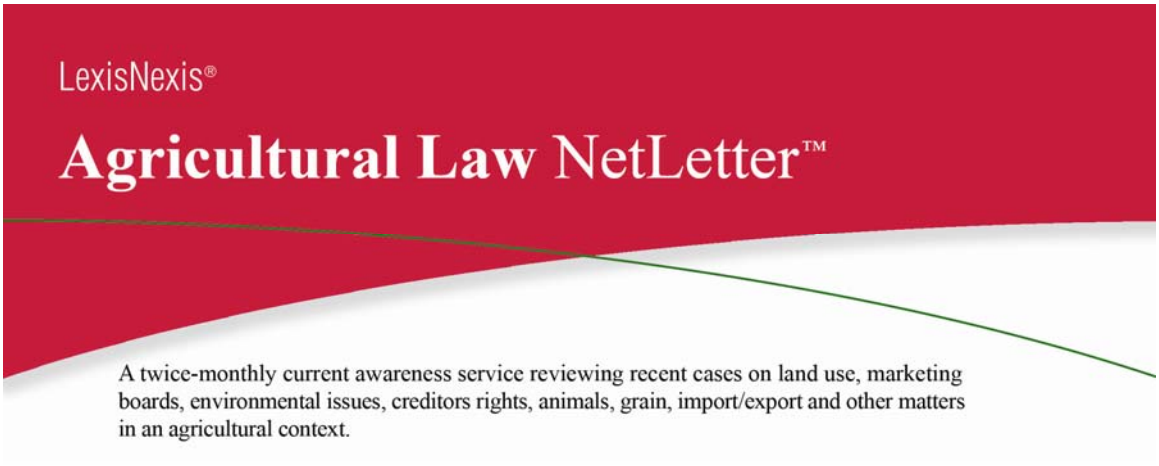

Thursday, February 10, 2011 - Issue 219

Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

* The Federal Court of Appeal has dismissed an application for judicial review by the Canadian Food Inspection Agency from the decision of the Canada Agricultural Review Tribunal. The Tribunal had dismissed CFIA's charge that a lamb producer had violated the Health of Animals Regulations by transporting lambs which did not bear "an approved tag". The Court held that the Tribunal had applied the correct standard of proof with respect to the alleged violation, being proof on a balance of probabilities; that the Court owed a deferential standard of view of reasonableness to the Tribunal's decision, and that there was evidence to support the Tribunal's decision. The Tribunal had concluded that the CFIA had failed to present sufficient evidence to establish that untagged lambs were owned by the producer and that the producer had failed to tag its lambs. (Attorney General of Canada v. Rosemont Livestock, CALN/2011-003, [2011] F.C.J. No. 101, Federal Court of Appeal)

* Dairy farmers who had been granted leave to appeal to the Supreme Court of Canada from a decision of the Ontario Court of Appeal had discontinued their appeal. The Ontario Court of Appeal had set aside the trial Judgment of $1,732,000.00 against the Ontario Ministry of Transport as a result of toxins in the water consumed by the farmers' dairy herd. The Court of Appeal had disagreed that the Ministry had breached its standard of care arising from the presence of contaminants in buried asphalt and other road materials. The Court of Appeal had held that even though the Ontario Government might have been negligent in its subsequent investigation, the Government had no duty to either investigate or remediate toxicity to farm animals - its only statutory duty was to ensure well water was fit for human consumption. (Berensden v. Ontario, CALN/2011-004, [2009] O.J. No. 5101; [2010] S.C.C.A. No. 24, Ontario Court of Appeal; On Appeal from the Supreme Court of Canada)

* A Justice of the Saskatchewan Court of Queen's Bench has dismissed a claim for damages arising from an alleged resulting trust and unjust enrichment arising from a "bitter family dispute over the ownership of farm land". The decision primarily turns on facts and credibility. The Court held that family members who claimed 13 quarter sections of land had failed to establish a resulting trust because they had failed to establish that they made any contribution to the purchase of the land. The Court dismissed the constructive trust claim - while the plaintiffs had made significant contributions to the maintenance of the lands, they were more than amply rewarded by gifts of other land and money. (MacPherson v. MacPherson, CALN/2011-005, [2011] S.J. No. 57, Saskatchewan Court of Queen's Bench)

**** NEW CASE LAW ****

Attorney General of Canada v. Rosemont Livestock; CALN/ 2011-003, Full text: [2011] F.C.J. No. 101; 2011 FCA 25, Federal Court of Appeal, Blais, Evans, Stratas, JJ.A., January 24, 2011.

