Federal Court  Cour fédérale

Date: 20201019

Docket: T-122-19

Citation: 2020 FC 981

Ottawa, Ontario, October 19, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Plaintiff

and

KILBACK STOCK FARM LTD.
ALLEN BLAIR KILBACK
DENISE ANNE KILBACK

Defendants

JUDGMENT AND REASONS

[1] This is a motion in writing, pursuant to Rule 369 of the *Federal Courts Rules,* SOR/98-106 [Rules], brought on behalf of the Plaintiff, Her Majesty the Queen in Right of Canada [Crown]. The motion seeks an order, pursuant to Rule 213(1), granting summary judgment in favour of the Plaintiff in the amount of $595,046.62 as of March 10, 2020, plus interest and costs.

[2] The subject action concerns a debt owing to the Crown pursuant to an application made by the corporate Defendant, Kilback Stock Farm Ltd. [Kilback Farm], and an advance payment under the federal *Agricultural Marketing Programs Act*, SC 1997 c 20 [AMP Act] made by the Manitoba Pork Credit Corporation [MPCC] to Kilback Farm for the 2008-2009 crop year. As shareholders of Kilback Farm, the defendants Allen Blair Kilback and Denise Anne Kilback [Individual Defendants] guaranteed the advance payment.

[3] On July 2, 2020, the Plaintiff filed its Motion Record. This included the affidavit of Mark De Luca, Supervisor of Recoveries Officers, Ottawa Office, Agriculture and Agri-Food Canada [AAFC] sworn on May 26, 2020 [De Luca Affidavit] and the affidavit of Shelley Warner, a paralegal with the Department of Justice, sworn on June 25, 2020 [Warner Affidavit], both affidavits provided in support of the motion. The Plaintiff also filed a Reply on October 5, 2020. The Plaintiff submits that all of the elements necessary to establish the Defendants' liability for this debt are before the Court and there is no genuine issue for trial.

[4] The Defendants filed their Motion Record on September 25, 2020, which included the affidavit of Allen Kilback, as an individual Defendant and former Chief Executive Officer [CEO] of Kilback Farm, sworn on September 25, 2020. The Defendants request that the Plaintiff's claim against the guarantors be dismissed on the basis that the applicable limitation period has expired and that the Plaintiff's claim against Kilback Farm be set down for trial.

Background Facts

[5] The background facts are largely not in dispute and the relevant supporting documentation is attached as exhibits to the De Luca Affidavit.

[6] In April 2008, Kilback Farm submitted an Application & Repayment Agreement – Corporation/Cooperative/Partnership Information for an advance payment under the AMP Act for the 2008-2009 crop year [Advance Payment Agreement]. The application included a Joint and Several Guarantee of the advance payment signed by each of the Individual Defendants on April 18, 2008 [De Luca Affidavit, para 2 and 4, Exhibit A].

[7] Kilback Farm received the advance payment in the total amount of $400,000.00 on or about April 30, 2008 and May 5, 2008 [Advance Payment]. The total amount owing as of December 31, 2018 is $557,639.19 (De Luca Affidavit, para 3, Exhibits B and C).

[8] On April 6, 2009, Allen Kilback, as an authorized signing officer, signed an Acknowledgment of a March 24, 2009 letter from the MPCC to Kilback Farm regarding the Advance Payments Program [APP]. The letter advised that the Minister had granted a Stay of Default for hog and cattle producers for the 2008-2009 advances received under the APP and by signing the Acknowledgement the producers agreed to repay their outstanding 2008-2009 advances in accordance with the terms and conditions set out in the letter (De Luca Affidavit para 5, Exhibit D).

[9] On December 3, 2010, the MPCC sent a letter to Kilback Farm advising that, effective October 1, 2010, the Minister had granted a further Stay of Default to producers having APP hog advance payments outstanding for the 2008 production period. The new stay would extend the repayment deadline to March 31, 2013. The letter requests that each shareholder review the attached Acknowledgement Document and states that if the producer is a corporation, only the signing authority needed to sign it. On January 24, 2011, Allen Kilback signed the Acknowledgment Document accepting the described terms and conditions of the Stay of Default (De Luca Affidavit paras 6 and 7, Exhibits E and F).

[10] On March 29, 2012, Allen Kilback, as CEO, producer and shareholder of Kilback Farm, signed an APP Amendment to the Application and Repayment Agreement [Advance Payment Agreement Amendment] as between the MPCC and Kilback Farm on behalf of that entity (De Luca Affidavit para 8, Exhibit G).

[11] After the default date of March 31, 2013, MPCC sent letters dated May 3, 2013 and May 23, 2013 to the Defendants advising that the Advance Payment received from MPPC was now in default, requesting repayment of the outstanding amount plus interest and costs, and indicating available payment options (De Luca Affidavit para 9, Exhibits H and I). MPCC also sent an email to the Individual Defendants on August 16, 2013, concerning which repayment term option they wished to select. MPCC sent another email dated October 16, 2013, indicting that because there had been no communications since September 5, 2013 the file would be sent to AAFC who, in turn, would send the file to their collections department (De Luca Affidavit para 9, Exhibits J and K).

[12] By letter of February 18, 2014, the APP Default Claim Unit of AAFC advised the MPCC that the Minister had honoured the guarantee under s 5 of the AMP Act on behalf of the producer, Kilback Farm. The Minister made a payment of $446,058.03 to MPCC (De Luca Affidavit para 10, Exhibits L and M).

[13] AAFC sent correspondence dated March 21, 2014, September 10, 2014, October 30, 2014, November 27, 2015, May 6, 2016, October 21, 2016 and May 23, 2017 to Kilback Farm advising of the outstanding balance and requesting a response (De Luca Affidavit para 11, Exhibit N).

[14] The De Luca Affidavit states that as of the date of default, April 1, 2013, the outstanding balance of the Advance Payment, together with interest calculated from the date the advance was issued, pursuant to s 6.2(a) of the terms and conditions under the Application and Repayment Agreement, was $438,379.80 (De Luca Affidavit para 12, Exhibit C). After the date of default, pursuant to section 6.2(b) of the terms and conditions of the Application and Repayment Agreement, interest accumulates on the outstanding amount at the prime lending rate plus 1.5%, calculated daily and compounded monthly, until the date of full payment (De Luca Affidavit para 13, Exhibit C). Further, that the Plaintiff has attempted to collect payments from the Defendants but the Defendants have failed or neglected to provide payment of the indebtedness. Therefore, the Defendants have breached the terms of the Advance Payment Agreement (De Luca Affidavit para 14).

[15] A final demand for payment was made by letters dated December 6, 2017 from the Department of Justice to each of Allen Kilback and Denise Kilback (Werner Affidavit, para 3, Exhibits A and B).

[16] This action was commenced by the Plaintiff on January 14, 2019.

[17] The Warner Affidavit sets out a calculation of the amounts owing pursuant to the Advance Payment Agreement as well as the Plaintiff's calculation of its claimed costs and disbursements.

