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**** HIGHLIGHTS ****

* A Justice of the Supreme Court of British Columbia has held that a widow who had granted a mortgage against her fruit farm as collateral security for her obligations under her guarantee of a corporate debt was not a "farmer" within the meaning of the Farm Debt Mediation Act, and that she was therefore not entitled to notice under the Act, or to mediation under the Act. The fruit farm's operations were carried on by a corporation in which the widow was a 50% shareholder. The corporation, not the widow, was the entity "engaged in farming for commercial purposes" within the meaning of the Act. The corporation was not entitled to receive notice under the Act because it was an unsecured debtor. The widow was not entitled to receive notice because she was not a "farmer" within the meaning of the Act. The Court held that the "purposive approach" which is required to be applied in interpreting the Act could not be expanded to require that the widow receive notice. (Wynndel Lumber Sales Ltd. v. Shukin, CALN/2013-004, [2013] B.C.J. No. 82, British Columbia Supreme Court)

**** NEW CASE LAW ****

Wynndel Lumber Sales Ltd. v. Shukin; CALN/2013-004, Full text: [2013] B.C.J. No. 82; 2013 BCSC 73, British Columbia Supreme Court, T.M. McEwan J., January 21, 2013.

Creditors Rights -- Farm Debt Mediation Act -- Whether the Guarantor of a Farmer is a "Farmer" within the meaning of the Act.

Wynndel Lumber Sales Ltd. ("Wynndel") commenced foreclosure proceedings against a small acreage owned by Valerie Shukin ("Mrs. Shukin"). The acreage consisted of Mrs. Shukin's home, a small orchard and a cherry processing facility.

The property had been purchased by Mrs. Shukin's deceased husband's parents in 1935 and had been in the family ever since. Mrs. Shukin received full title in 1999 after her husband died. The property was in an agricultural reserve and had been continuously farmed since Mrs. Shukin lived on it.

Mrs. Shukin is 78 years old and marketed fruit grown on the property from a roadside stand. The remainder of the fruit was placed in cold storage.

The fruit growing business was not operated by Mrs. Shukin personally but by Shukin Orchards Ltd. (the "Company"). Mrs. Shukin owned 120 shares in the Company while her 3 children held the remaining 240 shares. The Company did not receive rent from Mrs. Shukin for the property. Nor was there a lease.

Wynndel had, from time to time, advanced money to the Company. The loan documents identified the Company as the debtor. Mrs. Shukin granted a guarantee to Wynndel with respect to these loans. Her guarantee was secured by 4 collateral mortgages against the land. She was not the "principal debtor".

The affidavit evidence filed by Mrs. Shukin's son indicated that the Company carried on a commercial fruit growing operation and that all revenues and expenses in relation to the business were put through the Company. Mrs. Shukin's Affidavit indicated that she was not paid a wage by the Company, and that all of her labour and financial resources were used to support the "family farm operation".

The question was whether in the circumstances of the case Mrs. Shukin was a "farmer" within the meaning of the Farm Debt Mediation Act, S.C. 1997, c. 21 (the "Act"). Sections 2, 21 and 22 of the Act provide:

> "farmer" means any individual, corporation, cooperative, partnership or other association of persons that is engaged in farming for commercial purposes and that meets any prescribed criteria.
>
> "farming" means
>
> (a) the production of field-grown crops, cultivated and uncultivated, and horticultural crops;..
>
> * * *
>
> 21.(1) Every secured creditor who intends to
>
> (a) enforce any remedy against the property of a farmer, or
>
> (b) commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer
>
> shall give the farmer written notice of the creditor's intention to do so, and in the notice shall advise the farmer of the right to make an application

under section 5.

(2) The notice referred to in subsection (1) must be given to the farmer in the prescribed manner at least fifteen business days before the doing of any act described in paragraph (1)(a) or (b).

22.(1) Subject to subsection (2), any act done by a creditor in contravention of section 12 or 21 is null and void, and a farmer affected by such an act may seek appropriate remedies against the creditor in a court of competent jurisdiction.

(2) Subsection (1)

(a) does not affect the title to the property of a person who purchased in the property in good faith from the creditor and who was not then related to the creditor within the meaning of the regulations; and

(b) does not confer on the farmer any remedy against a person described in paragraph (a).

Mrs. Shukin argued that a "purposive approach", giving a fair, large and liberal interpretation to the construction of the Act be followed and Mrs. Shukin should have been notified of her right to mediation for proceedings brought on the mortgage collaterals with respect to the Company's debt.

It appears from the reasons that a Notice was not served on the Company under the Act [at para. 21].

Decision: McEwan, J. dismissed Mrs. Shukin's application for a declaration that she was a farmer within the meaning of the Act and dismissed her application [at para. 26 and 27].

