actually did, are consistent with a subjective intention to carry on business in common with a view to profit.

Ottenbreit, JA concluded [at para. 26] that the fact there was no partnership agreement was not conclusive, and that the income tax returns and the statements of farm income which were attached to them, which clearly showed that gross income, profits and losses

had been split 50/50 since 1978 is "cogent evidence the business was being operated in common" [at para. 28].

The fact Tina was represented to CAIS that she was farming in partnership with Paul was also evidence of a partnership. The fact that Paul made all the management decisions did not mean they were not in partnership [at para. 30] . "A person need not have any control over management to be found a partner: Volzke Construction Ltd. v. Westlock Foods Ltd., [1986] 4 W.W.R. 668 (Alta. C.A.)."

The fact that the land was jointly owned; that the accounts were jointly held and that Tina had joint signing authority and paid the farm bills also pointed to a partnership. Evidence that Paul owned all farm machinery, leased the farm lands and held the permit books in his own name had to be assessed with the other evidence, on balance, did not detract from the fact that the business being carried on in common [at para. 31 and 32].

2. Was the Business Being Carried on with a View of Profit?

Ottenbreit, JA observed that the possibility of profit was the reason the parties structured their tax returns, and their relationship as a partnership on the advice of their accountant. Ottenbreit, JA stated [at para. 33]:

> .a partnership need only have a view of profit. There is no need to actually make a profit: Spire Freezers Ltd. v. Canada, 2001 SCC 11, [2001] 1 S.C.R. 391 at para. 26. The argument that there was no partnership because the farm was, for the years 2003 to 2005, ultimately unprofitable is therefore not relevant to the determination of the issue of whether it was originally structured with a view to profit.

3. What was the Effect of s. 7 of the Partnership Act:

Ottenbreit, JA rejected Tina's argument that s. 7 of the Act was a complete defence. Section 7 of the Act provides:

> 7 Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Ottenbreit, JA indicated that the ordinary meaning of this section as applied to this case was that in order for the section to apply, Tina would have had to establish that Paul had no authority to act for the farm partnership, and the Co-op must have either known he didn't have this authority, or didn't believe him to be a partner. There was nothing in the evidence to suggest that Paul did not have authority [at para. 36].

**** CREDITS ****

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