[18] In their written submissions, the Defendants state that the facts are not in dispute other than:

a) The guarantors (the Individual Defendants) did not agree to extensions of the time for repayment or alteration of the original loan agreement;

b) The guarantors did not acknowledge the debt at any time after the advance was made;

c) Neither the principal debtor (Kilback Farm) nor the guarantors agreed to a limitation period other than the provincial limitation period.

Issue

[19] The Plaintiff states that the sole issue to be determined is whether summary judgment should be issued in its favour against the Defendants.

[20] The Defendants do not specifically address the question of whether summary judgement is appropriate, but raise a number of issues being: what is the effect of the fact that the Plaintiff's claim is subrogated; what is the applicable limitations period; was the limitation period modified by contract; when did the limitations period begin to run; what is the effect of the expiration of the limitations period; what was the effect of the modification of the loan agreement; and, is the Plaintiff estopped from pursuing its claim?

[21] In my view, what must be determined in this motion is determined by Rule 215(1).

[22] Rule 215(1) states that if, on 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. Rule 215(2)(b) states that if the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant summary judgment.

[23] In *Manitoba v Canada*, 2015 FCA 57, the Federal Court of Appeal considered Rule 215 and, citing *Burns Bog Conservation Society v Canada (Attorney General)*, 2014 FCA 170, held that there is no genuine issue if there is no legal basis for the claim based on the law or the evidence brought forward (para 15). The Court found that this was consistent with the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7, which held that there is no genuine issue if there is no legal basis to the claim or if the judge has the evidence required to fairly and justly adjudicate the dispute.

[24] Although the burden lies on the moving party to establish that there is no genuine issue for trial, Rule 214 requires that the party responding to the summary judgment to set out specific facts and adduce evidence showing that there is a genuine issue for trial. This requires the responding party to "put his best foot forward" or to "lead trump or risk losing" (*The Source Enterprises Ltd. V Canada (Public Safety and Emergency Preparedness*), 2012 FC 966 at para 18). Put otherwise, "while the ultimate burden on a motion for summary judgment rests with the moving party, there is an evidentiary burden on a responding party to put forward evidence to show that there is a genuine issue for trial" (*Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at para 23). The test is whether the case is so doubtful it deserves no further consideration (*Granville Shipping Co. v Pegasus Lines Ltd. SA*, [1996] 2 FC 853).

[25] I am satisfied that this issue can be determined summarily. Whether the Defendants have a genuine issue for trial in this matter turns on the question of what limitation period applies, when that limitation period began to run and, with respect to the Individual Defendants as shareholders/guarantors, if the Stays of Default and the Advance Payment Agreement Amendment continued their surety obligations. No genuine issue for trial exists because the evidence before me is sufficient to permit me to fairly and justly adjudicate this question (see *Leo Ocean S.A. v Westshore Terminals*, 2015 FCA 282). And, even if this issue amounts to a genuine issue, it is a question of law, which I am able to determine, and, accordingly, I may dispose of the matter by summary judgment.

Legislative Scheme

[26] The purpose of the AAP is described in s 4 of the AMP Act as being to improve marketing opportunities for the agricultural products of eligible producers by guaranteeing the repayment of the advances made to them as a means of improving their cash-flow. The AMP Act sets out a scheme whereby administrator organizations involved in the marketing of a particular agricultural product, the MPCC in this case, make advance payments to agricultural producers. Agricultural producers who obtain an advance payment must repay the advance plus interest to the administrator organizations. Advance payments made by the administrator organizations to producers are guaranteed by the Minister in the event that producers default on repayment.

[27] An individual producer who wishes to obtain an advance payment may do so by entering into a repayment agreement with the administrator organization (AMP Act, s 10(2)). Section 10(1) of the AMP Act lists the producer eligibility requirements for a guaranteed advance during a program year, including that:

> **(d)** if the producer is a corporation with two or more shareholders, a partnership, a cooperative or another association of persons,
>
> > **(ii)** each of the shareholders, partners or members, as the case may be, must agree in writing to be jointly and severally, or solidarily, liable — or a guarantor prescribed by the regulations must agree in writing to be liable — to the administrator for the producer's liability under section 22 and to provide any security for the repayment of the advance that the administrator requires

[28] Section 22 states that a producer who is in default is liable to the administrator for the outstanding amount of the guaranteed advance, interest and costs. Pursuant to section 23 of the

AMP Act, when a producer defaults on repayment of an advance, the administrator organization may request the Minister to repay the amount owing in place of the producer. When the Minister makes such a payment, the Minister is subrogated to the administrator organization's rights against the producer and any persons who are jointly and severally liable with the producer:

> **23(1)** If a producer is in default under a repayment agreement and the Minister receives a request for payment from the administrator or lender to whom the guarantee is made, the Minister must, subject to any regulations made under paragraphs 40(1)(g) and (g.1), pay to the lender or the administrator, as specified in the advance guarantee agreement, an amount equal to the Minister's percentage of
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> (a) the amounts mentioned in paragraphs 22(a) and (c); and
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> (b) the interest at the rate specified in the advance guarantee agreement on the outstanding amount of the advance, calculated from the date of the advance.
>
> **(2)** The Minister is, to the extent of any payment under subsection (1), subrogated to the administrator's rights against the producer in default and against persons who are personally liable under paragraphs 10(1)(c) and (d).
>
> **(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.
>
> **(4)** No action or proceedings may be initiated by the Minister to recover any amounts, interest and costs that are owing more than six years after the day on which the Minister is subrogated to the administrator's rights.

[29] I note that the above is the version of the AMP Act that was in force at the time the Defendants made their Application for Advance Payment (S.C. 1997, c.20), which the Plaintiff says is the applicable version of the legislation. In 2015, sections of the AMP Act were amended (*Agricultural Growth Act*, SC 2015, c 2, section 136(2)), including s 23, where the limitations provision was changed and subsections 23(6) – 23(9) were added. Section 23 now states:

(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.

(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.

(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.

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

(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.

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

[30] The Defendants make no specific submissions to the version of s 23 that applies in this matter and, in my view, nothing turns on the point in these circumstances.

Applicable Limitation Period

[31] The Defendants submit that the AMP Act does not establish a separate limitation period for the principal debt and it is therefore governed by provincial limitation period. They submit that s 7.8 of the Advance Payment Agreement states that it is to be interpreted in accordance with the laws of the province of Saskatchewan. The Saskatchewan *Limitations Act*, SS 2004, c L-16.1, s 5 provides for a two-year limitation period. According to the Defendants, while s 23(4) of the AMP Act somewhat modifies the limitation period, s 23(4) is subordinate to s 23(2). Further, s 23(4) confirms the nature of the Minister's claim as a derivative one. Therefore, until the Minister makes the guarantee payment triggering the six-year limitation period, the two-year Saskatchewan limitation period applies. Here the Minister made the guarantee payment after the

MPCC's two-year limitation period expired on the principal debt and the payment of the guarantee by the Crown "does not revive the ability of [the Minister] to take action because the debt is still a derivative claim". That is, the federal Crown ought to be in the same position as the MPCC with respect to the limitation period.