Canadian Food Inspection Agency -- Requirement to Tag Transported Animals -- Standard of Proof Administrative Law -- Canada Agricultural Review Tribunal -- Standard of Review.

The Attorney General of Canada (Canadian Food Inspection Agency) (the "CFIA") applied for judicial review of a January 25, 2010 decision made by the Canada Agricultural Review Tribunal (the "Tribunal").

The Tribunal is established pursuant to the provisions of s. 4.1 of the Canada Agricultural Products Act, 1985, c. 20 (4th Supp.).

The Tribunal had concluded that the CFIA had not proven on the balance of probabilities that Rosemont Livestock ("Rosemont") had violated s. 177(1) of the Health of Animal Regulations, SOR/91-525. Subsection 177(1) of the Regulations prohibits the "[transportation], or [causing] the transportation of, an animal.that does not bear an approved tag."

In order to establish a violation under s. 177(1), the CFIA had to prove "on the balance of probabilities" that the lambs found to be untagged belonged to Rosemont and that Rosemont had failed to tag the lambs.

The Tribunal concluded that the CFIA had not proven that the two essential matters on a balance of probabilities - that the untagged lambs had been shipped by Rosemont and that Rosemont had failed to tag any of its lambs.

Decision: Stratas, J.A., for the Court, dismissed the application [at para. 13].

Stratas, J.A. reviewed the Tribunal's findings of fact [at para. 6 to 9] and concluded [at para. 10] that the Tribunal was entitled to make these findings and that:

> ".Given the deferential standard of review of reasonableness that applies in this case, there is no basis upon which we can set aside these factual findings. Therefore, the Tribunal's conclusion that there was no violation must stand."

Stratas, J.A. also concluded that the Tribunal did apply the correct standard of proof, being a balance of probabilities, stating [at para. 12]:

> ".At the outset of its analysis (at paragraph 46), it reminded itself of that standard. It observed correctly that it was bound by section 19 of the Agriculture and Agri-Food Administrative Monetary Penalties Act, S.C. 1995, c. 40 to apply that standard and quoted this Court's decision in Doyon v. Attorney General of Canada, 2009 FCA 152 to the same effect.In referring to the lack of direct evidence from the Agency, the Tribunal did not impose a higher standard of proof upon the Agency. Rather, we are satisfied that the Tribunal weighed the evidence before it and, taking it in its totality, found that it did not establish a violation on the balance of probabilities."

Berensden v. Ontario; CALN/2011-004, Full text: [2009] O.J. No. 5101; [2010] S.C.C.A. No. 24; 2009 ONCA 845, Ontario Court of Appeal; On Appeal from the Supreme Court of, Canada J.T. Laskin, R.G. Juriansz and G.J. Epstein JJ.A., January 24, 2011.

Environmental Law -- Water Source Contamination from Toxic Waste -- Negligent Environmental Investigation -- Standards for Consumption by Human and Animals.

Negligence -- Environmental Contamination -- Historical Standard of Care.

On December 1, 2009, the Ontario Court of Appeal has set aside a judgment awarded to dairy farmers (the "Berensdens") who sustained damages of $1,732,000 as a result of toxins in the water provided to their dairy herd. The toxins resulted in health problems, illness, deaths and lack of milk production. The problem was eventually traced to highway waste containing asphalt and other materials which had been buried in the 1960s near the farm well by the Ontario Ministry of Transport. The Court of Appeal disagreed with the trial judge's finding that the Ministry had breached its standard of care, because the Berensdens failed to show that it was reasonably foreseeable in the 1960s that burying the waste might cause the well to become contaminated. It was inappropriate to use current knowledge to determine a duty of care in the past. The Court also held that even though the Ontario Government might have been negligent in an investigation it conducted in the 1980s and 1990s by failing to determine that the water was toxic to the dairy herd, it was not liable as it had no duty at the time to investigate or remediate toxicity which may harm farm animals. Its only statutory duty was to ensure well water was fit for human consumption. Berendsen v. Ontario 2009 ONCA 845.

