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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 Ontario Court of Appeal has set aside a judgment awarded to dairy farmers 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 dairy farmer 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, CALN/2009-006, [2009] O.J. No. 5101, Ontario Court of Appeal)

* A Justice of the Saskatchewan Court of Queen's Bench dismissed the claim of an ethanol production facility which argued that a term in its own contract which set an excessively low amount for liquidated damages was unenforceable as a penalty. The Court observed that contracts for liquidated damages are regularly enforced where the loss caused by the breach proves to be greater than the amount fixed by the agreement. The reason that the liquidated amount was low in this case, was because the ethanol facility failed to follow the procedure set out in the contract in publishing its "spot price" during the period that the loss occurred. (Terra Grain Fuels Inc. v. Babich, CALN/2009-007, [2009] S.J. No. 722, Saskatchewan Court of

Queen's Bench)

**** NEW CASE LAW ****

Berendsen v. Ontario; CALN/2009-006, Full text: [2009] O.J. No. 5101; 2009 ONCA 845, Ontario Court of Appeal, J.I. Laskin, R.G. Juriansz and G.J. Epstein JJ.A., December 1, 2009.

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

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

Bernard Berendsen, Maria Berendsen, and their children sued her Majesty the queen in Right of Ontario for losses sustained by their dairy farm operations as a result of contamination of their water supply by toxic road fill which the previous land owner had allowed the Ontario Minister of Transport (the "MTO") to bury on the farm.

In the 1960s the MTO undertook roadwork at a highway intersection near the farm.

The previous owner of the farm gave the MTO permission to deposit a large amount of concrete and asphalt waste near the farm well. No information was given to the previous owner concerning what was in the waste. No release was signed or payment made to him.

The waste material was spread out and covered with a layer of gravel.

Bernard and Maria Berendsen (the "Berendsens") purchased the farm in 1981 and converted it into a dairy operation. Their total investment in the farm, cattle, and equipment was about $550,000.

Within a year after taking possession serious problems emerged. There were unusual numbers of sick and dead cows, as well as low milk production. The Berendsens noticed the water had an oily smell. By 1988 they had stopped using the water for drinking. By 1989, Mr. Berendsen started hauling water for his cattle.

In 1989, Mr. Berendsen drilled a new well away from the buried materials, however, herd health problems continued.

In 1980, two veterinarians started monitoring the water intake of the cattle. The veterinarians concluded that the health problems and lack of milk production resulted from under consumption of water. They believed the cattle were not drinking the water because it was unpalatable. Corrective measures to filter the water were attempted without success.

In 1992, an independent environmental consultant conducted tests on both the waste materials and the water. He concluded that there were a number of "organic hazardous contaminants" in both the buried asphalt and the water. The contaminants included significant levels of benzo(a)pyrene, and dioxins and PCBs.

The MTO and the Minister of Environment were provided with the results, but refused to take remedial action. The Ontario Government took the position that the amount of chemicals detected in the water did not exceed "Ontario Drinking Water Objectives for Human Consumption".

In 1994, the Berendsens moved to a different location, at which they eventually developed a successful dairy. The previous farm was abandoned, but had not been sold. The buried materials remain on the farm which was uninhabited and inoperable as a working farm.

A number of expert witnesses gave evidence at trial, including veterinarians with expertise in dairy herd health and production, veterinary pathologists, veterinary toxicologists, environmental toxicologists and hydrogeologists. The immediate cause of the health problems in the cattle was their unwillingness to drink enough of the contaminated water.

Seppi, J. of the Superior Court of Justice, whose reasons were reported at (2008), 34 C.E.L.R. (3d) 223 and (2008) 38 C.E.L.R. (3d) 135, and [2008] O.J. No. 179 and CALN/2008-005 held the Ontario Government negligent and liable for damages of $1,732,000 for health, hardship and related losses sustained by the Berendsens. She found the Government negligent for both its initial careless disposal of toxic materials in the 1960s, as well as its subsequent careless investigation and its failure to remedy the problem once it was brought to its attention in the 1980s and 1990s.

The Government of Ontario appealed on the following grounds:

> Causation: The Government challenged the trial judge's finding that it materially contributed to the unpalatability of the well water provided to the cattle.
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> Duty of Care: The Government argued that the trial judge erred in finding that it had reached a standard of care because there was no evidence a reasonable person in the 1960s would have foreseen the risk of a deposit of waste material 60 feet away would contaminate a water well and cause harm to animals, and that it had no statutory duty to remove the waste material or remedy the contaminated well water in the 1980s and 1990s.

Decision: Laskin, J.A., Juriansz and Epstein, J.J.A. concurring, allowed the appeal of the Ontario Government, set aside the decision of the trial judge, and dismissed the action [at para. 85 and 86].

