Federal Court  Cour fédérale

Date: 20240521

Docket: T-1427-20

Citation: 2024 FC 765

Ottawa, Ontario, May 21, 2024

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

HIS MAJESTY THE KING IN RIGHT OF CANADA

Plaintiff

and

WIMMER BROOK ENTERPRISES INC AND GREGORY EARL PYLATUKE (ALSO KNOWN AS GREG PYLATUKE)

Defendants

JUDGMENT AND REASONS

I. Introduction

[1] The Plaintiff, His Majesty the King in Right of Canada, brings this motion for summary judgment. It seeks to recover the amount of $383,756.63, plus interest and costs, against the Defendants, claiming that they are in default of their repayment obligations for funds received

from the Advance Payment Program under the *Agricultural Marketing Programs Act*, SC 1997, c 20 [the AMPA].

[2] The Defendants, Wimmer Brook Enterprises Inc. [the Corporate Defendant] and Gregory Earl Pylatuke [the Individual Defendant], do not deny receiving the advance payment. However, they contest the motion on the grounds that the Plaintiff brought the action outside of the applicable limitation period. In the alternative, they argue that the Plaintiff applied the incorrect interest rate on the outstanding balance, and that the Individual Defendant should not be personally liable for any amounts owing by the Corporate Defendant.

[3] For the reasons that follow, I will grant this motion for summary judgment in full.

II. Background

[4] The AMPA is the federal statute that establishes and governs the Advance Payment Program to support agricultural producers. Under this program, organizations involved in marketing the agricultural product [the administrators or lenders] may make advance payments to producers before their crop or harvest produces revenue. The Minister of Agriculture and Agri-Food [the Minister] acts as a guarantor for these advances: *Moodie v Canada*, 2021 FCA 121 [*Moodie FCA*] at para 5. If a producer is in default of repaying an advance, and the administrator or lender makes a request to this effect, subsection 23(1) of the AMPA requires the Minister to honour the guarantee and pay the outstanding amount of the advance payment to the administrator or lender. The Minister then has a cause of action against the defaulted producer, pursuant to subsection 23(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.	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.

[5] The Canadian Canola Growers Association [the CCGA], a non-profit corporation registered under the laws of Manitoba, is an administrator pursuant to the AMPA. In March 2012, the Corporate Defendant applied to the CCGA for an advance payment for the 2012-2013 crop year and, by doing so, entered into a Repayment Agreement with the CCGA. The Corporate Defendant received payments from the CCGA totalling $343,071.68 [the Advance Payment], less an administration fee and withhold amounts, in April and July 2012.

[6] At the time that the Corporate Defendant applied to the CCGA for an advance payment, section 10 of the AMPA required that each shareholder of a producer corporation agree in writing to be jointly and severally liable to the administrator in order to be eligible for the advance. The Individual Defendant, as the President and sole shareholder of the Corporate Defendant, executed an agreement entitled the "Joint and Several Liability Continuing Guarantee" [the Liability Agreement], assuming personal liability for any advance payments received by the Corporate Defendant, on or about April 2, 2009.

[7] On three occasions—November 7, 2013; May 23, 2014; and July 28, 2014—the CCGA sent correspondence to the Defendants advising that the Advance Payment was in default status and requesting repayment of the outstanding amount plus interest and costs pursuant to the Repayment Agreement.

[8] On an unknown date, the CCGA requested that the Minister honour its guarantee under the AMPA with respect to the Defendants' outstanding balance of the Advance Payment. The Minister agreed and paid the outstanding balance with respect to the Advance Payment to the CCGA. It then sent eight correspondences from 2015 to 2017 to the Corporate Defendant, advising it of the outstanding balance.

[9] To date, the Defendants have repaid a total of $230,109.85.

III. Issue

[10] This motion for summary judgment raises the following four issues:

A. Is summary judgment available?

B. Is the action statute-barred?

C. Did the Plaintiff correctly calculate the interest on the outstanding balance?

D. Is the Individual Defendant personally liable for the amount owing?

[11] There is one preliminary issue: whether the Court should grant the Defendants' motion for leave to amend their pleadings brought under Rules 200 and 72(2)(a) of the *Federal Courts Rules*, SOR/98-106 [the Rules].

[12] On March 15, 2024, the Defendants submitted a responding motion containing a Notice of Motion seeking leave to amend their Statement of Defence. As part of this motion, they submitted the proposed amendments to their Statement of Defence. On March 21, the Court rejected the materials for filing as they were submitted without proof of service. The Defendants resubmitted their motion, with proof of service, on March 26.

[13] In its reply submitted on March 21, 2024, the Plaintiff consented to the Defendants' proposed amendments to the Statement of Defence as included in their rejected responding motion. As I find that these amendments are identical to those ultimately filed, I see no issue in granting the Defendants' motion and accepting their amendments under Rule 200 with the Plaintiff's consent.

