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Agricultural Law NetLetter™

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.

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**** HIGHLIGHTS ****

* The Saskatchewan Court of Appeal has held that land held by a developer is not "farm land" within the meaning of Part II of the Saskatchewan Farm Security Act, even if the developer leases the land to a farmer for agricultural purposes, and that developers are not entitled to the protection of the Act if they do so. The Act requires mandatory mediation prior to the commencement of foreclosure proceedings on mortgages of farm land, and provides that foreclosure proceedings commenced without compliance with the Act are a nullity. The Act does not specifically state who is, and who is not a "farmer" for the purpose of this protection, however, the Act does indicate that the intention of the Act is to protect farmers against loss of their farm land. The Court held that the intent of the Act was not to protect developers - only persons involved in the production of agricultural products. (F.M.I. Developments Ltd. v. 10269917 Alberta Ltd., CALN/2011-009, [2011] S.J. No. 164, Saskatchewan Court of Appeal)

* The Federal Court of Appeal has held that grain producers do have the standing to challenge ministerial directives concerning the manner in which directors are elected to the Canadian Wheat Board. However, the Court also held that the Minister of Agriculture did have the authority to issue a directive which denied permit book holders who had not delivered grain for 2 years the right to automatically receive ballots. (Friends of the Canadian Wheat Board v. Canada (Attorney General), CALN/2011-010, [2011] F.C.J. No 297, Federal Court of Appeal)

* A Justice of the Ontario Supreme Court of Justice has held that executors who were responsible for a deceased farmer's ginseng crop had a duty to act reasonably but not perfectly. An objection to the trustees' accounts on the grounds that they had mis-managed a ginseng crop by digging it before it was ready to harvest was dismissed. The deceased had, in his will,

specifically provided that his trustees were not to be held liable for any loss arising out of the bona fide exercise of their powers. (Krentz Estate v. Krentz, CALN/2011-011, [2011] O.J. No. 1124, Ontario Superior Court of Justice)

**** NEW CASE LAW ****

F.M.I. Developments Ltd. v. 10269917 Alberta Ltd.; CALN/ 2011-009, Full text: [2011] S.J. No. 164; 2011 SKCA 31, Saskatchewan Court of Appeal, G.R. Jackson, R.G. Richards and R.K. Ottenbreit JJ.A., March 14, 2011.

Creditor's Rights -- Saskatchewan Farm Security Act -- Definition of "Farmer" Mortgages -- Saskatchewan Farm Security Act -- Definition of "Farmer".

F.M.I. Developments Ltd. ("FMI") commenced foreclosure proceedings against 10269917 Alberta Ltd. ("Alberta Ltd.") on a $3.1 million mortgage with respect to a 154 acre parcel of land on the outskirts of Saskatoon, Saskatchewan.

FMI issued a Statement of Claim in October of 2009 seeking foreclosure, when Alberta Ltd. failed to meet its obligations under the mortgage. Alberta Ltd. was noted in default on March 12, 2010. FMI then applied for an Order Nisi for judicial sale.

Alberta Ltd. opposed the application on the grounds that FMI had not complied with the requirements of Part II of the Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1 (the "SFSA").

Part II of the SFSA provides for a mediation process followed by a report of the Farm Land Security Board with respect to proposed foreclosure proceedings relating to farm land.

Section 9 of the SFSA prohibits the commencement of foreclosure proceedings unless Section 11 of the Act is first complied with. Section 11 of the SFSA requires a Court Order permitting the commencement of foreclosure proceedings and expressly provides that commencing proceedings without an Order renders any action a nullity. Section 11 provides:

> "11(1) Where a mortgagee makes an application with respect to a mortgage on farm land, the court may, on any terms and conditions that it considers just and equitable:
>
> (a) order that clause 9(1)(d) or section 10 does not apply; or
>
> (b) make an order for the purposes of clause 9(1) (f).
>
> (2) Where an order is made pursuant to subsection (1), the mortgagee may commence or continue an action with respect to that mortgage.

> (3) Any action that is commenced without an order pursuant to this section is a nullity, and any order made with respect to an action or a proposed action without an order pursuant to this section is void."

Section 4 of the SFSA provides that the purpose of Part II is to "afford protection to farmers against the loss of their farm land".

Section 2(1)(f) of the SFSA defines "farm land" as land which is "used for the purposes of farming".

Section 2(1)(g) of the SFSA defines "farming" as follows:

> (g) "farming" includes livestock raising, poultry raising, dairying, tillage of the soil, bee- keeping, fur farming or any other activity undertaken to produce primary agricultural produce and animals;

Section 3(c) defines a "farmer" as a "mortgagor" and Section 2(1)(q) defines "mortgagor" as including a purchaser under agreement for sale of farm land.

The land in question was located outside of the City of Saskatoon and was zoned agricultural. Alberta Ltd. is an Edmonton-based development company. An officer of Alberta Ltd. swore an Affidavit indicating the land was rented to a farmer who grew hay on the land as forage for his cattle.