On May 20, 2010, the Supreme Court of Canada granted the Berensdens leave to appeal from the decision of the Ontario Court of Appeal.

On December 8, 2010, the Supreme Court granted Friends of the Earth Canada leave to intervene in the appeal.

Decision: On January 24, 2010, the Berensdens filed a Notice of Discontinuance with respect to the appeal.

MacPherson v. MacPherson; CALN/2011-005, Full text: [2011] S.J. No. 57; 2011 SKQB 40, Saskatchewan Court of Queen's Bench, E.C. Malone J., January 24, 2011.

Real Property -- Unjust Enrichment and Resulting Trust -- Farm Land.

Kenneth MacPherson, his wife Leanor MacPherson, and their son Chad MacPherson (collectively "Ken") sued Ken MacPherson's mother, Doris MacPherson ("Doris"), and Ken's younger brother, ("Keith") for damages in the sum of $100,000.00 arising from alleged constructive or resulting trust claims with respect to family farm land.

Ken claimed ownership of 5 quarter sections registered in the name of Doris and Doris' late husband (Ken's father), Jim, as joint tenants, and 8 quarter sections registered in the name of Ken and Keith, as tenants in common.

Ken alleged he returned to the family farm in 1980 as a result of promises made by his later father, Jim; that Ken had done most of the work with respect to both the land owned by Doris and Jim and the land owned in common by Keith and Ken.

Doris and Keith counterclaimed for damages for trespass and conversion. Credibility was a primary issue in what the trial Judge described as a "bitter family dispute over the ownership of farm land".

Decision: Malone, J. dismissed the Plaintiffs' claims for resulting trust, enjust enrichment and damages and granted Doris and Keith judgment on their counterclaim for trespass [at para. 76, 79 and 105].

Malone, J. observed that the Plaintiffs had no records whatsoever to support their claim [at para. 49], Malone, J. found that Doris and Keith were credible witnesses and accepted Doris' evidence wherever it conflicted with the Plaintiffs' evidence [at para. 32 and 34].

Malone, J. found there was no evidence to establish that Jim had offered ownership of any lands to Ken as a result of Ken returning to the family farm to work in 1980. Malone, J. adopted the statement of law set forth by Goldenberg, J. in Foga v. Foga 1996 CanLII 6783 (SK Q.B.), (1996), 143 Sask. R. 221, [1996] 7 W.W.R. 721 (Q.B.) with respect to unjust enrichment and resulting trust.

Malone, J. concluded [at para. 72 to 79]:

> "[72] With respect to the claim against Doris in both her personal capacity and as executrix of Jim's estate, I am not satisfied that the evidence of the plaintiffs entitles them to the relief sought on the basis of either a resulting or constructive trust.

[73] Jim and Doris acquired title to Doris' land without any contribution whatsoever from the plaintiffs and accordingly cannot be considered as holding title as trustees for them.

[74] Furthermore, the evidence does not support the plaintiffs' claim that they are entitled to Doris' lands under the constructive trust concept. While the plaintiffs made significant contributions to the maintenance of Doris' lands they were more than amply rewarded for their contributions by the gifts of land and money that I have referred to earlier.

[75] To suggest therefore that in these circumstances the plaintiffs suffered a deprivation and that as a result Jim and Doris were unjustly enriched is without substance.

[76] The claim against Doris in both her personal capacity and as executrix is therefore dismissed.

[77] Furthermore there is no evidence whatsoever that keith held title to his half of the joint lands as a trustee for Ken. Ken must have consented to this arrangement from the outset and cannot now claim that it is somehow unfair or inequitable.

[78] Finally, there is no evidence whatsoever to support a claim based on unjust enrichment with a corresponding deprivation when Ken, buy his own decision, in 1999, refused to work on cetain of the jointly held quarter sections.

[79] The claim against Keith is therefore dismissed.

With respect to the trespass claim, Malone, J. concluded [at para. 92] that the plaintiffs had no legal right whatsoever to use Doris' land and Keith's land, and that the plaintiffs' actions amounted to an "unlawful trespass" for which Doris and Keith were entitled to damages. Damages were awarded in the amount that Doris had paid for taxes and utilities for her home quarter ($9,714.26), and for Keith's share of gravel revenue which Ken had retained from the co-owned land ($6,280.90).

** CREDITS **

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