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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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Bi-weekly issues are added on Thursdays.

**\*\* HIGHLIGHTS \*\***

- \* A Justice of the Federal Court has allowed the appeal of a feedlot which took the position that an experienced feedlot worker who was paid an hourly wage to feed and care for cattle and maintain the feedlot's equipment, but who did so without supervision, spending as much time as required to get the job done, was an independent contractor, not an employee. Consequently, the feedlot was not required to pay Canada Pension Plan contributions, or make payments under the Employment Insurance Act. (*Southland Livestock Feeders Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [CALN/2011-014](#), [\[2011\] T.C.J. No. 158](#), Tax Court of Canada)
- \* A Justice of the Saskatchewan Court of Queen's Bench has held that the protection afforded to farmers from mortgage lender's solicitor and client costs under the Saskatchewan Farm Security Act can only be exercised by farmers. It cannot be exercised by the farmer's bankruptcy trustee, and cannot benefit other creditors of the farmer. A mortgage lender who foreclosed on farm lands was entitled to recover solicitor and client costs out of surplus sale proceeds in priority to the claim of the farmer's bankruptcy trustee. (*Advantage Credit Union v. Quibell*, [CALN/2011-015](#), [\[2011\] S.J. No. 224](#), Saskatchewan Court of Queen's Bench)

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

*Southland Livestock Feeders Ltd. v. Canada (Minister of National Revenue - M.N.R.)*; [CALN/2011-014](#), Full text: [\[2011\] T.C.J. No. 158](#); [2011 TCC 209](#), Tax Court of Canada, *Sheridan T.C.J.*, April 12, 2011.

Employment Law -- Employee or Independent Contractor -- Feedlot Workers -- Liability for Canada Pension Plan and Employment Insurance Act payments.

Southland Livestock Feeders Ltd. ("Southland") appealed to the Tax Court of Canada from the decision of the Minister of National Revenue (the "Minister") that in 2007 Walter Penner ("Penner") was an employee of Southland who was engaged in pensionable and insurable employment under paragraph 6(1)(a) of the Canada Pension Plan and paragraph 5(1)(a) of the Employment Insurance Act, respectively.

The issue was whether Penner was an employee or an independent contractor. Southland's owner testified that Penner was engaged to:

- (a) Feed cattle at Southland's custom feedlot;
- (b) Monitor each animal's development and adjust its nutrition to ensure the animal's health and profitability;
- (c) Maintain and repair Southland's equipment.

In order to perform these services, Penner used Southland's tractors and equipment. For repairs, he used his own tools, as well as Southland's tools.

Penner worked as many hours as was required to get the job done depending on the number of cattle on hand and the weather. Penner invoiced Southland according to the number of hours he worked at the rate of \$13.00 per hour. He worked without training or supervision and was hired based on his previous experience as a feedlot worker.

In addition to working for Southland, Penner worked at his own businesses which included raising of dogs and goats. He spent about a third of his time working for Southland.

No deductions were made from Penner's invoices for income tax, employment insurance or Canada Pension Plan premiums.

Decision: Sheridan, J. allowed Southland's appeal, and held that Penner was an independent contractor, not an employee [at para. 20].

Sheridan, J. commented on the test to be applied by the Court in determining whether a worker is an employee or an independent contractor at para. 10, stating:

[10] In determining whether a worker is an employee or an independent contractor, the Court must be guided by the four-fold test in 671122 Ontario Ltd. v. Sagaz Industries Canada Inc. [\[2001\] SCC 59](#), (CanLII), [\[2001\] 4 CTC 139](#) and may, in certain circumstances, take into account the intentions of the parties; Royal Winnipeg Ballet v. Minister of National Revenue, [2006 FCA 87](#) (CanLII), [2008] 1 C.T.C. 200. In the present matter, the evidence in respect of the Sagaz criteria is not particularly helpful in assessing Mr. Penner's status; of greater assistance is the evidence of the parties' intentions.

In considering the test in Sagaz, Sheridan, J. observed:

- Penner was not under Southland's "control". He effectively worked on his own without training or supervision during the hours he chose to complete the work.
- The evidence with respect to "tools" was neutral because Penner used both his equipment and Southland's equipment.
- Regarding the "chance of profit and risk of loss" Penner had some opportunity to maximize his earnings. The Court inferred that if Penner caused any economic loss, he "more than likely" would have had to make up for it.

Sheridan, J. concluded that it was necessary to give weight to the intention of the parties [at para. 15 and 16]. Sheridan, J. observed [at para. 17] the context in which their oral agreement was made, stating:

[17] Turning, then, to the context in which the oral agreement was made, it involved two cattlemen in southwest Saskatchewan's ranching country, both experienced and competent in the proper operation of a feedlot, each with other businesses on the go, in more or less equal positions of power to negotiate the rate and conditions for Mr. Penner's performance of certain services for Southland. If there was any inequity in bargaining power, it seems to me Southland was in the weaker position. In explaining one of the reasons why it would have been nonsensical for Mr. Penner to have provided his own tractor, wagon and grain augers, Mr. Cammer testified that it was difficult enough to find people willing to do feedlot work without imposing onerous (and redundant, since the very same equipment was already available at the feedlot) conditions on them. This suggests that had Mr. Penner wanted to, he could have negotiated for a position as an employee; whether Southland would have agreed to that is another matter.

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*Advantage Credit Union v. Quibell*; [CALN/2011-015](#), Full text: [\[2011\] S.J. No. 224; 2011 SKQB 144](#), Saskatchewan Court of Queen's Bench, D.L. Wilson J., April 7, 2011.