The chambers Justice rejected Alberta Ltd.'s argument that the land was "farm land" within the meaning of Part II of the SFSA, relying on the 1986 decision of the Saskatchewan Court of Appeal in Christie v. Texas Industries Ltd., [1986] 1 W.W.R. 532 (Sask. C.A.), that arose from similar facts, but under previous legislation - the Farm Land Security Act, S.S. 1984-85-86, c. F-8.01 (the "FLSA"). In the Christie decision, Tallis, J.A., speaking for the Court, held that the FLSA was not intended to apply to developers who leased land to farmers. In Christie, Tallis, J.A. stated, at p. 543:

> "Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of the legislature. To divine that intention we traditionally look to the words of the statute and if they are clear, we need go no farther. The legislature has expressed its purpose in s. 3 - to protect farms against loss of their farm land. Applying this approach to the within appeal, we hold that the defendant is not a "farmer" within the intendment of the legislation. On the facts of this case the appellant was in truth a developer and accordingly not within the purview of the legislation. Its lease of the land for farming purposes, after the notice delivered to the plaintiff under para. 10 of the agreement dated 12th October 1979, was merely incidental to its main business of developing. In order to bring the transaction within the Act there must be a realistic involvement in farming. In our opinion the legislature never intended that a developer, by leasing a parcel of land in the circumstances of this case, could gain the protection of the Farm Land Security Act."

Decision: Richards, J.A. (Jackson and Ottenbreit, J.J.A. concurring), dismissed the appeal [at para. 41].

Richards, J.A. agreed with the conclusion of the chambers Justice that no material changes had been made when the provisions of the FLSA were "rolled into" Part II of the SFSA [at para. 20].

Richards, J.A. also held that there were no significant differences between the facts in the Christie decision, and the facts in this case [at para. 22 to 28] observing [at para. 26] that Alberta Ltd. was a real estate developer, and had purchased the land for the purpose of creating a light industrial park. Alberta Ltd. allowed the renter to cut hay in 2009 and 2010 for the nominal amount of $750.00.

Richards, J.A. [at para. 29 to 40] also rejected Alberta Ltd.' s argument that nothing of significance should flow from the provisions of Section 4 of the Act which indicate the stated purpose of Part II is to "protect farmers against the loss of their farm land" because the Act defines both "farmers" and "farm land" and because a "farmer" need only be a mortgagor of "farm land" as these terms are defined in the SFSA.

Richards, J.A. referred, among other things, to the definition of "farming" in the SFSA which suggested that a "farmer" must be "someone engaged in farming. i.e. a producer of agricultural products" [at para. 38].

Richards, J.A.concluded that other sections in the Act referred to by Alberta Ltd. do not imply that it was a "farmer", for purposes of Section 4, refers to "any and all mortgagors" [at para. 40].

Friends of the Canadian Wheat Board v. Canada (Attorney General); CALN/2011-010, Full text: [2011] F.C.J. No 297; 2011 FCA 101, Federal Court of Appeal, Letourneau, J.A., Nadon and Sexton, JJ.A., March 16, 2011.

Grain -- Canadian Wheat Board -- Ministerial Directives Concerning the Election of Directors.

The Friends of the Canadian Wheat Board, and a number of grain producers (collectively the "Farmers") appealed to the Federal Court of Appeal from a decision of Russell, J. who dismissed their application for judicial review of the Government's directive concerning the election of directors in the Canadian Wheat Board. The directive was issued by the Minister of Agriculture and AgriFood in his capacity as Minister responsible for the Canadian Wheat Board (the "Minister" and the "Board").

Russell, J. held that the Farmers did not have standing to bring the application for judicial review; that the Minister had the lawful authority to issue the directive, and that the Minister did not act contrary to the Regulations Respecting the Election of Directors of the Canadian Wheat Board, SOR/ 98-414 (the "Regulations").

The Minister had directed the Board to ensure that permit book holders who had not delivered grain to the Board during the 2007/08 and the 2008/09 crop years could not

automatically be included on the voter's list. Permit holders who had not delivered grain would be required to establish that they were actual producers of grain before being eligible to vote.

In effect, the Minister's directive meant that permit book holders who had not made deliveries would be deprived of their right to automatically receive a voting package and a ballot.

Section 3.06(1) of the Regulations allowed the Governor in General in Council, on the recommendation of the Minister, to "make regulations respecting the election of directors".

Section 3.07 of the Regulations allowed the Board to take any measures that the Minister determined proper for the conduct, supervision and election of directors.

Section 6 of the Regulations provided that "every producer is entitled to be included in the voter's list in respect of the electoral district in which they produce grain".

Decision: Letourneau, J.A., (Nadon and Sexton, J.J.A. concurring), allowed the Farmers' appeal with respect to the issue of standing to bring the application, but dismissed the appeal on its merits [at para. 47].

With respect to the issue of standing, Letourneau, J.A. observed that one of the Farmers had not been included in the initial voter's list because he had not delivered grain to the Board in the relevant years, although he had been named in a permit book. The remaining Farmers were both named in permit books and had made deliveries. They were not directly affected by the directive.

