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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 ****

* A Justice of the British Columbia Supreme Court has held that a fabric covered equestrian barn anchored by solid concrete blocks resting on the ground was a chattel, and not a fixture. The Justice contrasted this barn with a second fabric covered equestrian barn anchored into concrete foundations. The Court summarizes the law of British Columbia with respect to fixtures. The Court concluded that a supplier which had failed to file a fixture notice under the British Columbia PPSA was entitled to remove the building anchored by concrete blocks because it was a chattel, not a fixture and because it was intended to be portable. (CMIC Mortgage Investment Corp. v. Rodriguez, CALN/2010-007, [2010] B.C.J. No. 425, British Columbia Supreme Court)

* A Justice of the Ontario Superior Court of Justice has struck out a number of tort claims by an Ontario tobacco producer against an Ontario marketing board. Claims which were struck were based on allegations that the Board had refused to share information concerning the survival of the tobacco industry with producers; that negotiating an "exit strategy" and government compensation for tobacco producers constituted a breach of statutory and fiduciary duties to producers; that the Board was negligent in failing to negotiate a commitment to purchase product from a manufacturer who demanded that producers convert their kilns to eliminate cancer causing substances; that the Board was negligent in failing to negotiate sales and seek markets and that it breached its duty to producers by passing regulations which prevented the sale and sharing of quota. The Court ruled that (with one exception) there was no recognized duty of care owed by the Board to producers with respect to these claims, and that there was not sufficient proximity between the Board and producers to warrant recognizing a new duty of care. The Court did hold, however, that a claim of negligent misrepresentation could be advanced against the Board for alleged

projections with respect to what crop sizes would be for the next three years and for losses sustained when these projections turned out to be incorrect. (Marlor Farms Inc. v. Ontario (Farm Products Marketing Commission), CALN/2010-008, [2010] O.J. No. 997, Ontario Superior Court of Justice)

**** NEW CASE LAW ****

CMIC Mortgage Investment Corp. v. Rodriguez; CALN/2010-007, Full text: [2010] B.C.J. No. 425; 2010 BCSC 308, British Columbia Supreme Court, P. Rogers J., March 11, 2010.

Real Property -- Fixtures -- Fabric Covered Farm Buildings.

Community Futures Development Corporation of Okanagan-Similkameen ("Community Futures") held a first, second and third mortgage over land owned by Maria Rodriguez ("Rodriguez") near Summerland, B.C. Community Futures had acquired the first mortgage from CMIC Mortgage Investment Corp.

In January of 2007, Community Futures obtained an Order Nisi with a 6 month redemption period. In September of 2007, Community Futures obtained an Order for Sale. In April of 2008, a large fabric sided barn known as "Cover-All #2" was removed from the property by 546663 B.C. Ltd. carrying on business under the name of Cover-All Buildings B.C. ("Cover-All").

Cover-All and Rodriguez had entered into a letter agreement dated June 1, 2006 with respect to Cover-All #2. The agreement provided that Cover-All would continue to have title to Cover-All #2 until it had been paid for in full and that until then, Cover-All could take the building away at any time it wished.

Cover-All did not register a fixture notice with respect to Cover-All #2 under the Personal Property Security Act (British Columbia).

Cover-All #2 consisted of fabric covered metal arches that were bolted or threaded into rods. The rods were affixed to large concrete blocks. The concrete blocks rested on the ground.

Door posts for doors at both ends of Cover-All #2 slid down over the top of metal rods. The metal rods were embedded in concrete pads which were buried into the ground.

Rodriguez swore an Affidavit which indicated that her intention was that she wanted a portable building [at para. 28].

Cover-All #2 was used by Rodriguez for her equestrian business.

Rodriguez had another fabric covered building on the property that had been embedded in concrete foundations, that had not been removed.

Decision: Mr. Justice Rogers dismissed Community Futures' claim for an interest in Cover-All #2 and held that at all material times, the building was a chattel [at para. 31 and 32].