Creditor's Rights -- Saskatchewan Farm Security Act -- Restriction on Recovery of Solicitor and Client Costs.

Bankruptcy and Insolvency -- Saskatchewan Foreclosures -- Entitlement of Trustee to Farmer's Benefits under Saskatchewan Farm Security Act.

A Saskatchewan farmer, Ross Allan Quibell ("Quibell") applied for an Order directing that surplus sale proceeds realized following the judicial sale of three quarter sections of farm land in foreclosure proceedings brought by Advantage Credit Union (the "Credit Union") should be paid to him rather than his Trustee in Bankruptcy, Pinder Bueckert & Associates Inc. (the "Trustee").

The Credit Union argued that it should be entitled to the payment of the full amount of its costs from the surplus proceeds, and that it should not be restricted to its party and party

costs only by virtue of the provisions of the Saskatchewan Farm Security Act, [S.S. 1988-89, c. S-17.1](#) (the "Act").

The Trustee had not been discharged, and claimed the funds for unpaid unsecured creditors. The Trustee argued that the Credit Union should only be entitled to party and party costs, not the solicitor and client costs payable under its mortgage, relying on s. 33 of the Act, which provides as follows:

- 33(1) In this section, "fees or costs" includes extra-judicial fees, costs, charges, expenses, allowances or commissions for the time and service of an officer, inspector or employee of the mortgagee or of any other person appointed for the purpose:
  - (a) with respect to the collection of any moneys due and payable under the mortgage;
  - (b) by way of commission on or expenses of a collection described in clause (a); or
  - (c) of getting in the mortgagee's share of the crop grown on the land in question in any year.
- (2) Subject to subsection (4), a mortgagee shall not charge to the farmer or the mortgagee account any fees or costs.
- (3) Any provision in any mortgage or agreement whereby the farmer contracts, agrees or covenants:
  - (a) to pay any fees or costs; or
  - (b) to allow fees or costs to be added to the principal money secured by the mortgage;

is null and void and of no effect.

(4) Nothing in this section affects the right of a mortgagee:

- (a) to recover costs as between party and party and not on a solicitor client basis, in an action under the mortgage;
- (b) to recover the costs of distress allowed by The Distress Act;
- (c) where grain is taken under The Crop Payments Act without levying a distress, to recover the actual expenses reasonably incurred in transporting the grain to the nearest available

market;

- (d) to charge a collection fee of 5% on the amount collected where, under a crop lease or agreement, the farmer has failed to deliver to the mortgagee the mortgagee's share of the crop within 20 days after the time for its delivery.

Quibell filed an assignment in bankruptcy on January 4, 2008. At the time, the Trustee estimated the value of Quibell's three quarters of land at \$100,000.00, which was significantly less than the balance owing on the Credit Union's mortgage.

The Trustee did not register an interest in the lands under the Saskatchewan Land Titles Act.

On June 8, 2009, the Saskatchewan Court of Queen's Bench approved a judicial sale of the land for the sum of \$205,290.00, which resulted in a surplus of \$34,722.56 being paid into Court. Quibell was discharged before the Order was granted, and argued that the surplus should go to him because the Trustee had not registered an interest in the lands.

Decision: Wilson, J. held that the Trustee was entitled to the surplus proceeds [at para. 13], but that the full amount of the Credit Union's costs, on a solicitor and client basis, must be paid out of the surplus [at para. 30].

Wilson, J. held that Quibell's interest in the farm land vested in the Trustee when Quibell filed his assignment by virtue of the provisions of the Bankruptcy and Insolvency Act [at para. 11] and that there was no requirement that the Trustee register an interest in the land to maintain this interest under the Bankruptcy and Insolvency Act [at para. 11 to 13].

With respect to the Credit Union's claim for solicitor and client costs, Wilson, J. held that the intent of the Act in limiting mortgage lenders to party and party costs was to provide a statutory benefit in favour of farmers, stating at para. 24:

[24] Subsection 33(3) of the SFSA declares any provision in a mortgage whereby a farmer contracts to pay fees, null and void. Pursuant to ss. 33(4), a mortgagee such as Advantage is prohibited from recovering solicitor client costs from a farmer in actions under the mortgage. In my view, the operational effect of these two subsections is to create a statutory benefit in favour of a farmer. This is in keeping with the intention of the SFSA which has been described as "extraordinary debt moratorium legislation". (Vide: *Czerwonka v. Paslawski*, reflect, (1989), [77 Sask. R. 206](#) (Q.B.) [1989] S.J. No. 353 (QL)).

After referring to the decision of McLellan in *Czerwonka*, and the decision of the Saskatchewan Court of Appeal in *Mulatz v. Toronto-Dominion Bank* 1994 CANLII 4594 (SKCA) (1994) [111 D.L.R. \(4th\) 601](#), Wilson, J. concluded that the statutory protection from solicitor and client costs under s. 33 of the Act could only be exercised by farmers, not bankruptcy trustees or subordinate writ holders, stating, at para. 29:

[29] I have concluded that the statutory right granted the farm in ss. 3 and 4

of s. 33 of the SFSA, is a right that can only be exercised by the farmer. It did not pass to the Trustee and, thus, Advantage is able to make a claim for its actual costs of the foreclosure and eventual judicial sale of the farm lands. In my view, s. 33 of the SFSA protects farmers. It was not meant to preclude recovery of costs against subordinate writ holders.

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**\*\* CREDITS \*\***

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

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