IV. Analysis

A. *Summary judgment is available*

[14] A motion for summary judgment is a procedure for obtaining judgment based on written evidence, without having to proceed to a full trial. Summary judgments allow the Court to summarily dispense with cases where there are no genuine issues to be tried, conserve scarce judicial resources, and improve access to justice: *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para 25.

[15] Rules 213–219 provide for summary judgment and summary trial. In particular, Rule 215(1) states:

If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

[16] The parties submit that this action may proceed under summary judgment, as there is no genuine issue for trial. I agree.

[17] In *Hryniak v Mauldin*, 2014 SCC 7, the Supreme Court of Canada explained the concept of a "genuine issue for trial" at paragraph 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[18] There is no genuine issue for trial here. As the parties submit, the Court has all the evidence required to fairly and justly adjudicate the dispute, including the relevant correspondences between the Plaintiff, the CCGA, and the Defendants; the Repayment Agreement; and the Liability Agreement. Summary judgment provides a proportionate and more expeditious process to resolve the Plaintiff's claim than a full trial.

B. *The action is not statute-barred*

[19] The parties agree that subsection 23(4) of the AMPA provides the applicable six-year limitation period:

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.	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.

[20] However, the parties disagree on when the limitation period started (i.e., the date on which the Minister became subrogated to the CCGA's rights against the Defendants).

[21] The Defendants submit that the relevant date was on or before July 28, 2014—the date on which the CCGA wrote to the Defendants that "your debt is now payable to the Crown and a representative from the Government of Canada will be in contact with you to arrange repayment."

[22] The Plaintiff submits that the subrogation date is December 12, 2014—the date that they allege that the Minister made a payment to the CCGA with respect to the Defendants' outstanding balance.

[23] In reference to subsections 23(2) and (4) of the AMPA, this Court held in *Canada v H & M Farm Ltd*, 2021 FC 905 at paragraph 14, that "the event that triggers the Minister's subrogation is the payment made to the administrator." The Court went on to state at paragraph 16 that "the limitation period begins to run when a payment is made." The Federal Court of Appeal in *Moodie FCA*, which both parties cite, reached a similar conclusion at paragraphs 12–15, affirming *Canada v Moodie*, 2020 FC 46 at paras 26–27; see also *Canada v Kenelane Farms Limited*, 2021 FC 924 [*Kenelane Farms*] at para 53.

[24] The record demonstrates that the July 28, 2014 letter that the Defendants rely on from the CCGA states that the CCGA had *requested* the Minister to honour its guarantee; the letter was not confirmation that the Minister had indeed accepted the request and made any such payment. This is also true of the undated letter from the Minister to the CCGA that the Defendants rely on, wherein the Minister wrote that "[a]s requested, Agriculture and Agri-food Canada – Advance Payments Program has honoured the guarantee under Section 5 of the Agricultural Marketing Programs Act on behalf of the above-noted producer." While the Defendants submit that the date of this letter can be inferred as prior to July 28, 2014, or at least prior to August 31, 2014, I find that it is irrelevant when this letter was dated, as it does not represent proof of payment. The letter even states that the CCGA "will receive a deposit," and provides details of what will occur "once this payment has been made." Again, the relevant date on which the Minister is subrogated is the day that the Minister actually makes a payment to the administrator.

[25] From the record, I find that the Minister made a payment to the CIBC account of the CCGA with respect to the Defendants' outstanding balance on December 12, 2014. The

Minister therefore had six years from that date to bring this action (i.e., until December 12, 2020). As the Statement of Claim issued on November 24, 2020, this action is not statute-barred.

C. *The Plaintiff correctly calculated the interest on the outstanding balance*

[26] The parties look to Article 6 of the Repayment Agreement to provide the interest rate. In particular, Article 6.2 applies where the Defendants are in default:

> 6.2. In the event that the Producer is declared in Default, the interest payable by the Producer will be:
>
> a) CIBC Prime rate plus 3% on the amount of the outstanding balance from the date the advance was cashed to the date the Producer was declared in Default, calculated daily and compounded monthly.
>
> b) CIBC Prime rate plus 3% on the amount of the outstanding Producer's liability from the date of Default until the advance, interest, and all costs of collection are repaid in full, calculated daily and compounded monthly (A standard rate of 5% will be applied to the outstanding balance as of 45 days after default).

[27] Although the parties agree that this Article sets out the applicable interest rate, they differ on its interpretation.

[28] The Plaintiff interprets Article 6.2 as providing for an interest rate equivalent to the CIBC prime lending rate plus 3%, calculated daily and compounded monthly, from the date the advance was issued.