Rogers, J. reviewed the law of British Columbia with respect to fixtures at para. 17 to 21, and concluded [at para. 21] that anything affixed to real estate is presumed to be a fixture unless the evidence shows that it is affixed for the purpose of making a better use of it as a chattel as opposed to it being integrated into the property as a whole, and that a thing which is not affixed to real estate will be presumed to be a chattel unless the evidence shows its presence on the property is intended to make it an integral part of the property as a whole, stating:

> "[17] Mortgage security will normally attach any fixtures to real property. Mortgage security will not normally attach chattels. The petitioner's mortgage in this case followed that convention.
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> [18] The leading case in British Columbia on the issue of when chattels are sufficiently affixed to real property to constitute fixtures at common law is La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd. et al (1969), 4 D.L.R. (3d) 549 (B.C.C.A.). In La Salle at p. 554, McFarlane J.A. adopted a four-part test that was set out in Stack v. T. Eaton Co., [1902] 4 O.L.R. 335:
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> I take it to be settled law: --
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> (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
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> (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
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> (3) That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and objection of such annexation, which are patent to all to see.
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> (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and objection of the annexation.
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> [19] In Royal Bank of Canada v. Maple Ridge Farmers Market Ltd., [1995] B.C.J. No. 1696 (S.C.), Maczko, J. proposed six rules useful in the assessment of what is a fixture and what is a chattel. Those rules are:

1) Any item which is unattached to the property, except by its own weight, and can be removed without damage or alterations to the fixtures or land that will need repair, is a chattel.

2) Any item which is plugged in and can be removed without any damage or alteration is a chattel.

3) Any item which is attached even minimally (i.e. it cannot simply be unplugged) is a fixture.

4) If a piece of equipment is attached to a structure, a part of which could be removed but which would be useless without the attached part, then the entire piece of equipment is a fixture. In other words, the item will be a fixture if it loses its essential character because it is of no use unless attached to a permanent and substantial improvement to the premises of which it formed part. The converse is also true. If an item can be detached without damage or alteration, and if the item retains its essential character without the attached part, then it will be a chattel.

5) Where an item is determined to be a fixture, it may nevertheless be removed if it can be shown that it is a tenant's fixture. A tenant's fixture may be removed from the premises during the currency of the tenancy provided that the tenant leaves the premises in exactly the same condition as he or she received them.

6) In very exceptional circumstances not covered by these rules the court should have resort to the purpose test. For example, a mobile home may be resting on the land by its own weight but it may be clearly established that it was intended to be a fixture. These circumstances should only arise rarely and in relation to very large or expensive items.

[20] In B.D.N. Mechanical Ltd. v. HMTQ in right of the Province of British Columbia, 2006 BCSC 78 Cole, J. referred to La Selle and to Royal Bank of Canada v. Maple Ridge Farmers Market Ltd. and went on to consider whether the six rules in the latter case comprised too strict an interpretation of the principles in the former. At paragraph 22 of his reasons, Cole, J. said:

> I recognize the possibility that strict adherence to these rules might lead to a result inconsistent with the LaSalle approach. In particular, rule three suggests that minimal attachment is sufficient to render an

> item a fixture even if it was clearly intended to remain a chattel. However, the Court of Appeal has not overruled Royal Bank. In my view, rule six provides the court with sufficient latitude to follow the rules without arriving at a result incongruent with LaSalle. More importantly, adopting these rules is consistent with the current approach of the Supreme Court of Canada, which prefers certainty with respect to taxation issues: Ludco Enterprises Ltd. v. Her Majesty the Queen, [2001] 2 S.C.R. 1082 at para. 59; Stewart v. Canada, [2002] 2 S.C.R. 645 at para. 4.

[21] From these authorities I take the law to be that a thing affixed to the real estate will be presumed to be a fixture unless the evidence shows it is affixed for the purpose of making better use of it as a chattel as opposed to being an integrated part of the property as a whole; and that a thing that is not fixed to real estate will be presumed to be a chattel unless the evidence shows that its presence on the property is intended to make it an integral part or an enhancement of the property as a whole. In effect, an object's affixation or non-affixation to the land will raise a rebuttable presumption as to its legal character. The degree of affixation and the size, value and nature of the object are factors in rebutting the presumption. To repeat Maczko J.'s recitation of rule 6 in Royal Bank of Canada:

> In very exceptional circumstances not covered by these rules the court should have resort to the purpose test. For example, a mobile home may be resting on the land by its own weight but it may be clearly established that it was intended to be a fixture. These circumstances should only arise rarely and in relation to very large or expensive items.