[32] In my view, the Defendant's position cannot succeed.

[33] As noted by the Plaintiff, the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 provides that provincial limitations legislation does not apply where Parliament has provided its own limitation period provisions within federal legislation:

> 32 Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

[34] In this case, the relevant federal legislation, the AMP Act, does exactly this by way of s 23(4). Section 23(4) requires the Minister to commence proceedings within six years after "the day on which the Minister is subrogated to the administrator's rights". The fact that s 7.8 of the Advance Payment Agreement states that the agreement is to be interpreted in accordance with the laws of Saskatchewan does not alter the fact that s 23(4) of the AMP Act displaces the Saskatchewan limitation period which might otherwise apply to the Minister's right of action.

[35] This Court has recently dealt with summary judgment motions for recovery of advance payments made under the AMP Act in *Canada v Klesse*, 2020 FC 45 [*Klesse*], *Canada v Moodie*, 2020 FC 46 [*Moodie*], *Canada v Harman*, 2020 FC 47 [*Harman*], and *Canada v McKinna*, 2020 FC 48 [*McKinna*]. In each of those actions, the defendants had defaulted on repayment of advance payments and the Minister had commenced actions within six years of being subrogated to the administrator's rights. The defendants argued that the Minister was bound by the provincial limitation periods that would have been applicable to the repayment agreements entered into between the producers and the respective administrators.

[36] Justice Pentney decided all four of those motions and found that the Minister's right of action was distinct from that of the administrator and was governed by the AMP Act. In *Klesse*, Justice Pentney found that:

> [28] The Plaintiff's right of action in this case derives from the operation of the *AMPA*; this is a claim based on statute, not contract. The relevant terms of the statute, and in particular the Minister's subrogation rights, are reflected in the agreements signed by the Defendant, but that does not have the effect of transforming their essential nature. I do not accept the Defendant's contention that these are to be interpreted as equitable or contractual claims. I will discuss the "clean hands" argument below.
>
> [29] I find that the agreements and the *AMPA* are consistent and clear: the Minister's right to bring an action for recovery of the amounts due arises only when a number of conditions have been met. First, the producer must be in default (section 22, *AMPA*). Second, the administrator must have made a demand to the Minister for payment of the amount specified by the legislation and Regulations (subsection 23(1), *AMPA*). Third, the Minister must have made a payment to the administrator pursuant to that demand (subsections 23(1) and (1.1), *AMPA*). Only if these conditions have been fulfilled does the Minister become subrogated to the rights of the administrator (subsection 23(2), *AMPA*). Once this occurs, the producer is liable to the Minister for the subrogated amount (subsection 23(3), *AMPA*). This is when the statutory limitation or prescription period begins to run, subject to the other provisions

> regarding time limitations set out in subsections 23(6) to (9) of the *AMPA*.
>
> ….
>
> [32] I therefore reject the argument that the agreements and the *AMPA* must be interpreted and applied as though the Minister and the administrators are "one and the same" entities. A number of conclusions flow from this finding.
>
> [33] First, the Minister's subrogation rights did not trigger at the same time as the Defendant went into default under the agreements. The terms of the agreements were subject to the provisions in the *AMPA*, which sets out the statutory pre-conditions pursuant to which the Minister's subrogation rights arise. An interpretation that these rights arise at the same time as the default on the obligation to the administrator is inconsistent with both the terms of the agreements and the scheme of the *AMPA*.

(see also *Moodie* at paras 25-31, 34; *Harman* at paras 26-35; *McKinna* at paras 24-33.)

[37] I agree with the Plaintiff that through s 23(4) of the AMP Act, Parliament has established the limitation period that applies to the Minister in pursuing legal actions for subrogated amounts owing under the AMP Act. Further, that the Minister's right of action is distinct from the administrator's, the MPCC in this case. Thus, Saskatchewan's *Limitation Act* has no application to the Minister's subrogated action stemming from the Crown honouring its guarantee to the MPPC following default by the Defendants of the Advance Payment.

[38] The Defendants argue, however, that the limitation period applicable to the cause of action by the MPCC as against the Defendants expired prior to the Minister being subrogated to the rights of the MPCC and that s 23(4) therefore cannot revive the debt. As addressed above in *Klesse*, the Minister's subrogation rights did not trigger at the same time as the defendant went

into default under the subject advance payment agreements. In any event, as the Plaintiff points out, the Defendants were not in default until March 31, 2013. Thus, the significant point is that the MPCC had no cause of action before that date. Further, the Minister made the guarantee payment to MPCC on February 14, 2014, which was within two years of the default date, April 1, 2013. The MPCC's cause of action was not statute barred by the Saskatchewan *Limitation Act* at that time. Thus, the MPCC's two-year limitation period had not expired when the Minister made the guarantee payment to MPCC. The Plaintiff commenced this action on January 14, 2019, less than six years after the Minister became subrogated to the MPCC's rights and within the six-year limitation period set out in s 23(4) of the AMP Act.

[39] In the result, I find that the six-year limitation period prescribed by s 23(4) of the AMP Act applies to the Minister's subrogated action arising from the Minister's honouring of the guarantee afforded to MPCC. Further, that the six-year limitation period had not expired when the Plaintiff commenced its action. Nor had the two-year limitation period as between MPCC and the Defendants expired when the Minister honoured the guarantee by making the guarantee payment to MPCC.

[40] This leaves the question of the liability of the Individual Defendants as shareholders and guarantors of the debt.

Liability of the guarantors

i. Expiry of limitation period

[41] The Defendants submit that the Individual Defendants signed the Joint and Several Guarantee personally in 2008, but that the guarantee did not arise upon demand and instead arose upon default. The Defendants refer to *Walters v Meiner et al*, 2004 BCSC 393 at paras 21-24 [*Walters*] and *Continental Steel Ltd. v. CTL Steel Ltd*, 2015 BCSC 1672 [*Continental Steel*], aff'd 2018 BCCA 82 in support of their submission that, in those cases, although the principal debtors acted in a way so as to extend the limitation period against them, the courts found that the principal debtors' actions were not binding upon the guarantors. Therefore, the limitations period was not extended against the guarantors even though the guarantors were directors of the corporate principal debtors. The Defendants submit that, in this case, while the corporate principal debtor Kilback Farm acknowledged the debt thus *extending* the limitation period as against the principal debtor, the Individual Defendants as guarantors did not. Thus, the limitation period as against the Individual Defendants as guarantors began running on the "original date of default" under the Advance Payment Agreement, which the Defendants say was September 30, 2009, but without explanation of how they arrive at that date.

[42] I would note, unlike in this case, in *Walters* the plaintiff conceded that their claims were out of time under the British Columbia *Limitation Act*. In *Walters* what was at issue was whether a payment made within the limitation period by the defendant, who was also the director and sole shareholder of the corporate defendant, constituted a confirmation of the cause of action, thereby extending the limitation period such that the claims were not barred. And, if the payment was a confirmation by the corporate defendant, was it also a confirmation by the individual guarantor who had provided promissory notes due on demand (*Walters* at para 4-5, 16). The Court found

that the payment by the corporate debtor constituted a confirmation of the plaintiff's cause of action on all of the promissory notes (para 19).