Laskin, J.A. considered the following issues:

1. Did the Ontario Government owe the Berendsens a duty of care?

The Ontario Court of Appeal had previously granted summary judgment dismissing the Berendsens' claim on the ground there was no duty of care, however the Supreme Court

of Canada reversed this decision in Berendsen v. Ontario, [2001] 2 S.C.R. 849, stating at para. 24:

> "the disposal of waste asphalt on private land gives rise to a duty of care owed only to the landowner involved and possibly a few other individuals who could be impacted by the disposal."

This issue was not, therefore, in contention before the Court [para. 21 to 25].

The Government did not challenge the trial judge's finding that the Berendsens had sustained damages of approximately $1.7 million [para. 26].

2. Causation

Laskin, J.A. reviewed the evidence with respect to causation in detail at para. 28 to 57. Although Laskin J.A. was critical to a number of the trial judge's findings, (in particular on the issue of whether or not the chemicals made the well water unpalatable to the Berendsens' cows), he did not decide whether these concerns would warrant setting aside the factual finding of causation [at para. 55].

3. Was the standard of care breached with respect to the Government's contamination of the land in the 1960s?

Laskin, J.A. observed [at para. 59] that:

> "To succeed in showing a breach of the standard of care in this case, the Berendsens had to show that, back in the 1960s when Ontario deposited asphalt and concrete waste on the dairy farm, harm to the cattle from this buried waste material was a reasonably foreseeable risk. It is not necessary that the precise way the harm occurred be foreseen; but the risk of harm in a general way from drinking or not drinking the water had to be reasonably foreseeable to impose liability."

Laskin, J.A. concluded that there was no evidence to support the trial judge's finding that the Ministry of Transport knew or ought to have known in the 1960s that dumping a large quantity of road bed waste near the site could potentially result in toxicity to the natural water supply to the farm [para. 60 to 62]. Neither common sense nor the statutory provisions in place at the time answered the question of whether this was reasonably foreseeable. No expert evidence was called by the Berendsens on this point, and Laskin, J.A. concluded that the cross-examination of the one Government witness who testified on this point did not establish reasonable foreseeability [at para. 64 to 66].

Laskin, J.A. also concluded that there was evidence to establish that this type of loss was not foreseeable in the 1960s, including the fact that the disposal of waste material was not regulated and was reasonably common at the time; no guidelines for the disposal of toxic waste existed in the 1960s; and that none of the witnesses could point to any studies or evidence which supported the proposition that it was understood, in the 1960s, that toxic

materials could migrate or contaminate water or make it unfit for cattle [at para. 67]. He concluded at para. 72:

> In the present case, I am not persuaded there is any evidence that the harm occurring to the Berendsens was reasonably foreseeable when Ontario deposited waste material on the dairy farm. Absent evidence, the trial judge's finding that Ontario breached the standard of care was an error of law. Since Ontario did not breach the duty it owed to the Berendsens, the Berendsens' negligence action must fail. Although this result may seem harsh in the light of what we now know about the environment, it is inappropriate to use our current knowledge to measure conduct occurring more than 30 years ago.

4. Did the Ontario Government breach its duty to investigate well water, and to remove the waste and remediate the contaminated well water?

Laskin, J.A. agreed that having made the policy decision to investigate whether the Berendsens' well water was contaminated in the 1980s, the Ontario Government owed a duty to carry out the investigation properly [at para. 73] relying on Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2.

The Ontario Government did not challenge the trial judge's finding that its investigation was negligent, however it argued that nothing turned on the finding because it had no duty to remove waste material or remedy the well water. Laskin, J.A. agreed [at para. 75]. Laskin, J.A. observed [at para. 78] the investigation was conducted for the specific and limited purpose of determining whether it met the applicable water standards for human consumption -- the Ontario Drinking Water Objectives. Testing showed that none of the chemicals in the water exceeded this standard. There were no standards at the time for water consumed by animals. Even if the investigation was negligent, there was no duty at the time to remove contaminants in excess of the existing standards for human consumption. He stated, at para. 79:

> After in concluded that the Berendsens' well water met the Objectives it was not required to spend more public money to go beyond the enforcement of its own standards. Therefore, Ontario cannot be held liable in damages for failing to remove the waste material or remedy the contaminated well water: see Kamloops.

Terra Grain Fuels Inc. v. Babich; CALN/2009-007, Full text: [2009] S.J. No. 722; 2009 SKQB 465, Saskatchewan Court of Queen's Bench, Ball J., December 2, 2009.

Contracts -- Future Delivery -- Liquidated Damage Clauses.

The Plaintiff, Terra Grain Fuels Inc. ("Terra") claimed damages for breach of contract against the Defendant, Byron Babich ("Babich") for failure to deliver wheat to Terra's ethanol production facility in accordance with the terms of a delivery contract.

