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Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

- * A justice of the Alberta Court of Queen's Bench has held that the potential breach of Alberta's Foreign Ownership of Land Regulation by a foreign national does not amount to lack of "clean hands", and does not deprive the foreign national to oppression relief under the Alberta Business Corporations Act against a Canadian citizen who held his shares in trust. (Frydman v. Pelletier, [CALN/2013-013](#), [\[2013\] A.J. No. 351](#), Alberta Court of Queen's Bench)
- * The Canada Agricultural Review Tribunal has allowed the review application of an Ontario hog farmer, and has set aside a violation and penalty assessed by the CFIA, arising from the alleged transportation of a lame hog to market causing undue suffering contrary to section 138 of the Health of Animals Regulations. The Tribunal carefully reviews relevant Federal Court of Appeal authorities, the elements of the offence, and the Tribunal's authority to review CFIA decisions. (Roelands v. Canada (Border Services Agency), [CALN/2013-014](#), [\[2013\] C.A.R.T.D. No. 8](#), Canada Agricultural Review Tribunal)
- * The Canada Agricultural Review Tribunal has upheld a violation and a \$6,600 penalty assessed by the CFIA against a poultry processor arising from the transportation of chickens, a number of which died in transport due to exposure to adverse weather conditions. The Tribunal reviewed the elements of the offence in relation to the transport of poultry, and principles involved in the assessment of penalties. (Exceldor Coopérative v. Canada (Border Services Agency), [CALN/2013-015](#), [\[2013\] C.A.R.T.D. No. 4](#), Canada Agricultural Review Tribunal)

**** NEW CASE LAW ****

Frydman v. Pelletier; [CALN/2013-013](#), Full text: [\[2013\] A.J. No. 351](#); [2013 ABQB 225](#), Alberta Court of Queen's Bench, C.L. Kenny J., April 15, 2013.

Foreign Ownership of Agricultural Land -- Illegality -- Ex Turpi Causa.

Facts: The Applicant, Jean Frydman ("Frydman") brought an application seeking a declaration that certain shares held in Vialta Investments Ltd ("Vialta") were held in trust for him by the Respondent Jean-Pierre Pelletier ("Pelletier") and that Pelletier had engaged in oppressive conduct.

Pelletier opposed the application and brought a cross-application to have this claim consolidated with an action wherein in a number of parties including Frydman, had made claims against Pelletier for damages for fraudulent activity.

Frydman is an international businessman ordinarily resident in France. Through a corporate entity he owns 49% of Vialta. He claimed he was the beneficial owner of the remaining 51%.

Pelletier is Frydman's son in law. He worked for Frydman's companies for over 40 years and at his request managed Frydman's interests in Canada. He became a Canadian citizen in 1980.

Vialta was incorporated in 1978. Pelletier was a director and held shares in Vialta claimed by Frydman since 1979.

Frydman held land in Alberta through other companies which were eventually amalgamated with Vialta. All monies in Vialta came from other companies owned by Frydman. Pelletier never put any money into Vialta or these other companies.

After 1977, agricultural land in Alberta could not be owned by a foreign controlled corporation. Pelletier suggested to Frydman that Pelletier be the majority shareholder in the event Vialta wished to purchase agricultural land.

In April of 2011 Pelletier signed a "convention" acknowledging that his shares had always been held in trust for Frydman and that he would return them on request.

In late 2010 Frydman had become aware of accounting irregularities involving Vialta. In July of 2011 his accountants confirmed Pelletier had been involved in fraudulent activity.

In November of 2011 Frydman requested, and Pelletier refused, to transfer the shares.

Pelletier claimed Frydman had given him the shares as compensation for all his work and the benefit of his Canadian citizenship and that there was an oral agreement that he would only transfer his shares if there was a settlement of these claims. He considered the "convention" to be conditional.

Pelletier argued, among other things, that Frydman brought the application with "unclean hands" because the law of Alberta prevents foreign companies from holding agricultural land and that Vialta was structured to get around this limitation.

Decision: Kenny, J granted Frydman's application, dismissed Pelletier's cross-applications and directed that Pelletier's shares in Vialta be transferred to Frydman [at para 52 and 53].

Kenny, J concluded that Pelletier's evidence was not believable [at para 32].

Kenny, J considered the principles governing the oppression remedy [at para 18 to 36] and the cross-application [at para 39 to 51].

With respect to compliance with Alberta's foreign ownership laws Kenny, J stated [at para 35]:

"what the company can do and cannot do and what ramifications will be of the company holding land in Alberta have nothing to do with this application. The evidence raised also indicates issues with Mr. Pelletier's dealings with the company and so it is ironic that he would raise the issue of unclean hands when he is an accomplice in the dealings with the company. I do not find that Mr. Frydman has commenced this action with unclean hands.