[43] With respect to the question of whether the part payment by the corporate debtor also constituted a confirmation by the guarantor, the Court held that the fact that the guarantor was also a director and an officer of the corporate debtor did not create the contended agency relationship which would have otherwise bound the guarantor to the confirmation pursuant to the provisions of the *Limitations Act*. Further, the terms of the guarantee did not import any requirement that the individual debtor's obligation was to be triggered only by a demand. As each promissory note was payable on demand, the cause of action as against both the corporate principal debtor and the guarantor arose at the time of making the promissory note, or at the very latest, at the time of the debtor's default in failing to make the first monthly interest payment. The British Columbia Supreme Court found that in those circumstances, the part payment by the corporate principal debtor did not extend the running of the limitation period against the guarantor, and that there was no confirmation of the cause of action as against him. Thus, the action against him personally was out of time and was dismissed.

[44] In *Continental Steel*, the British Columbia Supreme Court considered a similar issue and stated that if the wording of a guarantee itself states that the guarantor's obligation is only triggered by demand from the creditor, then the limitation period on enforcement of the guarantee will not start running until that demand is made. However, if there is no such wording, the limitation period for enforcement of a guarantee begins to run at the same time as the cause of action on the debt arises (para 149). Further, that a confirmation by the debtor can extend the

limitation period for the cause of action on the debt. However, s 5(7) of the British Columbia *Limitation Act*, the prevailing provision, provided that a confirmation generally only applies to the party making it (i.e. debtor, not the guarantor) (para 52). While an agency relationship between the guarantor and the debtor could be sufficient to cause the confirmation resetting the limitation period to apply to the guarantor as well, such relationships are rare. And even if the guarantor is the director of the debtor company, this will not necessarily be sufficient to create such an agency relationship (para 151).

[45] The individual guarantee in *Continental Steel* did not stipulate a time for payment and did not require a demand for payment in order to be payable, it was due immediately. The British Columbia Supreme Court held that where a guarantee does not require a demand to be made on the guarantor before payment on the guarantee is required, the limitation period against the surety begins to run immediately after the guarantee is given. Thus, the liability and the limitation period began to run when the guarantee was given and the partial payment by the corporate debtor did not, in that case, extend the limitation period on the individual's guarantee. On appeal, the British Columbia Court of Appeal noted that the trial judge's findings on this point had not been challenged (para 47).

[46] In my view, these decisions do not assist the Individual Defendants.

[47] The Defendants do not assert that the limitation period began to run at the time the guarantee was given, such as the promissory notes in *Walters*. They acknowledge that the debt was payable on default. However, they submit that the limitation period began running on the

original date of default under the loans, which they say was September 30, 2009, and thus had expired when the Plaintiff's action was commenced. While Kilback Farm, the corporate principal debtor, acknowledged the debt thus extending the limitation period as against it as the principal debtor, the Individual Defendants, as guarantors, did not do so. Thus, the extension of the limitation period does not apply to them.

[48] Here the Advance Payment Agreement is governed by the AMP Act. The circumstances constituting default are set out in s 21(1) of the AMP Act. Section 21(2) of the AMP Act permits stays of default:

> **(2)** Subject to any regulations, if a default is impending, the Minister may, at the administrator's request, order the default to be stayed for a specified period on any terms and conditions that the Minister may establish.

[49] Section 22 speaks to a producer's liability in the event of default:

> **22** A producer who is in default under a repayment agreement is liable to the administrator for
>
> > **(a)** the outstanding amount of the guaranteed advance;
> >
> > **(b)** the interest at the rate specified in the repayment agreement on the outstanding amount of the advance, calculated from the date of the advance;
> >
> > **(c)** the costs, including legal costs, incurred by the administrator to recover the outstanding amounts and interest, if those costs are approved by the Minister, other than the costs that the administrator has recovered by means of a fee charged to the producer under subsection 5(4); and
> >
> > **(d)** any other outstanding amounts under the repayment agreement.

[50] And, as set out above, pursuant to s 23 of the AMP Act, in the event of default by a producer, when the Minister honours the guarantee given to an administrator, the Minister becomes subrogated to the administrator's rights as against the producer.

[51] The provisions of the AMP Act are reflected in the Advance Payment Agreement. Section 5 of the Advance Payment Agreement the deals with default:

> 5. Default
>
> 5.1 The Producer is in default if the Producer:
>
> 5.1.a has not made all their obligations under the Repayment Agreement by the end of the production period;
>
> 5.1.b files a notice of intention to make a proposal or a makes a proposal under the *Bankruptcy and Insolvency Act*…
>
> 5.1.c is otherwise declared in default by the Administrator in accordance with the Repayment Agreement.

[52] Section 5.2 states that the administrator shall declare a producer in default and immediately inform the producer of this in the stipulated circumstances, which include that the producer has not met any of the obligations under the agreement within 20 days after the administrator mails or delivers a notice that the producer has not met its obligations and requesting that it do so (s 5.2.a). And upon default, the producer is liable to the administrator for the outstanding amount of the guaranteed advance, interest at the rate specified and costs (s 5.3). Further:

> 5.5 If the Producer is declared in default and the Minister makes payment under the guarantee, **the Minister is subrogated to all rights of the Administrator against the defaulted Producer and against any other persons liable under this Repayment Agreement**. The Producer is, in addition to the amounts stated in Subsection 5.3 of these Terms and Conditions, liable to the Minister

> for interest at the rate specified in Subsection 6.2 of these Terms and Conditions on the amount of the Producer's liability under Subsection 5.3 of the Terms and Conditions and the costs incurred by the Minister to recover the amount, including [illegible] & costs.
>
> (emphasis added)

[53] In this matter, the original repayment requirements under s 3.1.b of the Advance Payment Agreement were that 50% of the outstanding amount of the advance payment was to be paid within 15 days following the period of 12 months from the date the advance was issued, with the balance due within 45 days from the period of 12 months from the date that the advance was issued. The evidence is that the Advance Payment funds were issued to Kilback Farm on April 30, 2008 and May 5, 2008. Thus, the original repayment dates would have been on or about May 15, 2009 and June 15, 2009.

[54] As indicated above, the evidence is that on March 24, 2009 a Stay of Default to September 30, 2010 was granted by the Minister, which was acknowledged by Allen Kilback, as the authorized signing officer of Kilback Farm, on April 6, 2009. On December 3, 2010 a further Stay of Default was granted to March 31, 2013, which was acknowledged by Allan Kilback on January 24, 2011. A notice of default was sent by MPCC to Kilback Farm on May 3, 2013. On February 14, 2014, the Minister made the guarantee payment to MPCC. Based on these facts, default did not occur prior to March 31, 2013.

[55] And, as I have found above, the Minister made the guarantee payment within two years of the default date and the MPCC's cause of action as against the Defendants was therefore not statue barred when the payment was made. The Minister's action was commenced on January

14, 2019, less than six years after the Minister became subrogated to the MPCC's rights and within the prevailing six-year limitation period set out in s 23(4) of the AMP Act.

