

Federal Court



Cour fédérale

Date: 20210208

Docket: T-1075-19

Citation: 2021 FC 123

Ottawa, Ontario, February 8, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Plaintiff

and

ELVERN KENNETH ESAU

Defendant

JUDGMENT AND REASONS

I. OVERVIEW

[1] The defendant, Elvern Esau, operates a large-scale ranching and farming operation in northeastern British Columbia. In 2015, he received an advance payment for cattle from the British Columbia Breeders and Feeders Association (“BCBFA”) under the Agriculture and Agri-Food Canada Advance Payments Program (“APP”). In 2016, his company Horseshoe Valley

Ranch Ltd. (“Horseshoe Valley”) received another advance payment from the BCBFA, this time for grain.

[2] Under the terms of the APP, the advance payments were guaranteed by the Minister of Agriculture and Agri-Food Canada (“the Minister”). Consequently, when Mr. Esau and Horseshoe Valley defaulted on their respective obligations to repay the advance payments, the amounts advanced by the BCBFA were repaid by the Minister, with interest. When the Minister makes such a payment, he is subrogated to the rights of the administrator organization (in this case, the BCBFA) against the agricultural producer and the parties who are liable under the terms of the advance payment agreements.

[3] In 2019, the Crown commenced this action seeking recovery of the debt owed by Mr. Esau in relation to the 2015 advance payment. The Crown also commenced a second action (T-1270-19) seeking recovery of the debt owed by Horseshoe Valley, Mr. Esau and his son Stacy (who had signed personal guarantees) in relation to the 2016 advance payment.

[4] The Crown has moved for summary judgment in both actions. The defendants oppose the motions, maintaining that there are genuine issues for trial in both matters.

[5] For the reasons that follow, I am granting the motion for summary judgment in this action. In a separate Judgment and Reasons filed in T-1270-19, I grant the motion for summary judgment in that action as well.

II. BACKGROUND

[6] The APP is a program established under the *Agricultural Marketing Programs Act*, SC 1997, c 20 (“*AMPA*”) to support agricultural production in Canada by providing cash advances to agricultural producers. Under the program, administrator organizations involved in the marketing of a particular agricultural product can make advance payments to producers of crops or livestock. The producers, in turn, will use the funds advanced to them to cover expenses associated with their production activities. Interest accrues on the advance payment at a rate set out in the application. Ordinarily, the amount owing in repayment of the advance payments is reduced over the course of the growing season by the delivery of crops or livestock (as the case may be) to the administrator organization. At a certain point stipulated in the advance payment application, the producer must repay the administrator organization any amount of the advance payment (plus interest) that remains outstanding. The Minister of Agriculture and Agri-Food Canada guarantees repayment to the administrator organization in cases where the producer defaults.

[7] When the Minister repays an administrator organization in a case of default, he is subrogated to the administrator’s rights against the producer and against any parties who are liable in relation to the advance payment: see subsection 23(2) of the *AMPA*. As well, subsection 23(3) of the *AMPA* provides that the producer is liable to the Minister for interest on the subrogated amount as well as costs incurred by the Minister to recover that amount. (See the Annex for the pertinent statutory provisions.)

[8] On or about May 20, 2015, Mr. Esau applied to the BCBFA for an advance payment for cattle for the 2015-16 crop year. He was eligible for an advance payment in the total amount of \$230,944.22, less an administration fee. Mr. Esau authorized portions of the advance payment to be remitted to two third parties. The balance was paid to him in June 2015. (Due to an administrative error, Mr. Esau actually received more than he was entitled to but the overpayment was rectified.)

[9] Mr. Esau was in default with respect to the repayment of the advance payment as of April 1, 2017. At that time, the outstanding balance of the advance payment together with interest was \$246,636.01. After the date of default, interest continued to accumulate in accordance with the terms and conditions stipulated in the advance payment application.

[10] On or about January 17, 2018, the Minister honoured the guarantee available under section 23 of the *AMPA* with respect to the remaining debt owing from the defaulted 2015 advance payment to Mr. Esau and paid \$240,803.23 to BCBFA.

