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**** HIGHLIGHTS ****

* A Justice of the Alberta Court of Queen's Bench has held that the maxim ex turpi causa ("out of fraud, no action arises") could not be used to assist a spouse in an action against her ex-realtor husband who may have breached Alberta's Foreign Ownership of Land Regulations by holding farm land for foreign nationals in the name of his company, and by swearing a declaration that his company was the beneficial owner of the land and did not hold the land in trust. The decision considers Alberta's Foreign Ownership of Land Regulations, and the potential consequences of non-compliance with the Act. (Bartlett v. Bartlett, CALN/2012-006, [2012] A.J. No. 203, Alberta Court of Queen's Bench)

* A Justice of the Saskatchewan Court of Appeal has granted leave to appeal a recent Court of Queen's Bench decision which concluded that an exemption with respect to farming and ranching under the Saskatchewan Labour Standards Act only applies if the employee is doing "farm type" or "ranch type" work. The Justice noted that there was some inconsistency in Saskatchewan case law on this point, and that the issue was obviously important. (Rocking Hills Cattle Co. Ltd. v. Saskatchewan (Director of Labour Standards), CALN/2012-007, [2012] S.J. No. 87, Saskatchewan Court of Appeal)

* A Justice of the Court of Queen's Bench of Manitoba has refused to issue an injunction staying the operation and implementation of the Marketing Freedom for Grain Farmers Act which would, among other things, repeal the Canadian Wheat Board Act. The Court refused to follow the decision of Campbell, J. in Friends of the Canadian Wheat Board v. Canada (Minister of Agriculture), 2011 FC 1432 (CanLII) (CALN/2011-039), [2011] FCJ. No. 1678, 2011 FC 1432, in which Campbell, J. had held that the Minister responsible for the CWB breached his statutory duty under the Act by repealing the Act without consulting with producers and holding a producer vote. The Manitoba Court held that s. 47.1 of the Canadian Wheat Board Act could not be interpreted as restricting the form or manner in which Parliament could amend or repeal the Canadian Wheat Board Act, and that

the merits of the plaintiffs' case were so wanting that it had not been established that there was a serious issue to be tried. (Oberg v. Canada, CALN/2012-008, [2012] M.J. No. 53, Manitoba Court of Queen's Bench)

**** NEW CASE LAW ****

Bartlett v. Bartlett; CALN/2012-006, Full text: [2012] A.J. No. 203; 2012 ABQB 122, Alberta Court of Queen's Bench, R.A. Graesser J., February 24, 2012.

Acquisition of Farm Land by Non-Citizens and Foreign Controlled Corporations -- Ex Turpi Causa and Consequences of Statutory Breach.

The Plaintiff, Gail Leona Bartlett ("Gail") sued her husband, Vernon John Bartlett ("Vernon") for a divorce and for a division of matrimonial property.

One of the issues was whether farm property acquired by Vernon on behalf of Mr. and Mrs. Weiser (the "Weisers"), who were foreign nationals, should be included in the matrimonial property of the parties.

With the exception of this farm property, all matrimonial property had been divided.

The farm land in question was acquired by Vernon's company in 1998, when Vernon was an active realtor. The Weisers (German nationals) were interested in buying 427 acres which Vernon had shown them, and in relocating to western Canada. Mrs. Weiser made an offer to purchase the property for $365,000 which was accepted.

Vernon was aware there were difficulties with foreign nationals acquiring rural land in Alberta, however Mrs. Weiser assumed there would be ways of getting around any restrictions. Mrs. Weiser was introduced to a Drayton Valley lawyer who advised Mrs. Weiser that she and her husband could not acquire the property because of the Foreign Ownership of Land Regulations, Alta. Reg. 160/79 (the "Regulations") which was passed under the Immigration Act (Canada), and the Agricultural and Recreational Ownership of Land Act (Alberta).