[56] Accordingly, based on the evidence, I do not agree with the Defendants' submission that the limitation period began running on the "original date of default" under the Advance Payment Agreement, which they say was September 30, 2009, and thus had expired when the Plaintiff's action was commenced. Default did not occur on that date, although it could have occurred on the dates triggered by s 3.1.b of the Advance Payment Agreement, if the Stays of Default had not been granted and the Defendants did not repay the Advance Payment as required.

[57] It is significant, in the context of the Defendants' argument, that this is not a circumstance where Kilback Farm, the corporate principal debtor, acknowledged or confirmed the debt before or after the end of the limitation period, thereby *extending* the limitation period as against it. Thus, a question of whether or not the limitation period was similarly *extended* with respect to the Individual Defendants as guarantors does not arise. Rather, here the subject action was brought *within* the six-year limitation period. There was no extension. Here, because of the Stays of Default as permitted by the AMP Act and acknowledged on behalf of Kilback Farm, the limitation period had simply not started to run until default on March 31, 2013.

[58] Limitation periods start running because of an event or occurrence. That is, limitation periods begin to run when the claim is discoverable, when the cause of action arises or as defined by statute. For example, the Defendants refer to the *Limitations Act* of Saskatchewan. It states that, unless otherwise provided in that Act, that no proceedings shall be commenced with respect

to a claim after two years from the day on which the claim is discoverable. A claim is discovered on the day in which the claimant first knew, or in the circumstances ought to have known, the injury, loss or damage had occurred or otherwise as set out therein (*Limitations Act*, s 5, 6(1)). And, as stated in *Klesse*, the s 23(4) AMP Act statutory limitation period begins to run when the Minister becomes subrogated to the rights of the administrator (*Klesse* at para 29). In this matter, because of the Stays of Default, no cause of action on the part of the MPCC or the Minister as against any of the Defendants arose on September 30, 2009, the date the Defendants assert was the "original date of default". No limitation period began to run on that date. Only upon the actual the date of actual default, April 1, 2013, did the limitation period as between the MPCC and the Defendants begin to run.

ii. Impact of amendment of terms

[59] The Defendants also submit that it is established law that where a lender and principal debtor have amended the terms on the principal debt, the guarantors may be discharged. The Defendants reference *Manulife Bank of Canada v Conlin*, [1996] 3 SCR 415 at paras 2-4 [*Manulife*] as well as *Turfpro Investments Inc. v. Heinrichs*, 2014 ONCA 502 [*Turfpro*] and *GMAC Leaseco Corporation v Jaroszynski*, 2013 ONCA 765 at para 76 [*GMAC*] in support of that proposition. They submit that because the principal debt was amended three times as between the Kilback Farm and the MPCC, but without the guarantors having agreed to such amendments, the Individual Defendants as guarantors are discharged from their liability.

[60] The Plaintiff submits that the rule in *Manulife* – that a guarantor will be released from liability on a guarantee where the creditor and the principal debtor agree to material alteration of

the terms of the contract debt without the consent of the guarantor – is justified because the guarantor should be aware and have the opportunity to consent to any material changes affecting the guarantor's risk. However, the Plaintiff submits that the circumstances in this matter do not justify the application of the rule. Further, that consent may be inferred where an individual has multiple roles, such as signing officer of a company and shareholder /guarantor, and the knowledge they acquire and the consent that they give in one capacity must be applied to them in each of their other capacities (*Royal Bank v 338390 Alberta Ltd*, [1997] 210 AR 148 (ABQB) at paras 34-40 [*Royal Bank*]; *Co-operative Trust Company of Canada v Kirby and Thorpe*, [1986] 6 WWR 90 (SKQB) [*Co-operative Trust*]; *Montreal Trust Co of Canada v Jaynell Inc*, [1993] 111 Sask R 178 (SKQB) at para 44). In this matter, the consent given on behalf of Kilback Farm can be inferred to also be the consent of the shareholder guarantors, the Individual Defendants.

[61] As a starting point, I note that in *Manulife*, the Supreme Court of Canada held that:

> 2 It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. The principle was enunciated by Cotton L.J. in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), at pp. 505-6, in this way:
>
> > The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court . . . will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding

> the alteration, and that if he has not so consented he will be discharged.

This rule has been adopted in a number of Canadian cases. See for example *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562.

3 The basis for the rule is that any material alteration of the principal contract will result in a change of the terms upon which the surety was to become liable, which will, in turn, result in a change in the surety's risk. The rationale was set out in *The Law of Guarantee* (2nd ed. 1996) by Professor K. P. McGuinness in this way, at p. 534:

> The foundation of the rule in equity is certainly consistent with traditional thinking, but it is a fair question whether it is necessary to invoke the aid of equity at all in order to conclude that in a case where the principal contract is varied materially without the surety's consent, the surety is not liable for any subsequent default. Essentially, a specific or discrete guarantee (as opposed to an all accounts guarantee) is an undertaking by the surety against the risks arising from a particular contract with the principal. If that contract is varied so as to change the nature or extent of the risks arising under it, then the effect of the variation is not so much to cancel the liability of the surety as to remove the creditor from the scope of the protection that the guarantee affords. When so viewed, the foundation of the surety's defence appears in law rather than equity: it is not that the surety is no longer liable for the original contract as it is that the original contract for which the surety assumed liability has ceased to apply. In varying the principal contract without the consent of the surety, the creditor embarks upon a frolic of his own, and if misfortune occurs it occurs at the sole risk of the creditor. A law based approach to the defence is in certain respects attractive, because it moves the surety's right of defence in the case of material variation from the discretionary and therefore relatively unsettled realm of equity into the more absolute and certain realm of law. In any event, it is clear quite certainly in equity and quite probably in law as well, that the material variation of the principal contract without the surety's consent (unless subsequently ratified by the surety) will

> result in the discharge of the surety from liability under the guarantee.

And further at p. 541, he wrote:

> Where the risk to which the surety is exposed is changed, the rationale for the complete release of the surety is easily explained. To change the principal contract is to change the basis upon which the surety agreed to become liable. A surety's liability extends only to the contract which he has agreed to guarantee. If the terms of that contract (and consequently the terms of the surety's risk) are varied then the creditor should no longer be entitled to hold the surety to his obligation under the guarantee. To require a surety to maintain a guarantee in such a situation would be to allow the creditor and the principal to impose a guarantee upon the surety in respect of a new transaction. Such a power in the hands of the principal and creditor would amount to a radical departure from the principles of consensus and voluntary assumption of duty that form the basis of the law of contract.