[11] The Minister then made demands of Mr. Esau for repayment of the defaulted 2015 advance payment. When these demands were not satisfied, in 2019 the Crown commenced this action for recovery of the amount it alleges is owed by Mr. Esau in relation to the 2015 advance payment. The principal and interest outstanding at the date of default was \$246,636.01.

[12] Mr. Esau filed his Statement of Defence on August 12, 2019.

[13] Meanwhile, on or about July 19, 2016, Horseshoe Valley, a company belonging to Mr. Esau and his son Stacy, applied to the BCBFA for an advance payment for grain under the *AMPA* for the 2016-17 crop year. On the same date, Mr. Esau and Stacy executed a Joint and Several Liability Continuing Guarantee with respect to the advance payment for which Horseshoe Valley had applied. The application was approved and, on July 29, 2016, the BCBFA advanced the amount of \$112,783.65 to Horseshoe Valley.

[14] Horseshoe Valley was in default with respect to the repayment of the 2016 advance payment as of September 30, 2017. At that time, the outstanding balance of the advance payment together with interest was \$93,546.53. After the date of default, interest continued to accumulate in accordance with the terms and conditions stipulated in the advance payment application.

[15] On or about January 22, 2018, the Minister honoured the guarantee available under section 23 of the *AMPA* with respect to the remaining debt owing from the defaulted 2016 advance payment to Horseshoe Valley and paid \$90,010.19 to BCBFA.

[16] The Minister then made demands of Horseshoe Valley, Elvern Esau and Stacy Esau for repayment of the defaulted 2016 advance payment. When these demands were not satisfied, in 2019 the Crown commenced an action for recovery of the amount it alleges is owed by the defendants in relation to the 2016 advance payment (Court File No. T-1270-19).

[17] The defendants filed their Statement of Defence in this action on September 26, 2019.

[18] On January 21, 2020, the Crown filed motions for summary judgment in both matters. The defendants filed Amended Statements of Defence in both actions after receiving the motions for summary judgment.

[19] In relation to the present action, which concerns the 2015 advance payment for cattle, Mr. Esau denies liability because, he alleges, the BCBFA breached its obligations to him. Specifically, he alleges that one Connie Patterson, an administrator of the APP with BCBFA failed to execute a priority agreement in favour of the APP and did not apply funds generated through the sale of cattle to the 2015 advance payment, as she should have. Instead, according to Mr. Esau, Ms. Patterson applied the funds to repay loans to Mr. Esau from the South Peace Bred Heifers Cooperative. Mr. Esau asserts that the “effect of the misapplied funds would have significantly paid down any APP amounts outstanding or in their entirety.” He maintains that these actions were in breach of the BCBFA’s duties towards him and that he suffered losses as a result which should be set off against any amounts owing to the Crown. This submission is supported solely by an affidavit from Stacy Esau despite the fact that he appears to have little if any direct knowledge of several material facts.

[20] In relation to the second action, which concerns the 2016 advance payment for grain, the defendants also deny liability because of the actions of Ms. Patterson. They allege that, rather than sell their grain to a third party and use the proceeds to repay the advance payment, as she should have, Ms. Patterson authorized its use as cattle feed and then used the proceeds of the sale of the fed cattle to pay down a separate loan from the South Peace Feeders Cooperative. They maintain that these actions were in breach of the BCBFA’s duties towards them and that they

suffered losses as a result which should be set off against any amounts owing to the Crown. This submission is also supported solely by an affidavit from Stacy Esau. However, unlike with respect to the 2015 advance payment, he does appear to have had direct dealings with Ms. Patterson in respect of the 2016 advance payment and therefore has direct knowledge of material facts relating to it.

III. THE TEST FOR SUMMARY JUDGMENT

[21] The Crown has moved for summary judgment under Rule 213 of the *Federal Courts Rules*, SOR/98-106. Under Rule 215, the Court shall grant summary judgment if it is satisfied that there is no genuine issue for trial with respect to a claim or defence, as the case may be. Under Rule 214, the party responding to a motion for summary judgment “shall not rely on what might be adduced as evidence at a later stage in the proceedings.” Rather, it “must set out specific facts and adduce evidence showing that there is a genuine issue for trial.”