Section 4 of the Regulations provides:

> (1) Subject to these Regulations, no ineligible person or foreign controlled corporation shall take or acquire, directly or indirectly, an interest in controlled land.
>
> (2) Nothing in subsection (1) affects the succession by any person to an interest in controlled land arising out of the death of a person.

"Ineligible person" is defined in s. 2 as:

> "ineligible person" means
>
> (a) an individual who is not a Canadian citizen or a permanent

resident

Section 7 of the Regulations deals with options to purchase as follows:

> An ineligible person or foreign controlled corporation may take or acquire an option to purchase in controlled land if
>
> (a) the option to purchase is exercisable within a period of one year from its effective date and not afterwards, and
>
> (b) the option to purchase contains a condition that it may be exercised only in favour of the ineligible person or foreign controlled corporation when the ineligible person or foreign controlled corporation becomes eligible to acquire the interest under these Regulations.

Section 20 deals with remedies:

> (1) If
>
> (a) an ineligible person, foreign controlled corporation, trustee, general partner of a foreign controlled limited partnership or any other person takes or acquires an interest in controlled land contrary to these Regulations, or
>
> (b) under these Regulations an ineligible person, foreign controlled corporation, trustee, general partner of a foreign controlled limited partnership or any other person is required to divest himself or itself of an interest in controlled land and does not do so within the time limited by these regulations, the Supreme Court of Alberta or the District Court of Alberta may, on the application of the Attorney General of Alberta by way of originating notice, order the judicial sale of the interest in controlled land so required to be divested.
>
> (2) The proceeds of a judicial sale made under subsection (1) shall be applied first to pay the costs of the judicial sale including the costs of the Attorney General in bringing the application for the judicial sale and secondly to pay to the ineligible person, foreign controlled corporation, trustee, general partner of a foreign controlled limited partnership or other person the amount paid by him or it for the interest in controlled land, and the amount, if any, remaining shall be pad into the General Revenue Fund of Alberta.

The Regulations require the purchaser of rural or recreational properties greater than 20 acres in size to swear a statutory declaration that the purchaser is a Canadian citizen or permanent resident of Canada and not a foreign controlled corporation, and that the purchaser is not holding the property in trust for anyone who is not a Canadian citizen or a permanent resident of Canada or which is a foreign controlled corporation.

Mrs. Weiser's lawyer advised that the transaction could be structured in a way to get around the Regulations if the named purchaser was a Canadian citizen or a Canadian controlled corporation. The Weisers would loan the purchase monies to the citizen or Canadian controlled corporation. The loan would not be secured by way of a registered mortgage, as a mortgage in favour of a non-Canadian or a foreign controlled corporation could not be registered because of the Regulations. The citizen or Canadian controlled corporation would then sign a promissory note in favour of the foreign national, grant an unregistered mortgage collateral to the promissory note, and enter into an option with the foreign national to sell the property to the foreign national at the original purchase price, conditional upon the foreign national obtaining an exemption under the Regulations, or becoming a permanent resident of Canada. The option would be valid so long as it was for a period of less than one year under s. 7 of the Regulations.

In the meantime, the property would be rented to the foreign national with the foreign national being responsible for all costs associated with the property. Nothing would appear on title, other than the option.

Vernon agreed to be the Canadian citizen for the transaction for the Weisers through a newly incorporated company owned by Vernon.

All closing funds were provided by the Weisers. Vernon's company signed a loan agreement in favour of a new company owned by the Weisers which acknowledged the indebtedness to it for the full amount of the purchase price and also granted an option in favour of the Weisers' company entitling it to acquire the property for the amount of the indebtedness when it ceased to be an ineligible purchaser under the Regulations.

To facilitate the conveyancing, Vernon signed a statutory declaration declaring that his company was purchasing the property in its own right, and that it was not holding the property in trust for any ineligible person under the Regulations.

Following closing, Mrs. Weiser moved onto the property. Gail and Vernon separated in 2000. Vernon began a romantic relationship with Mrs. Weiser in 2000 and eventually moved in with her on the property.