[62] As to what comprises a material alteration, the Ontario Court of Appeal in *Turfpro* stated:

> [14] This court recently addressed the material alteration test in *GMAC Leaseco Corporation v. Jaroszynski*, 2013 ONCA 765, 118 O.R. (3d) 264, at paras. 76 - 77:
>
> > In *Manulife* at para. 10, Cory J. approves of Lord Westbury's formulation in *Blest v. Brown* (1862), 4 De G.F. & J. 367, at p. 376: apart from any express stipulation to the contrary, a surety will be discharged where the contract has been changed, without his or her consent, unless the change is in respect of a matter that cannot "plainly be seen without inquiry to be unsubstantial or necessarily beneficial to the surety".
> >
> > Or, as this court put it in *Royal Bank of Canada v. Bruce Industrial Sales Limited* (1998), 1998 CanLII 3050 (ON CA), 40 O.R. (3d) 307, at p. 320, relying on *Manulife*, "alterations to the principal contract will be held to be material unless they are plainly

> unsubstantial or necessarily beneficial to the guarantor."

[15] The basis for the rule relating to material alterations arises from the guarantor's agreement to guarantee the risk arising from the contract between the creditor and the principal debtor. Fairness dictates that this risk not be altered unilaterally by the parties to that contract. Accordingly, a guarantor will be relieved from liability unless an exception applies.

[16] Applicable jurisprudence appears to recognize four exceptions to the rule. First, relief will be denied if the alteration is plainly unsubstantial. Secondly, relief will also be denied if the alteration is necessarily beneficial to the guarantor; that is, it cannot be prejudicial to the guarantor or otherwise than beneficial to the guarantor.

[17] An example of a material alteration that may discharge a guarantor from liability is described by Kevin P. McGuinness in *The Law of Guarantee*, 3d ed. (Markham, Ont.: LexisNexis, 2013) at para. 11.265:

> A binding agreement made by a creditor with the principal debtor to allow the principal further time in which to pay or perform the guaranteed debt or obligation will discharge the surety from liability, where the length of time so granted is not trivial. This principle of law is of great antiquity. Two justifications may be advanced for the rule. The first is that any binding agreement to extend time is prejudicial to the surety, since the effect of such an agreement is to prevent the surety from claiming against the principal, in the event that the creditor calls upon the surety to pay or perform at the time originally contemplated. If the surety were able to so claim, then the practical effect would be to nullify the agreement between the principal and creditor as to the extension of time. If on the other hand the surety were precluded from claiming against the principal by virtue of the extension of time, then the principal would be in a better position than the debtor (which would be inconsistent with the secondary nature of the surety's liability). [Citations omitted.]

[18] Thirdly, as noted by Cory J. in *Manulife*, at para. 4, a guarantor may contract out of protections provided by the common

> law or equity. For instance, typically, an institutional lender's standard form guarantee will contain provisions allowing for time extensions for repayment, renewal, and forbearance.
>
> [19] Lastly, alteration of the risk assumed by the guarantor may be addressed by obtaining a guarantor's consent to the proposed or actual alteration.

[63] In my view, it is the issue of whether the Individual Defendants consented to the Stays of Default and the Advance Payment Agreement Amendment that must be considered in this circumstance.

[64] In *Co-operative Trust,* the plaintiff claimed against the defendants as guarantors of a corporate indebtedness under a mortgage. The defendants were the only shareholders and the directors of the corporation. The defendants argued that a mortgage extension agreement, made without the guarantor's consent, varied the terms of the guaranteed mortgage so as to release the guarantors.

[65] The Court found that the changes made to the guaranteed mortgage by the mortgage extension agreement were material. However, while the defendants did not expressly consent, orally or in writing, to the changes, they did consent. The Court stated that "Consent is to be inferred from their conduct. Consent need not be express: *North Western National Bank of Portland v. Ferguson* (1918), 1918 CanLII 11 (SCC), 57 S.C.R. 420, at p. 430". The Court found that:

> [11] Both the letter of April 21 and the mortgage extension agreement of July 13, 1980, were signed by the defendants, although only as officers of the corporation, Twelfth Building Ltd., and not personally. But the defendants obviously had complete knowledge of the changes being effected in the guaranteed mortgage. In

> addition to having this knowledge, without the defendants' agreement with the changes and execution of the documents, the very arrangements of which the defendants complain could not have been effected. Their position is very analogous to that of solicitors in the 1853 English case of *Woodcock v. Oxford and Worcester Railway Co.*, 61 E.R. 551. In that case the solicitors were guarantors of a contract. They, as solicitors, prepared a number of documents used by the principals in effecting changes in the contract. The solicitors thus had knowledge of the proposed changes and assisted in carrying out the changes to the contract by the preparation of the documents and, indeed, acting as solicitors of the principal debtors. There had been no express consent, but nevertheless, the court held that the guarantors were not discharged, they having had full knowledge and having assisted in bringing about the changes.
>
> [12] **In the present case, the overt act of the defendants in executing the documentation resulting in the changes complained of by them must be taken as constructive assent by them as guarantors to the changes in question**. The defendants were not sitting passively on the side while two other parties effected changes to the guaranteed mortgage. They actively participated.
>
> (emphasis added)

[66] *Royal Bank* concerned an application by the plaintiff for summary judgment against an individual defendant, a guarantor who was also the principal of the corporate defendant. The corporate defendant obtained a line of credit from the plaintiff. The Alberta Master held that:

> [31] There is an overabundance of case law dealing with whether a guarantor has been released by a variation of the loan agreement. Ultimately, each case turns on the terms of the guarantee and the particular facts.
>
> [32] There are three limiting facts in the present lawsuit. First, the borrower is a corporation, not an individual as was the case in *Manulife Bank of Canada v. Conlin* (1996), 1996 CanLII 182 (SCC), 139 D.L.R. (4th) 426 (S.C.C.). Second, the guarantor is the principal of the borrower. Third, the guarantee is not limited to guaranteeing just a particular debt, as was the case in *Holland-Canada Mortgage.*

[33] The first two facts are relevant to whether there was a consent by the guarantor to an increase in the interest rate. If there was, that is an end to his case.

[34] The consent of the guarantor need not be express. It can be inferred from the circumstances: *North Western National Bank of Portland v. Ferguson* (1918), 1918 CanLII 11 (SCC), 57 S.C.R. 420 (S.C.C.) . There Anglin J. says, p. 430:

> The guarantor's assent to an extension need by neither contemporaneous with it nor explicit. It may be implied in his own original contract assuming the liability. It may be involved in the arrangement or understanding between the principals which he has undertaken to guarantee - perhaps without sufficient inquiry. It must always be a question of the intention of the parties either expressed or, if not, to be inferred from the terms in which they have couched their agreement, construed, if they be "at all ambiguous," in the light of their relative positions and of the surrounding circumstances; *Coles v. Pack; Wood v. Priestner;* whether an extension without reservation of rights, relied upon as having worked the discharge of the guarantor, was or was not within the purview of the guarantee. To assume that it was not, if the terms are susceptible of the contrary construction, merely because it is not expressly provided for, however strong the grounds of inference that it must have been understood, is certainly unwarranted.

[35] The same point is made in *Pioneer Trust Co. v. 220263 Alberta Ltd.,* (1989), 1989 CanLII 3044 (AB QB), 94 A.R. 86 (Alta. Q.B.), aff'd (1991), 113 A.R. 377 (Alta. C.A.), leave to appeal refused (1992), 125 A.R. 330 (note) (S.C.C.). There the trial judge found that the guarantors had impliedly consented to the term of the loan being extended (the lawsuit was dismissed on another ground).