[22] Whether under the *Federal Courts Rules* or under provincial rules of civil procedure, the purpose of summary judgments is the same. As the Supreme Court of Canada stated in *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372 at para 10:

The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and costs on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[23] The test to be applied on a motion for summary judgment in this Court is not in dispute here. The approach of the parties is consistent with the following recent statements by the Federal Court of Appeal in *Canmar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 24:

The test is not whether a party cannot possibly succeed at trial, but rather whether the case is clearly without foundation, or is so doubtful that it does not deserve consideration by the trier of fact at a future trial. There does not appear to be any definitive or determinative formulation of the test, but the underlying rationale is clear: a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial. [Citations omitted.] This should obviously translate into a heavy burden on the moving party.

[24] The Federal Court of Appeal went on to state the following (at para 27):

The legal burden to establish that there is no genuine issue for trial clearly falls on the moving party. That being said, once the moving party has discharged its burden, the evidentiary burden falls on the responding party, who cannot rest on its pleadings and must come up with specific facts showing that there is a genuine issue for trial: *Cabral v. Canada (Citizenship and Immigration)*, 2018 FCA 4, [2018] F.C.J. No. 21 at para. 23. As the Federal Court stated in *Watson v. Canada (Indian and Northern Affairs)*, 2017 FC 321 at paragraph 22, “[w]hile the burden falls on the moving party, both parties must put their best foot forward.” [Further citations omitted.]

IV. ANALYSIS

[25] The defendants contend that the alleged actions of Ms. Patterson raise a genuine issue as to the amounts, if any, they owe to the Crown with respect to the 2015 and 2016 advance payments. Specifically, they submit that a trial is required to determine whether Ms. Patterson was in a conflict of interest, whether she breached her duties towards the defendants by

allocating proceeds of sales to other debts and not to repayment of the advance payments, and whether, if this is in fact the case, this reduces (or perhaps even eliminates) any debts owing to the Crown under the 2015 and 2016 advance payment agreements.

[26] I do not accept the defendants' submission.

[27] While I have concerns that the defendants have not put their best foot forward in providing an evidentiary basis for their response to the motions for summary judgment (especially in relation to the 2015 advance payment), I am prepared to assume for the sake of argument that they could adduce evidence at trial to establish the role they allege Ms. Patterson played and the things they allege she did. The problem for the defendants, however, is that Ms. Patterson is not a Crown servant. Whatever she may have done, her actions cannot bind the Crown or alter the defendants' obligations under the 2015 and 2016 advance payment agreements. Ms. Patterson's actions may raise genuine issues as between her and the defendants, but they do not raise any issues for trial as between the Crown and the defendants. The defendants have not attempted to bring a third party claim against her. Even if they did, this would not give rise to a genuine issue for trial in this Court. There being no relationship between the cause of action in a potential third party proceeding and any applicable federal law, the Federal Court would have no jurisdiction over it: see *Canadian Forest Products Ltd v Canada (Attorney General)*, 2005 FCA 220 at paras 50-57. To the extent that the defendants seek to advance equitable considerations that could relieve them of their debts to the Crown, I can see none. Even taking the defendants' case at its highest, there is no suggestion that Ms. Patterson

misappropriated funds or used them otherwise than in furtherance the defendants' interests (i.e. by paying down other debts that they owed).

[28] In summary, the Crown alleges that the defendants received advance payments from the BCBFA, these advance payments were not repaid as required under the terms agreed to by the defendants when they applied for the advance payments, and the Crown is now subrogated to the rights of the BCBFA. The defendants have not disputed these core allegations and the Crown's evidence in support of the motions for summary judgment stands uncontradicted. The Crown's evidence on these motions clearly establishes that the defendants owe to the Crown the amounts sought as judgment. There is no genuine issue for trial.

V. CONCLUSION

[29] For the foregoing reasons, the Crown's motion for summary judgment is granted.

JUDGMENT IN T-1075-19

THIS COURT'S JUDGMENT is that

1. Summary judgment in the amount of \$268,021.72 is granted in favour of the plaintiff;
2. Pre-judgment interest shall be calculated on this amount from the date of
May 8, 2019, in accordance with the terms of the Advance Payment application at the
rate of BMO Prime Rate plus 1%, calculated daily and compounded monthly;
3. Post-judgment interest is fixed at an annual rate of 5.00 % per annum, as set by the
Interest Act, RSC 1985, c I-15, section 3, from the date of this judgment;
4. Costs shall be payable to the plaintiff in the fixed, all-inclusive amount of \$2,048.14
in accordance with the bill of costs submitted;
5. A copy of this Judgment and Reasons shall be filed in Court File No. T-1270-19.