Gail argued, among other things, that the entire transaction involving the Weisers should be tainted by breaches of the Foreign Ownership of Land Regulations, and that the principals of ex turpi causa should apply in the result that the property should be treated as Vernon's property, free and clear of any debts or encumbrances in favour of the Weisers.

Since the transaction was completed in 1998, Mrs. Weiser became a permanent resident and was entitled to own real estate in Alberta [at para. 46].

Decision: Graesser, J. dismissed Gail's claims [at para. 73 and 82].

Graesser, J. stated that there was a "strong argument" that the transaction was illegal, at para. 39 to 42, stating:

> "[39] I am troubled by the transaction that led to the property being registered in Mr. Bartlett's company's name. The circumstances of the transaction, and his evidence at trial, leave me in some considerable doubt as to the truth of the statutory declaration provided by him on closing. It is difficult to reconcile his role as purchaser, owing the full purchase price to a foreigner or foreign controlled corporation, obliged to convey the property to the foreigner on the foreigner becoming a Canadian citizen or permanent resident of Canada, and giving the foreigner complete and unrestricted use of the property (with the foreigner paying all of the necessary expenses), and his declaration that he was not a trustee of the property for the foreigner.
>
> [40] However, that is a matter for the Attorney General, and not for me. Mr. Bartlett may well be at some jeopardy in that regard, as he appears to acknowledge that the effect of the transaction was that his company held the lands in trust for the Weisers or their company.
>
> [41] It is also difficult to reconcile the transaction with the Foreign Ownership of Land Regulations. The transaction was structured in a clandestine way, hiding from the Land Titles Office the true nature of the transaction. That of course was necessary, because neither the Weisers nor their corporation could be registered on title as mortgagees. Their corporation could not have any interest in the property as mortgagee or otherwise. A caveat protecting the option could have valid, but only for a potential purchase within 1 year from the date of the option.
>
> [42] There is, in my view, a strong argument that the transaction was illegal. It certainly violated the spirit of the Regulations, if not the Regulations themselves."

However, Graesser, J. noted that if the transaction had come to the attention of the Attorney General or the Solicitor General, the remedy was under s. 20 of the Regulations, to require the property to be sold by judicial sale with any profit (after repaying the purchase price to the ineligible purchaser) going to the Crown [at para. 45].

Graesser, J. reviewed the case law concerning ex turpi causa or "out of fraud no action arises" [at para. 49 to 56] stating [at para. 52], that the scope of ex turpi causa in a tort action is a defence may be relied on to a recovery to a plaintiff on the ground that to do otherwise would undermine the integrity of the justice system by permitting the plaintiff to profit by an illegal act or to evade a criminal penalty [at para. 52]. He observed [at para. 57] that the application of the doctrine is a discretionary exercise by the Court and [at para. 59] that unjust enrichment is a favour now considered in the application of the

doctrine. Graesser, J. observed that there was no evidence that Vernon had benefited from the transaction with the Weisers, other than to receive a real estate commission [at para. 58] and that what Gail was seeking was to uphold the transaction, in a way that would allow her to use ex turpi causa as a way of creating a remedy, rather than as a defence to a claim against her or her interest in matrimonial property [at para. 62].

Graesser, J. concluded [at para. 65 and 66]:

> [65] There is no general law prohibiting an Albertan or an Alberta company from borrowing monies from a foreign national or a foreign corporation. The foreign national or corporation may not be able to get security on rural or recreational lands, but the underlying debt is nonetheless valid. I am doubtful that applying ex turpi causa could have gone so far as to hold that Mr. Bartlett had no obligation to repay the debt to the Weisers or their company, but that issue is not before me.
>
> [66] The justice system has not been asked to intervene in the transaction by any of the parties to it or by the Crown. The Crown might, at some stage, have forced divestiture under the Regulations. If Mr. Bartlett or his company had reneged on any of their obligations to the Weisers or their companies, the justice system might well have had to deal with ex turpi causa issues between Mr. Bartlett and the Weisers. But intervention here is sought by a stranger to the transaction in order to create a windfall for her."