The contract required Babich to deliver 16,000 bushels of wheat to Terra in the 2007 and 2008 crop years at a price of $3.67 per bushel.

When the contract was entered into, Terra offered farmers $3.54 per bushel for a one year term and $3.67 per bushel for a 2 year term even though the price was well above the 12 year average price. In the spring of 2007 deliveries exceeded Terra's requirements, Terra could not use all of the grain farmers had supplied. Some of it was thrown outside on the ground and spoiled. However, in the spring of 2007, the market price for wheat started to rise. In late 2007, prices exceeded $7.00 per bushel and in the first 8 calendar months of 2008, prices were between $9.00 and $10.00 per bushel.

On March 7, 2008, Babich sold his wheat to a local elevator for $7.27 per bushel, rather than delivering it to Terra. He received $31,520 more than what Terra would have paid him by doing so.

The primary issue at trial related to a clause in Terra's contract which entitled it to liquidated damages to 27.22 cents per bushel (the equivalent to $10.00 per tonne) or its posted "spot price" whichever was greater. The clause provided:

> OBLIGATIONS AND LIABILITY OF GROWER: The Grower is required to sell and deliver the Minimum Quantity to Terra Grain Fuels. If the Grower fails to deliver the Minimum Quantity as required due to any cause except an act of God resulting in loss or degradation of crop dedicated to this contract, the Grower shall pay to Terra Grain Fuels immediately upon default liquidated damages (which the parties agree is a genuine pre-estimate of the damages Terra Grain Fuels will suffer as a result of such default) equal to the greater of $10.00 per tonne or the amount by which Terra Grain Fuels' posted spot price on the failure date exceeds the contract price, for each tonne or portion thereof not delivered. If an act of God prevents delivery of the Minimum Quantity, the Grower must deliver all the production from the dedicated acres if it meets the specifications in this contract or if Terra Grain Fuels is prepared to take delivery and assess a discount as hereinbefore provided.

Terra had failed to post a spot price for wheat in 2008. Terra argued that the clause is its own contract was a penalty, not a genuine pre-estimate of damages, and was therefore unenforceable. It sought damages between $60,000 and $70,000 based on Canadian Wheat Board prices. Babich argued that damages should not exceed $8,710, being 27.22 cents per bushel for 16,000 bushels.

Decision: Ball, J. concluded that the contract was binding on Babich [para. 1] but that Terra was limited to damages of 27.22 cents per bushel, being $8,710.40 [at para. 26].

Ball, J. differentiated between agreements which create penalties and agreements which create a genuine pre-estimate of liquidated damages as follows, at para. 20 to 21:

> The test for differentiating between an agreement for "liquidated damages" and a "penalty" is whether the amount stipulated in the contract as payable

> is a genuine pre-estimate of damages. The provision will be void as a penalty where it requires the party in breach to pay amounts that are unconscionably high relative to the greatest loss that could arise from the breach. In those situations, payment will be considered unconscionable and extravagant if it produces a generally unreasonable result, either in amount or in the conditions under which payment is made, so that the court may find it unjust to allow such a sum to be recovered (Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company Limited, [1915] A.C. 79 at p. 87).
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> Where a contract expressly states that the parties have agreed upon a genuine pre-estimate of liquidated damages, courts have upheld the agreement unless it is clear that the stipulated damages constitute an unconscionable penalty (Elsley v. J.G. Collins Insurance Agencies Ltd. 1978 83 D.L.R. (3d) 1; [1978] 2 S.C.R. 916). The effect of the words "liquidated damages" is to limit liability for breach of contract if, taken in their context, they do amount to a genuine limitation.

Ball, J. observed there were a number of cases in which Courts had enforced clauses which provide for liquidated damages where the actual loss caused by the breach was greater than the amount fixed by the agreement [at para. 22] referring to Gisvold v. Hill (1963), 37 D.L.R. (2nd) 606 (B.C.S.C.); Maxwell v. Gibsons Drugs Ltd. et al (1979), 103 D.L.R. (3d) 433 (B.C.S.C.); Dorge v. Dumesnil et al (1973), 39 D.L.R. (3d) 750 (Man.Q.B.); Cellulose Acetate Silk Company Limited v. Widnes Foundry (1925), Limited, [1933] A.C. 20 (H.L.)).

Ball, J. observed that damages are to be calculated not by what a defendant in breach might gain, but what the plaintiff might lose as a result of the breach [at para. 24] and concluded that the clause in the contract was valid and binding. The only reason that Terra did not recover its full loss is because it failed to post a spot price. He held that failing to award the damages specified by the contract would amount to rewriting the contract [at para. 23 and 25].

** CREDITS **

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