“John Norris”

Judge

ANNEX

Agricultural Marketing Programs Act, SC 1997, c 20 (section 23)

Payments to be made by Minister

23 (1) If the producer is in default under the repayment agreement and the Minister receives a request for payment from the administrator or lender to whom the guarantee is made, the Minister must, in accordance with the advance guarantee agreement and subject to any regulations made under paragraph 40(1)(g) or (g.1), pay to the lender or the administrator, as the case may be, an amount equal to the amounts referred to in paragraphs 22(a) and (c) and the interest, other than the interest paid by the Minister under subsection 9(1), at the rate specified in the advance guarantee agreement on the outstanding amount of the advance, calculated from the date of the advance.

Payments may be made by Minister

(1.1) The Minister may, subject to any regulations made under paragraph 40(1)(g) or (g.1), pay to the lender or the administrator, as specified in the advance guarantee agreement, an amount equal to the amounts referred to in paragraphs 22(a) and (c) and the interest, other than the interest paid by the Minister under subsection 9(1), at the rate specified in the advance guarantee agreement on the outstanding amount of the advance, calculated from the date of the advance, if

(a) the producer is in default under the repayment agreement and has made an application under section 5 of the *Farm Debt Mediation Act*; or

Paiement ministériel obligatoire

23 (1) Si le producteur est en défaut relativement à un accord de remboursement, le ministre doit, après réception d'une demande en ce sens de l'agent d'exécution ou du prêteur à qui, le cas échéant, la garantie a été donnée, lui remettre, conformément à l'accord de garantie d'avance et sous réserve des règlements pris en vertu des alinéas 40(1)g) ou g.1), la somme correspondant aux sommes mentionnées aux alinéas 22a) et c) et les intérêts — autres que ceux payés par le ministre en application du paragraphe 9(1) — sur la somme non remboursée de l'avance garantie calculés au taux prévu dans l'accord de garantie d'avance, courus à partir de la date du versement de l'avance.

Paiement ministériel facultatif

(1.1) En outre, il peut le faire dans les cas suivants :

a) le producteur défaillant a présenté une demande en vertu de l'article 5 de la *Loi sur la médiation en matière d'endettement agricole*;

(b) the producer has been in default under the repayment agreement for the period specified in the advance guarantee agreement.

b) le producteur a été défaillant pendant la période prévue par l'accord de garantie d'avance.

Subrogation

(2) The Minister is, to the extent of any payment under subsection (1) or (1.1), subrogated to the administrator's rights against the producer in default and against persons who are liable under paragraphs 10(1)(c) and (d) and may maintain an action, in the name of the administrator or in the name of the Crown, against that producer and those persons.

Subrogation

(2) Le ministre est subrogé dans les droits de l'agent d'exécution contre le producteur défaillant et les personnes qui se sont engagées au titre des alinéas 10(1)c) et d), à concurrence du paiement qu'il fait en application des paragraphes (1) ou (1.1). Il peut notamment prendre action, au nom de l'agent d'exécution ou au nom de la Couronne, contre ce producteur et ces personnes.

Recovery of interest and costs

(3) The producer is liable to the Minister for interest on the subrogated amount, calculated in accordance with the repayment agreement, and the costs incurred by the Minister to recover that amount, including legal costs.

Frais engagés par le ministre

(3) Le producteur est redevable au ministre des frais engagés par celui-ci pour procéder au recouvrement en vertu du paragraphe (2), y compris les frais juridiques et les intérêts sur le montant des frais calculés conformément à l'accord de remboursement.

Limitation or prescription period

(4) Subject to the other provisions of this section, no action or proceedings may be taken by the Minister to recover any amounts, interest and costs owing after the six year period that begins on the day on which the Minister is subrogated to the administrator's rights.

Prescription

(4) Sous réserve des autres dispositions du présent article, toute poursuite visant le recouvrement par le ministre d'une créance relative au montant non remboursé de l'avance, aux intérêts ou aux frais se prescrit par six ans à compter de la date à laquelle il est subrogé dans les droits de l'agent d'exécution.