[36] What was said in *North Western National Bank of Portland* was applied in *Co-operative Trust Co. of Canada v. Kirkby*, 1986 CanLII 3325 (SK QB), [1986] 6 W.W.R. 90 (Sask. Q.B.). There the guarantors were the principals of the corporate borrower. The trial judge says, p. 93:

> If change was limited to extending the time it might be acceptable because of rights of and against the surety purportedly reserved by the mortgage extension agreement. The other material changes,

> such as the change in rate of interest require the consent of the surety.
>
> The defendants did not expressly consent to the changes, orally or in writing, but I find that they did consent. Consent is to be inferred from their conduct. Consent need not be express: *North West. Nat. Bank of Portland v. Ferguson* (1918), 1918 CanLII 11 (SCC), 57 S.C.R. 420 at 430, 44 D.L.R. 464 {Ont.].

[37] He goes on to say, p. 94:

> In the present case, the overt act of the defendants in executing the documentation resulting in the changes complained of by them must be taken as constructive assent by them as guarantors to the changes in question. The defendants were not sitting passively on the side while two other parties affected changes to the guaranteed mortgage. They actively participated.

[38] When the line of credit was capped at $50,000 and the interest rate increased the guarantor actively participated in those changes. He signed the note as officer for the corporation. He can hardly divide his mind into breachtight compartments, one as signing officer and one as guarantor.

[39] *Royal Bank v. Lane* (1991), (sub nom. *ABC Color & Sound Ltd. v. Royal Bank*) 1991 ABCA 196 (CanLII), 117 A.R. 271 (Alta. C.A.) also recognizes the reality of that kind of situation, paras. 43-44:

> The guarantors contend that the Bank unilaterally increased the interest rate on ABC's loan. They say that was a change detrimental to the guarantors, thus releasing them.
>
> It is difficult to understand how the Bank could effectively increase the interest without ABC's consent. And as ABC always acted through the guarantors, it is hard to see how the Bank could do that without the guarantor's consent. A higher rate may have been considered for the future. But the only evidence of its implementation is one promissory note signed by the guarantors (in their capacity as officers of ABC). We were not told how it came to be signed, and there is no finding by the trial judge.

> But doubtless they signed it in blank some time before, and the Bank filled it out later. If they authorized the Bank to fill out the note in that manner, they cannot as guarantors say that they did not consent. See Stony Plain District Savings & Credit Union Ltd. v. Crosswinds Travel Ltd. and Wallace (1989), 978 A.R. 248, 252-253.

[40] The "many hats" concept was also applied to find consent by a guarantor in *Veteran Appliance Service Co. v. 109272 Developments Ltd.* (1985), 1985 CanLII 1405 (AB QB), 67 A.R. 117 (Alta. Q.B.) aff'd (1987), 1987 ABCA 30 (CanLII), 76 A.R. 340 (Alta. C.A.) leave to appeal refused (1987), 79 A.R. 240n (S.C.C.). In that case the trial judge says, para. 53:

> It may well be that the knowledge, of and consent by, the defendant Brosseau was as a director, principal shareholder, and signing officer of the corporate defendant. I am satisfied, however, and particularly in a case such as the present, that when a person wears as many hats as did the defendant Brosseau that the knowledge he acquires and the consents which he gives in one capacity must be applied to him in each of his capacities. While it was impossible, therefore, for the plaintiff to prove knowledge and an express consent to the variations in the terms of the mortgage by the defendant Brosseau, as guarantor, it has clearly proved these by implication and that if his consent is required such proof is sufficient in the circumstances of this case.

[41] I am satisfied that if the guarantor's consent to an increase in the interest rate was required there was implied consent.

[67] The Plaintiff also relies on *Montreal Trust* where the Saskatchewan Queen's Bench held:

> [44] To emulate the language of my brother Armstrong, J., in *Co-operative Trust Company of Canada v. Kirkby and Thorpe* (1986), 1986 CanLII 3325 (SK QB), 51 Sask.R. 298, at p. 300, here, albeit Williams and Fennell signed said mortgage extension agreement only as officers of Jaynell, both of these defendants, on behalf of themselves and Jaymont and Fennell Holdings Ltd. obviously had complete knowledge of the changes being effected to the guaranteed mortgage. Further, and, in addition to having this knowledge, it is clear that without their participation

> in and agreement to the noted changes to the original mortgage, and their execution of the mortgage extension agreement, the very arrangement to which the respondent defendants complain of through para. 5 of their statement of defence could not have been effected. In the circumstances, the overt acts of both Williams and Fennell (and, through them, Jaymont and Fennell Holdings Ltd.) in executing said mortgage extension agreement must be taken to be as guarantors of said changes.

[68] In this matter the Defendants do not specifically identify the three amendments to the principal debt that they say were made without their agreement and which therefore discharge them from liability for the debt.

[69] However, it would seem apparent that these are the:

i. March 24, 2009 Stay of Default to September 30, 2010 granted by the Minister, which required the producers to sign the acknowledgement with MPCC indicating that they understood and accepted the terms of the stay of default. The attached Acknowledgement was signed by Allen Kilback, as the authorized signing officer of Kilback Farm, on April 6, 2009;

ii. December 3, 2013 further Stay of Default (effective October 1, 2010) to March 31, 2013 granted by the Minister. The Acknowledgement Document was signed on behalf of the producer, Kilback Farm, by Allen Kilback and confirms that he acknowledged, understood and accepted the Terms and Conditions of the Stay of Default as described therein; and

iii. The Amendment to the Application and Repayment Agreement stated as being ratified and confirmed by Kilback Farm, and signed by Allan Kilback as CEO on March 29, 2012.

[70] As previously stated, the Advance Payment Agreement is governed by the AMP Act. One of the eligibility requirements for a corporate producer with two or more shareholders is that each of the shareholders must agree in writing to be jointly and severally, or solidarily, liable to the administrator for the producer's liability under section 22 and to provide any security for the repayment of the advance that the administrator requires (AMP Act, s 10(1)(d)(ii)).

[71] The Joint and Several Guarantee signed by each of the Individual Defendants as shareholders of Kilback Farm states:

> We, being the Shareholders, Members or Partners, as the case may be, of the Corporation, Cooperative or Partnership as stated in Section 12 of this Application for Advance, in consideration of an advance being made to the Corporation, Cooperative or Partnership, as the case may be, by the Administrator for the amount stated in Part 2 of this Application for an Advance, for the 2008-2009 APP production period **and the Minister of Agriculture and Agri-Food Canada guaranteeing the repayment of such advance** and interest thereon, **do hereby agree to be jointly and severally liable to the Administrator, or the Minister of Agriculture and Agri-Food Canada, for any amount owing by the Corporation**, Cooperative or Partnership, as the case may be, **pursuant to the APP**.
>
> (emphasis added)
>
> By signing this document, you understand and agree that action may be taken against you personally to be liable under Section 5.0 of the Terms and Conditions of the Repayment Agreement to repay the full amount of any defaulted advance.