[Editor's Note: There is good reason to believe that the Applicant in this case is in violation of Alberta's Foreign Ownership of Land Regulations. However there are a number of Alberta cases which conclude that the maxim "ex turpi causa" (out of fraud, no action arises) cannot assist a wrong doer who has participated in a breach of this Regulation. See for example: *Bartlette v. Bartlette*, [CALN/2012-006](#), [2012] A.J. No. 203]

Roelands v. Canada (Border Services Agency); [CALN/2013-014](#), Full text: [2013] C.A.R.T.D. No. 8; 2013 CART 8, *Canada Agricultural Review Tribunal*, Dr. Bruce La Rochelle, Member, March 14, 2013.

Safe Transportation of Livestock -- Undue Suffering in Transport -- Elements of the Offence -- Authority of the Canadian Agricultural Review Tribunal.

Facts: An Ontario farmer, Andy Rowlands, applied to the Canadian Agricultural Review Tribunal (the "Tribunal") for the review of a violation and penalty assessed by the Canadian Food Inspection Agency (the "CFIA") under section 138(2) of the Health of Animals Regulations (Canada) (the "Regulations").

Section 138 (2) (a) of the Regulations provides that "no person shall load or cause to be loaded on any motor vehicle an animal that by reason of infirmity, illness, fatigue or any other cause cannot be transported without undue suffering during the expected journey."

The CFIA assessed a violation and issued and assessed a penalty of \$800 arising from the transportation of a hog with a deformity to its hind legs which could walk, but not without difficulty.

Decision: La Rochelle, Member concluded [at para 55] that the CFIA had not made out the violation, and set aside the violation and penalty.

La Rochelle, Member relied on the decisions of the Federal Court of Appeal in Canada (Food Inspection Agency) v. Porcheire de Cèdres Inc. and AG Canada (CFIA) v. Serbo Transports Inc (both reported at [\[2005\] F.C.J. No. 273](#), [2005 FCA 59](#)) which held that "undue" does not mean "excessive" but "undeserved", "unwarranted", "unjustified", and "unmerited" [at para 29] and concluded, relying on the Federal Court of Appeal decision in Doyon v. Canada (Attorney General), [\[2009\] F.C.J. No. 605](#), [2009 FCA 152](#), that the CFIA must establish the following elements [at para 34]:

- that the animal was loaded or transported .
- on a motor vehicle, railway car, aircraft, or vessel.
- that the cargo was an animal.
- that the animal could not be transported without undue suffering.
- that the animal suffered unduly on the expected journey.
- that the animal could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause. And,
- that there was a causal link between the transportation, the undue suffering and the animals infirmity, illness, injury, or fatigue, or any other cause.

La Rochelle, Member noted that lame animals can be transported [at para 44] and that some degree of suffering in transport does not constitute a violation; that a video showed the pig walking; that the evidence of Roelands (who intended to use the hog for personal consumption and who was a farmer with 35 years of experience in handling hogs, and who provided a logical explanation) should be considered, and that the CFIA's evidence "particularly with respect to the causes of the pigs condition" was insufficient [para 35 to 54]

Exceldor Coopérative v. Canada (Border Services Agency); [CALN/2013-015](#), Full text: [\[2013\] C.A.R.T.D. No. 4](#); 2013 CART 4, Canada Agricultural Review Tribunal, Donald Buckingham, Chairperson, February 19, 2013.

Safe Transport of Livestock -- Poultry -- Undue Suffering due to Weather Conditions.

Facts: A poultry processor, Exceldor Cooperative ("Exceldor") applied to the Canada Agricultural Review Tribunal (the "Tribunal") for the review of a violation and a penalty of \$6,600 assessed by the Canadian Food Inspection Agency (the "CFIA") under section 143(1) (d) of the Health of Animals Regulations (Canada) (the "Regulation").

The Regulation provides that "No person shall transport or cause to be transported any animal in any motor vehicle crate or container if injury or undue suffering is likely to be caused to the animal by reason of undue exposure to weather."

The violation involved 3 shipments of chickens on the night of November 16 -17, 2010. In excess of 20,000 chickens were shipped by truck to an abattoir. The shipments took between 5 and 7 hours over 449 to 398 km. Over 400 chickens were dead on arrival. It was raining and windy and temperatures were between 5 and 8 degrees celsius. One of the trucks had a tarp, but it was damaged. Many of the chickens were soaked on arrival.

Decision: Chairperson Buckingham upheld the violation [at para44] and the penalty [at para54].

Buckingham, Chair reviewed the elements of the offence [at para 32]:

1. That the animal was transported.
2. By motor vehicle, railway car, aircraft, vessel, crate or container.
3. That the transported cargo was the animal.
4. That the animal incurred injury or risked incurring undue suffering caused by undue exposure to the weather.
5. That there is a causal link between the transportation, risk of injury or undue suffering because of undue exposure to the weather.

Buckingham, Chair reviewed the evidence in detail at para 33 to 44 which he held proved the elements of the offence.

With respect to the quantum of the penalty and the record of the penalty Chairman Buckingham reviewed in detail the elements involved in the calculation of the penalty under the Agriculture and Agri-Food Administrative Monetary Penalties Regulations (Canada) at para 49 to 54:

- Prior Violations.
- Intent or negligence.
- Harm.

He upheld the penalty, and advised Exceldor that it was entitled to apply to have the violation removed from its record after 5 years.

**** CREDITS ****

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



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