Deduction, set-off or compensation

(5) The amounts, interest and costs owing may be recovered at any time by way of deduction from, set-off against or, in Quebec, compensation against any sum of money that may be due or payable by Her

Compensation et déduction

(5) Le recouvrement, par voie de compensation ou de déduction, du montant d'une telle créance peut être effectué en tout temps sur toute somme à payer par l'État à la personne ou à sa succession.

Majesty in right of Canada to the person or their estate or succession.

Acknowledgment of liability

(6) If a person acknowledges liability for the amounts, interest and costs owing, whether before or after the end of the limitation or prescription period, the time during which the limitation or prescription period has run before the acknowledgment of liability does not count in the calculation of the limitation or prescription period and an action or proceedings to recover the amounts, interest and costs may be taken within six years after the day of the acknowledgment of liability.

Types of acknowledgment

(7) An acknowledgement of liability means

(a) a written promise to pay the amounts, interest and costs owing, signed by the person or his or her agent or other representative;

(b) a written acknowledgment of the amounts, interest and costs owing, signed by the person or his or her agent or other representative, whether or not a promise to pay can be implied from it and whether or not it contains a refusal to pay;

(c) a payment, even in part, by the person or his or her agent or other representative of any of the amounts, interests and costs owing;

(d) any acknowledgment of the amounts, interest and costs owing made by the person, his or her agent or other representative or the trustee or administrator in the course of

Reconnaissance de responsabilité

(6) Si une personne reconnaît, même après l'expiration du délai de prescription, qu'elle est responsable d'une telle créance, la période courue avant cette reconnaissance de responsabilité est exclue du calcul du délai de prescription et une poursuite en recouvrement peut être intentée dans les six ans suivant la date de la reconnaissance de responsabilité.

Types de reconnaissance de responsabilité

(7) Constituent une reconnaissance de responsabilité :

a) la promesse écrite de payer la créance exigible, signée par la personne, son mandataire ou autre représentant;

b) la reconnaissance écrite de l'exigibilité de la créance, signée par la personne, son mandataire ou autre représentant, que celle-ci contienne ou non une promesse implicite de payer ou une déclaration de refus de paiement;

c) le paiement, même partiel, de la créance exigible par la personne, son mandataire ou autre représentant;

d) la reconnaissance par la personne, son mandataire, son représentant, le syndic ou l'administrateur de l'exigibilité de la créance, dans le cadre de mesures prises conformément à la

proceedings under the *Bankruptcy and Insolvency Act*, the *Farm Debt Mediation Act* or any other legislation dealing with the payment of debts; or

(e) the person's performance of an obligation under the repayment agreement referred to in subsection (1).

Period excluded

(8) Any period in which it is prohibited to commence or continue an action or proceedings against the person to recover the amounts, interest and costs owing does not count in the calculation of a limitation or prescription period under this section.

Enforcement proceedings

(9) This section does not apply in respect of an action or proceedings relating to the execution, renewal or enforcement of a judgment.

Loi sur la faillite et l'insolvabilité, à la *Loi sur la médiation en matière d'endettement agricole* ou à toute autre loi relative au paiement de dettes;

e) l'exécution par la personne de toute obligation imposée par l'accord de remboursement mentionné au paragraphe (1).

Période exclue

(8) Toute période au cours de laquelle il est interdit d'intenter ou de continuer contre la personne des poursuites en recouvrement d'une créance exigible est exclue du calcul de tout délai prévu au présent article.

Mise en oeuvre de décisions judiciaires

(9) Le présent article ne s'applique pas aux poursuites relatives à l'exécution, à la mise en oeuvre ou au renouvellement d'une décision judiciaire.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1075-19

STYLE OF CAUSE: HER MAJESTY THE QUEEN IN RIGHT OF CANADA
v ELVERN KENNETH ESAU

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

JUDGMENT AND REASONS: NORRIS J.

DATED: FEBRUARY 8, 2021

WRITTEN REPRESENTATIONS BY:

Don Klaassen

FOR THE PLAINTIFF

Benjamin La Borie

FOR THE DEFENDANT

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