Rogers, J. concluded that Cover-All #2 was not actually affixed to the land. It was therefore presumptively a chattel [at para. 22]. He accepted Rodriguez's evidence that she intended the building to be portable, observing that the other fabric covered building on the land had been embedded into concrete foundations, and that evidence strongly suggested that "Ms. Rodriguez wanted to have the option of moving the building around her property or dismantling it quickly and easily" [at para. 29]. The fact that Rodriguez intended to use the building for her equestrian business did not overcome the evidence that the structure was a chattel.

Marlor Farms Inc. v. Ontario (Farm Products Marketing Commission); CALN/2010-008, Full text: [2010] O.J. No. 997; 2010 ONSC 1573, Ontario Superior Court of Justice, T.A. Heeney J., March 12, 2010.

Marketing Boards and Commissions -- Claims Against Marketing Boards and Commissions -- Breach of Fiduciary Duty, Negligence and Negligent Misrepresentation.

The Plaintiff, Marlor Farms Inc. ("Marlor Farms") operated a tobacco farm in Ontario until 2005, when it exited the tobacco business. The tobacco industry in Ontario had suffered from a broad and severe decline between 1999 and 2008. Marlor Farms brought an action against The Ontario Flue-Cured Tobacco Growers' Marketing Board ("the Board") which alleged that the Board had been largely responsible for the destruction of the tobacco industry, and the financial losses sustained by Marlor Farms as a result.

Marlor Farms' Statement of Claim alleged the following categories of claims:

1. Kiln Conversion: Recommending to producers that they convert their kilns from direct to indirect heat to eliminate cancer causing nitrosamines without obtaining a signed commitment from a manufacturer with respect to crop size [at para. 12 to 14].

2. Refusal to Share Information: In particular, with respect to the Board's refusal to negotiate with Imperial Tobacco in connection with its expansion of its Delhi and Tillsonburg Exchanges, as a result of which Imperial removed its operations from Canada, and its failure to apply for research grants [at para. 15 to 16].

3. Negotiating an Exit Strategy: Negotiating with the Federal and Provincial Governments for a compensation package for tobacco producers which resulted in permanent cessation of tobacco production in Ontario, and the consequential loss of the value of tobacco quota, income and lost property values, when the Board had no jurisdiction to do so [at para. 17 to 20].

4. Failure to Properly Negotiate Annual Crop Sizes and to Seek Other Markets: Negligence in not seeking other markets and negotiating an exit practice which negated its duty to growers under the law.

5. Passing a Regulation that Prevented Renting or Share-Growing Quota: Allegedly passing, without statutory authority, a regulation which prevented Marlor Fams from renting or share-growing its production quota if it sold the kilns located on its farm.

The Board brought an application to strike the Marlor Farms' claim on the grounds that it disclosed no reasonable cause of action [at para. 3].

Decision: Mr. Justice T.A. Heeney granted the application with respect to all of the claims, other than a claim for negligent misrepresentation. He refused an application for leave to amend the claims which had been struck because they were unknown to law and could not have been cured by amendment [at para. 88 to 91].

Heeney, J. reviewed the "Cooper-Anns test" at para. 37.

He held as follows with respect to each of the claims:

1. Claim of Refusal to Share Information: Heeney, J. held that this claim did not fall within the recognized category where a duty of care had been found to exist [at para. 39 to 30] and that this was not a situation where there was sufficient proximity to recognize a new duty of care [at para. 41 to 49]. Henney, J. concluded that the Board had duties to many interests and persons and that there was nothing in the legislation to support a finding of proximity as between producers and the Board, stating [at para. 41, 42, 43, 44, 46 and 47]:

> "[41] We move, therefore, to the next question, which is whether this is a situation where a new duty of care should be recognized. In that regard, the comments at para. 43 of Cooper are instructive:
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> > In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.
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> [42] Applied to the case at bar, proximity, if it exists, must arise from the statutes and regulations under which the Board was created. Mr. Robertson has pointed to nothing in the enabling legislation which would support the existence of a duty of care owed to ndividual producers to share information coming into the hands of the Board.
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> [43] Indeed, there is nothing in the legislation that supports a finding of proximity in general as between a producer, such as the plaintiff, and the Board so as to give rise to a duty of care. In my view, the breadth of the Board's power, and the competing interests that it must balance in the exercise of that power, are inconsistent with the existence of a duty of care in favour of any one person or category of persons who are subject to regulation by the Board.
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> [44] To expand on that thought, I first observe that the Board is a regulator of a regulated product. Its powers over the industry are absolute...
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> ...
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> [46] In can readily be seen that the Board, to whom those powers under the FPMA have been delegated, can neither owe a duty of care to producers, nor be mindful of their interests in its exercise of its statutory duties, because producers are only one of many parties -- advertisers, assemblers, buyers, bankers, sellers, packers, processors, shippers, warehousers and truckers -- who are regulated and affected by the actions of the Board, and whose interests may frequently be in conflict.