Letourneau, J.A. referred to and relied upon the decision of the Federal Court of Appeal in Moresby Explorers Ltd. v. Canada (Attorney General), 2006 FCA 144 (CanLII), 2006 FCA 144 in which Pelletier, J.A. observed, at para. 17, that while "standing is a device used by courts to discourage litigation by officious inter-meddlers, it is not intended to be a pre-emptive determination that a litigant has no valid cause of action". "there is", he said, "a distinction to be drawn between one's entitlement to a remedy and one's right to raise a justiciable issue".

Letourneau, J.A. held that while the Farmers who did receive permit books were not directly affected by the decision, they did have a direct interest in ensuring that the election of members to the Board was conducted and held accordingly to law, stating at para. 30:

> "[30] .I think that all the appellants in the present instance who are producers have a direct interest in ensuring that the election of members of the CWB is conducted and held according to the law. Thus they have personal standing to challenge the vires of the minister's directive. I am comforted in this view by the fact that they are compelled to market their crop with the CWB and that the minister's directive has an effect on the composition of the initial voters list. A similar directive issued for the 2006 election resulted in the disenfranchisement of some 16,577 producers with

> the following effect. Of the producers who automatically received a ballot, 49.9% responded. With respect to the 16,577 producers who had to apply for ballots, only 1,618 ballots were cast, showing then a turnout of less than 10%: see appeal book, tab 7, at page 119, the affidavit of Robert Roehle. There is no doubt that the directive changed the dynamic of the decision."

Letourneau, J.A. concluded [at para. 33] that all of the Farmers, other than the "Friends of the Canadian Wheat Board" had standing to bring the application for judicial review.

With respect to the substantive merits of the appeal, Letourneau, J.A. referred to Sections 6, 7 and 8 of the Regulations and the definition of "producer" under the Act. Letourneau, J.A. agreed with the reasons of the trial judge, stating at para. 45 and 46:

> "[45] The minister wanted to make sure that only producers within the meaning of the Act would appear on the voters list, i.e. producers actually engaged in the production of grain (actual producer) and any person entitled, as landlord, vendor or mortgagee, to the grain grown by an actual producer to any share therein (emphasis added). In other words, as the directive shows, the minister wanted to ensure that only producers eligible to vote at the election would appear on the voters list.
>
> [46] As a result of the minister's directive, only those producers who had delivered grain to the CWB during the 2007-08 and 2008-09 crop years would automatically appear on the voters list. Proof of actual delivery by a permit holder is proof of actual production by that permit holder. Others would have to establish, according to the procedure set forth in the Regulations, that they are producers within the meaning of the Act in order to be on the voters list. The directive provided a means for facilitating the proof that a permit holder is a producer eligible to vote at the election. I agree with the judge that a "measure intended to ensure the integrity of the voters list is a measure that determines the proper conduct and supervision of an election of directors within the meaning of section 3.07 of the Regulations."

Krentz Estate v. Krentz; CALN/2011-011, Full text: [2011] O.J. No. 1124; 2011 ONSC 1653, Ontario Superior Court of Justice, J.R.H. Turnbull J., March 14, 2011.

Wills and Estates -- The Duty of Care of Executors and Trustees -- Farming Operations.

The trustees of the Estate of Roman Krentz applied to pass their accounts.

When the appliation was made, two of the deceased's four children filed Notices of Objection. The objectors, among other things, alleged that the Estate's trustees had mis-managed the Estate's ginseng farming operations. They criticized the trustees' decision to dig the 2/3 year crop of the Estate's ginseng, rather than leaving it in the ground for another year.

The objectors, both of whom were experienced ginseng farmers, testified that if the roots had been left to grow another year, the increased yield would have resulted in a greater profit being available for distribution among the beneficiaries. Detailed evidence was provided to the Court concerning growing and harvesting ginseng, which is a unique agricultural product.

The deceased's Will specifically gave the deceased's trustees the power to exercise all acts of ownership with respect to the property comprising his estate "without the consent or intervention of any beneficiary or judicial authority" and provided that the "Trustees are not to be responsible for loss arising out of the bona fide exercise of such powers".

Decision: Turnbull, J. dismissed the beneficiaries' objection on the grounds that the trustees had acted reasonably and prudently and in a bona fide exercise of their powers, and that by the terms of the Will, they were not liable for any loss arising out of bona fide exercise of their powers, stating at para. 34:

> [34] It is clear that Roman intended all decisions to be made by his Trustees. Their duty was to act reasonably and not perfectly. I find on the facts before me that the Trustees did act reasonably and prudently and in a bona fide exercise of their powers in deciding to dig the 2/3 crop. Hindsight is always 20/20 but that is not the test by which the actions of the Trustees should be assessed. Even if the decision to dig the 2/3 crop was a wrong one (which one will never know), in the end it was directed by Roman that it was their sole decision to make. By the very terms of his will, they are not to held liable for any loss (which has not been proven) arising out of their bona fide exercise of their powers as Trustees."

** CREDITS **

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