Because Vernon never had an interest in the property, Gail could not have a matrimonial property claim to the property [at para. 67].

[Editor's Note: Alberta, Saskatchewan and Manitoba all contain legislation which significantly restricts the ability of individuals who are not Canadian citizens, landed immigrants, or Canadian corporations, from acquiring farm land. This decision deals with the Alberta legislation. The issue of ex turpi causa in relation to Alberta's regulations was also considered in the decision of Begeman v. Bender, 2007, ABQB 266 with the same result.]

Rocking Hills Cattle Co. Ltd. v. Saskatchewan (Director of Labour Standards); CALN/2012-007, Full text: [2012] S.J. No. 87; 2012 SKCA 17, Saskatchewan Court of Appeal, R.G. Richards J.A. (In Chambers), February 23, 2012.

Employment Law -- Application of Labour Standards Legislation to Farms and Ranches -- Bookkeeping Staff.

Rocking Hills Cattle Co. Ltd. ("Rocking Hills") and Mark Rupcich brought an application for leave to appeal the decision of Gunn, J. who concluded that an exemption with respect to farming and ranching under the Saskatchewan Labour Standards Act only applies if the employee is doing "farm type" or "ranch type" work. Gunn, J. upheld an adjudicator's award in favour of a bookkeeper who worked full-time, year round, without being paid overtime or holiday pay (CALN/ 2012-004 [2011] SJ No. 763).

Decision: Richards, J.A. granted leave to appeal [at para. 14].

Richards, J. observed [at para. 10] that there was obiter authority for the proposition that a person doing non-farm related work can fall within s. 4(3) of the Act if he or she is employed by a bona fide farmer or rancher: Elcan Forage Inc. v. Weiler [1992] S.J. No. 243, 102 Sask. R. 197 (Q.B.).

Richards, J. also concluded, with respect to the question of importance of the proposed appeal, that the proper interpretation of s. 4(3) of the Act was obviously important.

Oberg v. Canada; CALN/2012-008, Full text: [2012] M.J. No. 53; 2012 MBQB 64, Manitoba Court of Queen's Bench, S.I. Perlmutter J., February 24, 2012.

Grain Marketing -- Canadian Wheat Board -- Rule of Law.

The plaintiffs, who were former Board members of the Canadian Wheat Board ("CWB") sought an interlocutory order staying and/ or suspending the operation and implementation of the Marketing Freedom for Grain Farmers Act, S.C. 2011, c. 25 (the "New Act") or in the alternative, the operation of Parts I and II of the New Act, pending a decision as to the validity of the New Act.

In their Statement of Claim, the plaintiffs sought declarations that the New Act was invalid and infringes on the rule of law and the Constitution Act. The plaintiffs relied on the decision of Campbell, J. in Friends of the Canadian Wheat Board v. Canada (Attorney General), [2011] F.C.J. No. 1678, 2011 FC 1432 (CanLII), in which the plaintiffs were applicants, and in which Campbell J. declared that the Minister responsible for the CWB breached his statutory duty pursaunt to s. 47.1 of the Canadian Wheat Board Act, R.S.C. 1985, c. C-24 (the "CWB Act") to consult with the CWB Board and to conduct a vote of wheat and barley producers as to whether they agree with removing wheat and barley from the application of the CWB Act and eliminating CWB's exclusive statutory marketing mandate.

The plaintifffs argued that the New Act was the result of an illegal action of the Minister and that the New Act was thus invalid.

Section 47.1 of the CWB Act provides:

> "47.1 The Minister shall not cause to be introduced in Parliament a bill that would exclude any kind, type, class or grade of wheat or barley, or wheat or barley produced in any area in Canada, from the provisions of Part IV, either in whole or in part, or generally, or for any period, or that would extend the application of Part III or Part IV or both Parts III and IV to any other grain, unless
>
> (a) the Minister has consulted with the board about the exclusion or extension; and

> (b) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister."