> [47] The exercise of those powers will inevitably involve taking action that is contrary to the best interests of any one party, and may cause hardship or inconvenience...

2. Negotiating an Exit Strategy: Henney, J. observed that the plaintiff had alleged that the Board's conduct in pursuing an exit strategy and bringing a permanent end to tobacco production in Ontario was not authorized by the legislation, and amounted to a breach of fiduciary duty and a breach of trust. Henney, J. concluded that there was no recognized category of duty of care for this claim, and that no factors gave rise to proximity [at para. 52].

Henney, J. also held that even if there was proximity, residual policy considerations militated against recognizing a novel duty of care [at para. 53 to 60] stating, at para. 58 to 60:

> [58] Simply put, to hold the Board liable in negligence for making or not making policy decisions would restrict its ability to carry out its statutory duties under the FPMA and regulations.
>
> [59] If a citizen disagrees with a policy that his government chooses to pursue, it is not open to him to sue the government in tort. His recourse becomes available at election time, when he can seek to elect a different government that is prepared to pursue a different policy. In the same way, it is not open to the plaintiff to sue the Board because it disagrees with the exit strategy that the Board chose to pursue. The plaintiff's recourse would have been to try to elect like-minded directors who were prepared to pursue a different policy.
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> [60] In my view, the plaintiff has failed on both branches of the Cooper-Anns test, and no duty of care should be recognized to exist. Accordingly, I am satisfied that it is plain and obvious that the plaintiff's claims relating to the Board having pursued an exit strategy must fail. The claim for an injunction restraining the Board from negotiating that exit strategy with the provincial and federal governments is doomed to failure for the same reasons, as is the claim for punitive damages for allegedly acting outside the Board's statutory authority.

3. Failure to Properly Negotiate Annual Crop Sizes and Seek Other Markets: Heeney, J. held that this claim did not satisfy either the first branch or the second branch of the Cooper-Anns test and stated [at para. 63]:

> [63] Aside from that, a lawsuit that claims that the Board failed to negotiate a good deal for the producers is untenable from the standpoint of simple logic. The Board forms only one part of the Negotiating Committee. The remainder of the committee consists of 8 representatives from the major tobacco manufacturing companies. The Board has no control over the outcome of negotiations, and there is no mechanism to

> impose an agreement on the parties in the event that they are unable to agree. To succeed, the plaintiff would have to prove that, had the Board done things differently in their negotiations, the manufacturers would have been persuaded to agree to a different deal. That is simply impossible to prove.

4. Passing a Regulation that Prevented Renting or Share-Growing Quota: Henney, J. held [at para. 66] that there is no recognized duty of care in tort for passing a regulation, and that this is not a situation where proximity should be recognized. It is a pure policy decision which is immune from tort liability. If Marlor Farms felt the regulation was ultra vires, it had administrative law remedies available to it.

5. The Claim for Kiln Conversion: Henney, J. concluded that Marlor Farms had a cause of action related to the Board's failure to get a signed commitment from manufacturers at both levels of government in relation to future tobacco crop size [at para. 69].

However, Henney, J. held that alleged misrepresentations by the Board to producers with respect to future crop sizes were actionable [at para. 70 and 71]:

> [70] However, read generously as the Statement of Claim must be on a motion of this kind, these allegations amount to a claim for negligent misrepresentation. That is to say, the Board told the producers what the crop sizes would be for the next three years, and the plaintiff relied on those representations in making the business decision to invest in kiln conversion. When the projections turned out to be incorrect, the plaintiff suffered damages.
>
> [71] Negligent misstatement is one of the categories specifically cited by the Supreme Court of Canada in Cooper where proximity has been recognized. It is not, therefore, necessary to undergo the full Cooper-Anns analysis. Furthermore, if it were necessary to consider the second branch of the test, I am of the view that making a representation as to a state of facts is, arguably, an operational act, as opposed to an act of policymaking, and is therefore not immune from tort liability.

** CREDITS **

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