McEwan, J. observed that if the security had been granted by the Company, a notice under the Act would have had to have been served on the Company and that [at para. 21]:

> As it is, the security is collateral on property held by a person whose relationship to the petitioner is not that of a "farmer" in relation to a farm debt, but of a guarantor in relation to a debt incurred by a "farmer".

McEwan, J. [at para. 10] referred to the decision of Community Futures Development Corp. v. Litzenberger, [2006] B.C.J. No. 1244, 2006 BCSC 856 (CanLII), 2006 BCSC 856, 23 C.B.R. (5th) 182 for guidance with respect to the interpretation of the Act. In Litzenberger, Joyce, J. stated that a purposive approach be given to interpreting the definition of "farmer", stating:

> [7] The FDMA, which came into force April 1, 1998 is the successor to the

Farm Debt Mediation Review Act, R.S.C. 1985, c. 25 (2nd supp.). The legislation is remedial in nature. Its purpose is to provide insolvent farmers with some breathing room by providing them an opportunity to apply for a stay of proceedings and mediation so that they may attempt to reorganize their financial affairs. In M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., 1999 CanLII 648 (SCC), [1999] 2 S.C.R. 961, Mr. Justice Binnie described the purpose of the predecessor legislation to the FDMA in the following terms at 973-974:

> Farmers without the protection of a marketing board or other price stabilization schemes face volatile markets and volatile prices. The legislation recognizes that temporary financial embarrassment is part of a farmer's lot, and does not necessarily signal lack of long-term financial viability. The Act provides a short standstill period within which the farmer has an opportunity to demonstrate long-term viability to creditors.

[8] Mr. Justice Binnie noted at para. 25 that in accordance with the Interpretation Act, R.S.A. 1985, c. I-21, the statute is to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". He said the applicable principle of statutory interpretation was expressed by Lamer C.J. in R. v. Z.(D.A.), 19982 CanLII 28 (SCC), [1992] 2 S.C.R. 1025, in considering the Young Offenders Act.

> In interpreting the relevant provisions of an Act, the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and purpose of the legislation. ...

[9] In Corp. Les Produits de la Jardiniere v. National Bank of Canada, [1996] F.C.J. No. 460, Mr. Justice Nadon of the Federal Court, referring to the former Farm Debt Review Act, described the overall purpose of this legislation in the following terms at para. 14:

> Thus, the Act sets out a set of temporary measures intended to enable farmers to continue operating while benefiting from a grace period before entering into arrangements with their creditors with the assistance of a panel of experts acting as a conciliator.

[10] Nadon J. held that the definition of "farmer" must be interpreted liberally and included anyone who temporarily ceased to engage in farming

> activities.
>
> [11] Thus, when interpreting the definition of "farmer" I must use a purposive approach and give the expression a fair, large and liberal interpretation to ensure that the objects of the legislation are obtained.

McEwan, J. noted [at para. 10] that the parties had agreed that the Company was a "farmer" and that it was engaged in "farming for commercial purposes".

McEwan, J. held that the purposive approach had limitations and that there were "meaningful implications" between legal entities, stating, at para. 22 and 23:

> [22] A purposive approach to the legislation requires a consideration of its reasonable limitations. The Act creates an extraordinary form of relief that protects farmers from the demands of creditors in circumstances where the vagaries of farming may have rendered them temporarily insolvent.
>
> [23] The Shukins organized their affairs so that the Company ran the farm. Ms. Shukin did not transfer the land on which the Company conducted part of the farm operation to the Company. Distinctions between legal entities have, and are meant to have, meaningful implications. Ms. Shukin's personal efforts in relation to commercial farming are subsumed into the Company, and are the Company's efforts; as a landowner, she is an entity apart from the Company and stands, not in the relation of farmer-to-creditor with the petitioner, but simply as a person obliged to make good on the Company's obligations pursuant to a collateral instrument.

McEwan, J. referred to a decision of the Supreme Court of Canada in McEwen Re, 1941 CanLII 54 (SCC) 542 in which the Supreme Court of Canada overturned a lower Court ruling which held that an executor, who held land in her personal capacity could not bring herself within the provisions of the Farm Creditors Arrangement Act even though she was not the owner of the land and even though there was no contract between her and the creditor.

McEwan, J. held [at para. 25 and 26]:

> ... that the purpose of the legislation is to provide a remedy for farmers in relation to their creditors, and that the notion of a "fair large and liberal" interpretation of the legislation cannot extend to a redefinition of the relationships between the parties to achieve a desired result.
>
> [26] Applying the terms of the current Act, Ms. Shukin was not a farmer, because her efforts were entirely those of the Company. She is not a debtor in relation to the farm debt, only the Company is. Her liability under a collateral instrument lies outside the ambit of the statute.

**** CREDITS ****

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