Decision: Perlmutter, J. dismissed the plaintiffs' motion [at para. 80 to 84]. Perlmutter, J. considered the following issues in connection with the three stage test for granting an interlocutory injunction:

(a) Serious Issue to be Tried

Perlmutter, J. concluded that he was not bound by Campbell, J.'s decision and refused to follow it.

Perlmutter, J.:

> - Rejected the contention that s. 47.1 set out conditions which mandate the manner and form in which the statute could not be modified or repealed as set out in R. v. Mercure, 1988 CanLII 107 (SCC), [1988] 1 S.C.R. 234. Perlmutter, J. observed that one cannot establish a remedy unless one can point to the law with which the government action conflicts [at para. 14]. In this regard, the only substantive basis which could be relied upon by the plaintiffs was an alleged violation of s. 47.1 of the CWB Act.
>
> - Referred to s. 42(1) of the Interpretation Act, which provides:
>
> > "Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person."
>
> - Observed [at para. 19 and 20] that s. 42.1 of the Interpretation Act requires that federal statutes ordinarily be interpreted to accord with the Doctrine of Parliamentary Sovereignty and that it must be shown that Parliament intended, in the face of s. 42, to bind or restrict the legislative powers of those of its members who are also members of the Executive.
>
> - Concluded that s. 47.1 did not use language showing that Parliament intended to bind itself or restrict its legislative powers with respect to revamping the single desk or repealing the CWB Act. Section 47.1 only applied to "add or exclude a grain".

Perlmutter, J. also concluded [at para. 23] that the CWB Act was not of a constitutional or quasi-constitutional nature such as the Canadian Bill of Rights and that it could not, therefore, be relied upon as dictating "manner and form" restrictions.

Perlmutter, J., therefore, concluded that s. 47.1 of the CWB Act could not be used as a basis for challenging the validity of the New Act and concluded [at para. 29] that:

> "[29] ...the merits of the plaintiffs' case are so wanting that the application for injunctive relief ought to be rejected on this ground alone. In my view, it has not been established that there is a serious issue to be tried."

(b) Irreparable Harm

Perlmutter, J. held that the plaintiffs' evidence did not establish irreparable harm on any of the grounds alleged by the plaintiffs [at para. 34]:

i. The ability for forward contracting outside the single desk for the 2012-2013 crop year;

ii. Uncertainty and potential for contracts being overturned if the New Act is declared invalid, which the plaintiffs say was experienced in the barley market in 1993 and 2007, resulting in a disruption in the supply of Canadian wheat and barley in Canada. They say that the reputation of CWB and C anadian grain producers as a reliable supplier of high quality grain will be damaged; and

iii. The removal of the elected directors means that producers will no longer have elected directors representing their interest in the governance of the CWB.

(c) Balance of Convenience

Perlmutter, J. observed [at para. 55] that it is wrong to insist on proof that the New Act will produce a public good. Rather, the public good of the New Act is presumed:

> "[55] ...Courts will not lightly order that laws that Parliament has duly enacted for the public good are inoperable in advance of complete constitutional review. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed."

and [at para. 56]:

> "[56] ...it is assumed that laws enacted by democratically elected legislatures are directed to the common good and serve a valid public purpose, interlocutory injunctions are rarely granted in constitutional cases."

Perlmutter, J. held that the plaintiffs had not established that the suspension of the New Act would provide a public benefit observing, at para. 73 that:

> "[73] In the case at bar, the plaintiffs argued that the threshold applicable to

exemption cases ought to apply because the plaintiffs say the New Act is limited to the 70,000 producers involved and how they conduct their business. Counsel for the Attorney General argued that the plaintiffs are not seeking an exemption as against them as eight individuals. Quite correctly, in my view, Counsel for the Attorney General noted that the plaintiffs do not represent all producers, and there are producers who oppose the plaintiff's position. Moreover, the New Act does not just affect producers, but millers, elevator operators, and others."

** CREDITS **

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