[29] In contrast, the Defendants submit that the interest rate ought to be 5% simple interest, due to their interpretation of the last sentence of Article 6.2(b). They further submit that the Court ought to direct a reference to calculate the interest.

[30] I find that directing a reference is inappropriate on summary judgment due to the operation of Rule 214 and, in any event, unnecessary in the circumstances. The Plaintiff did not err in calculating the interest applied to the outstanding balance owed by the Defendants.

[31] The AMPA does not establish the applicable interest rate: *Canada v Stadnik*, 2003 FC 1249 at para 10. Instead, as the Plaintiff submits, it ratifies the interest rate specified in the repayment agreement. Paragraph 22(b) of the AMPA calls for the producer to pay interest on the outstanding amount of the advance to the administrator "at the rate specified in the repayment agreement." Once the Minister is subrogated to the administrator's rights, subsection 23(3) provides that the producer is liable to the Minister for interest on the subrogated amount, "calculated in accordance with the repayment agreement."

[32] I interpret Article 6.2 of the Repayment Agreement as setting the interest rate on the outstanding balance at the CIBC prime lending rate plus 3%, calculated daily and compounded monthly, from the date that the CCGA issued the advance. I agree with the Plaintiff that the standard rate of 5% referenced in Article 6.2(b) relates to an additional charge on top of and separate from the interest charge. This interpretation of the provision is in accordance with the Supreme Court's guidance that a contract "must be read as a whole:" *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 23-24.

[33] Looking at the Repayment Agreement as a whole, I find that Article 5.3 similarly references the "standard rate of 5%," stating:

> 5.3. Upon Default, the Producer is liable to the Administrator for:
>
> a) the outstanding amount of the guaranteed advance;

> b) the interest at the rate specified in Section 6.0 of these Terms and Conditions on the outstanding amount of the advance, calculated from the date the advance was issued until the advance is repaid;
>
> c) costs incurred by the Administrator to recover the outstanding amount (a standard rate of 5% will be applied to the outstanding balance as of 45 days after default) and interest, including legal costs approved by the Minister.
>
> (Emphasis added.)

[34] It is evident that the rate of 5% referenced in Article 6.2 under review similarly relates to the collection costs, which are separate from the interest owed on the outstanding balance. This interpretation of the provision is consistent with a holistic reading of the contract.

D. *The Individual Defendant is personally liable for the amount owing*

[35] The Defendants submit that the Individual Defendant is not personally liable for the amount owing because the Liability Agreement was not executed in accordance with subsection 31(2) of the *Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1 [SFSA]; legislation meant to provide certain protections to farmers in Saskatchewan. This provision outlines requirements for a guarantee under the SFSA to have any effect. The Defendants submit that none of the requirements were met: the Individual Defendant did not appear before a lawyer or notary public, did not acknowledge to a lawyer or notary public that he executed the guarantee, and did not sign any certificate contemplated by the SFSA, let alone sign it in the presence of a lawyer or notary public.

[36] I agree with the Plaintiff that the Liability Agreement signed by the Individual Defendant, though containing the word "guarantee," is not a guarantee within the meaning of section 31 of the SFSA.

[37] Paragraph 31(1)(b) of the SFSA defines guarantee as "a deed or written agreement whereby an individual enters into an obligation to answer for an act, default, omission or indebtedness of a farmer in relation to farm land or other assets used in farming, but does not include guarantees entered into prior to the coming into force of [the SFSA]."

[38] In other words, a guarantee arises where an individual's liability is triggered upon some failure of the principal debtor. In contrast, the Liability Agreement is more akin to an indemnity, as the Individual Defendant agreed to be personally liable for the advance payment at the same time as the Corporate Defendant, regardless of whether the Corporate Defendant defaulted. This is evident through a close reading of the Liability Agreement wherein the Individual Defendant guaranteed to be liable individually for all amounts owing by the Corporate Defendant on "any advance made to the [Corporate Defendant] now or in the future." The Liability Agreement also contained a provision that read that the "CCGA shall not be bound to exhaust its recourse against the Producer or other parties before being entitled to payment from the Guarantors under the Guarantee."

[39] I further agree with the Plaintiff that this interpretation is consistent with the persuasive case law analyzing the analogous provision in Alberta's *Guarantee Acknowledgments Act*, RSA 2000, c G-11 [the GAA]. Paragraph 1(a) of the GAA defines guarantee as "a deed or written agreement whereby a person, not being a corporation, enters into an obligation to answer for an

act or default or omission of another." The Alberta Court of Appeal has held that where an individual possesses "joint and several liability," or is "personally" or "primarily" liable, the GAA does not apply as the obligations are not conditional: *Royal Bank of Canada v Swartout*, 2011 ABCA 362 at para 38; *Knafelc v Fountain Tire Ltd*, 2009 ABQB 201 at paras 42-43. This Court recently endorsed the distinction between guarantee and indemnity in the context of the enforceability of a joint and several liability agreement made pursuant to the AMPA in *Canada v Talsma Farms Ltd*, 2021 FC 356 [*Talsma Farms*]. Justice Favel found that the agreement in dispute, which bears resemblance to the Liability Agreement and similarly used the word "guarantee", was not a guarantee under the GAA but rather had the indicia of an indemnity: *Talsma Farms* at para 30. Madam Justice Kane made a similar finding in *Kenelane Farms* at paragraphs 47–48.

[40] Here, the Individual Defendant signed the Liability Agreement as the sole shareholder of the Corporate Defendant, agreeing to be jointly and severally liable for the amounts advanced. As such, it is reasonable to find that the Liability Agreement represents an indemnity and the SFSA does not apply. Although the definition of guarantee under the SFSA slightly differs from the GAA's definition, including the word "indebtedness," I find that such an addition does not materially change the definition nor limit the application of the case law decided under the GAA.

[41] Therefore, the Liability Agreement did not need to be executed pursuant to the SFSA and is in effect. The Individual Defendant remains personally liable for the amount owing.

V. Conclusion

[42] In conclusion, the Court grants summary judgment in favour of the Plaintiff. The action is not statute-barred and both the Corporate Defendant and Individual Defendant remain liable for the amount owing, including the interest calculated by the Plaintiff in accordance with the Repayment Agreement, i.e., the CIBC prime lending rate plus 3%, calculated daily and compounded monthly. The Plaintiff has established, via affidavit evidence that this amounts to a total claim of $383,756.63. The Defendant has not adduced any evidence or cross-examined the Plaintiff's affiants. As a result, the affidavit evidence of the Plaintiff's affiants is undisputed and the Court accepts it.

[43] The Plaintiff seeks its costs of this motion fixed at $1,830.74 in lieu of taxation. It further seeks interest on the sum of $383,756.63 at the per diem interest rate of $106.95 from February 19, 2024 until the date of judgment, and post-judgment interest at 5.00% per annum pursuant to section 3 of the *Interest Act*, RSC 1985, c I-15.

[44] The Court ordinarily awards costs to the successful party. Under Rule 400(1), the Court has full discretionary power over the amount and allocation of costs. Rule 400(4) specifies that the Court may award lump sums, stating:

Tariff B	**Tarif B**
(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.	**(4)** La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

[45] I find that, in accordance with Rule 400(4), the Plaintiff is entitled to its costs and disbursements in the amount of $1,830.74, the calculation of which is set out in the affidavit of Shelley Warner.

[46] The cause of action arose in Saskatchewan, where the Defendants reside. Pursuant to subsection 37(1) of the *Federal Courts Act*, RSC 1985, c F-7, the laws governing interest in that province apply to the determination of post-judgment interest. In Saskatchewan, post-judgment interest is set at 5%: *Enforcement of Money Judgments Act*, RSS c E-9.22, s 113; *Enforcement of Money Judgments Regulations*, RSS c E-9.22 Reg 1, s 10.

JUDGMENT in T-1427-20

THIS COURT'S JUDGMENT is that:

1. The Plaintiff's Motion for Summary Judgment is granted.

2. The Defendants, Wimmer Brook Enterprises Inc. and Gregory Earl Pylatuke are jointly and severally liable and shall pay to the Plaintiff:

   - the sum of $383,756.63, which reflects the outstanding amount plus interest pursuant to the Repayment Agreement executed by the Defendants;
   - the Plaintiff's costs and disbursements fixed at $1,830.74 in lieu of taxation;
   - interest on the sum of $383,756.63, which shall accrue at the per diem interest rate of $106.95 from February 19, 2024 (the date of filing of this Motion for Summary Judgment) to the date of this Court's judgment, and thereafter at 5% per annum; and
   - interest on the sum of $1,830.74, which shall accrue at 5% per annum from the date of this Court's judgment.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1427-20
STYLE OF CAUSE:	HIS MAJESTY THE KING IN RIGHT OF CANADA v WIMMER BROOK ENTERPRISES INC AND GREGORY EARL PYLATUKE (ALSO KNOWN AS GREG PYLATUKE)

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

JUDGMENT AND REASONS:	ZINN J.
DATED:	MAY 21, 2024

WRITTEN REPRESENTATIONS BY:

Cailen Brust	FOR THE PLAINTIFF
Grant Carson	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Attorney General of Canada Saskatoon, Saskatchewan	FOR THE PLAINTIFF
Carson & Co Barristers and Solicitors Melfort, Saskatchewan	FOR THE DEFENDANTS