[72] Section 17 of the Declaration and Attestation signed by Allen Kilback as President and CEO and the authorized representative of Kilback Farm states that:

> 17) I, or all of the Partners/Shareholders/Members, as applicable, agree, pursuant to section 23(4) of the AMPA, to the limitation period of six (6) years from the day on which the Minister is subrogated as per section 6 of the Terms and Conditions of the

> Applications and Repayment Agreement for the purposes of initiating actions or proceedings to recover any amounts owned to the Crown

[73] The record before me confirms that Allen Kilback and Denise Kilback each held a 50% interest in Kilback Farm when the application for the Advance Payment was made.

[74] The Individual Defendants were both shareholders of Kilback Farm as seen from the Joint and Several Guarantee where, in consideration of an advance being made to Kilback Farm by the MPCC and the Minister guaranteeing the repayment of the advance, they agreed to be jointly and severally liable to the MPCC or the Minister for any amount owing by Kilback Farm pursuant to the Advance Payment Agreement.

[75] The Application & Repayment Agreement – Declaration & Attestation at s 3.2 "Producer Attestation" requires the authorized signing officer for the corporation, Kilback Farm, to sign the declaration on the following page. It is signed by Allen Kilback as president and CEO as a person authorized to sign the Application and Repayment Agreement on behalf of the corporation. An Assignment Agreement Livestock was signed by Allen Kilback as President and CEO and by Denise Kilback as Vice President and CFO of Kilback Farm.

[76] It is also of note that the December 3, 2013 further Stay of Default states that:

> For now, we ask that you or each of the shareholders/partners/members read the attached Acknowledgment Document. If the producer is a partnership, all partners must sign this document. If the producer is a corporation, only the signing authority need to sign it.

[77] Allen Kilback, as an authorized signing officer of Kilback Farm, had knowledge of and agreed to the Stays of Default and Advance Payment Agreement Amendment by his execution of those documents. It is difficult to see how Allen Kilback could therefore claim that in his capacity as shareholder guarantor he was not aware of the terms and conditions of the Stays of Default and Advance Payment Agreement Amendment which he executed in his capacity as authorized signing officer of Kilback Farm.

[78] In my view, even though Allen Kilback did not, in his capacity as guarantor, expressly agree to the subject changes, in these circumstances consent can be inferred from his conduct on the basis that "the overt act of the defendants in executing the documentation resulting in the changes complained of by them must be taken as constructive assent by them as guarantors to the changes in question" (*Co-operative Trust* at para 12). As the President, CEO and authorized signing officer of Kilback Farm, Allen Kilback must not only have known of the changes, he actively participated in them. This is not a situation where the guarantor was an arm's length third party (see *Gabbs v Bouwhuis*, 2007 BCSC 887 at paras 58-70).

[79] The only evidence filed by the Defendants in response to this motion for summary judgment is the affidavit of Allen Kilback, which does not include any documentary exhibits. This affidavit states that in 2007 the Bank of Montreal, a secured creditor of Kilback Farm, appointed PricewaterhouseCooper [PWC] as receiver because Kilback Farm was in default. And "[a]lthough I cannot recall for certain, I believe that PWC may have insisted that I apply for the case advance" which Mr. Kilback deposes he questioned at the time. The affidavit also states that Mr. Kilback recalled having a conversation expressing concern about applying for the Advance

Payment with Ron Marchenski, who worked for MPCC at the time, given that feed costs were about $80 per animal while they could only be sold for about $50 per animal. The affidavit states Mr. Marchenski “encouraged me to apply for the advance, saying that it would probably be turned into a grant or forgivable loan, so there was noting to lose”.

[80] Mr. Kilback’s Affidavit also states that when MPCC sent its amendment and extension agreements, it did not say anything about pursuing him or Denise Kilback personally on their guarantees. The Affidavit states that the combination of what Mr. Marchenski had told Mr. Kilback and the fact that MPCC did not require his or Denise Kilback’s personal signature, led the Individual Defendants to believe that the MPCC was not pursuing them on their personal guarantee. And, by 2013, having heard nothing from MPCC to indicate that it was pursuing the Individual Guarantors on the personal guarantees, they began to pursue new endeavors in the belief that that had no further personal liability.

[81] In my view, in his affidavit Mr. Kilback merely explains why the Advance Payment Agreement was entered into by Kilback Farm. Whether that was a good or bad decision and why it was made is not relevant to this motion in the sense that the Advance Payment Agreement was executed and its validity is not at issue. Similarly, the validity of the shareholder guarantees is not disputed.

[82] Mr. Kilback’s stated belief that the MPCC was not pursuing the Individual Defendants on their personal guarantee because of the conversation he had with Mr. Marchenski prior to entering the Advance Payment Agreement, and because MPCC did not require his or Denise

Kilback's personal signatures, does not accord with the documentation pertaining to the Advance Payment.

[83] The shareholder guarantees were an eligibility requirement for the Advance Payment. Thus, the shareholder guarantors had already agreed to their joint and several liability in the event of default by Kilback Farm, to the MPCC or to the Minister if the Minster honoured the guarantee to MPCC. Further, the Advance Payment Agreement Amendment at s 5 states that the amending agreement is to be read together with, and forms part of, the Application and Repayment Agreement (Advance Payment Agreement). All terms of that agreement and any subsequent amendment to it that had not been modified by the Advance Payment Agreement Amendment or the terms of the Stay of Default remained in full force and effect. This would include the requirement for shareholder guarantees, which had previously been given. Further, in the Declaration & Attestation, *all of the shareholders* of Kilback Farm agreed that, pursuant to s 23(4) of the AMP Act, the limitation period of six years from the day on which the Minister is subrogated to the administrators' interests applied for the purpose of initiating actions or proceedings to recover any amounts owed to the Crown. Moreover, as the further Stay of Default extended the Advance Payment repayment date to March 31, 2013 and there was no default until after that date, there would be no reason for MPCC to communicate with the Individual Defendants concerning the shareholder guarantee, or to pursue the Individual Defendants on their guarantee, prior to that time.

[84] Significantly, there is no evidence that Allen Kilback or Denise Kilback at any time sought confirmation from MPCC of their stated belief that they would not be held responsible for

the debt that they guaranteed as shareholders of Kilback Farm. There is also no evidence from Allen Kilback or Denise Kilback indicating that Allen Kilback would not have signed the Stays of Default and the Advance Payment Agreement Amendment, on behalf of Kilback Farm, had they known their existing shareholder guarantee would be enforced on default of the Advance Payment Agreement by Kilback Farm.

[85] Denise Kilback did not file an affidavit or any evidence in response to this motion. While the Statement of Defence states that Denise Kilback was not aware of, and did not agree to, the terms the Advance Payment Agreement Amendment, this is a pleading, it is not evidence. Parties responding to a motion for summary judgment must put their best foot forward, or risk losing. Absent any evidence to the contrary, as a shareholder, Vice President, and Chief Financial Officer of Kilback Farm, consent by Denise Kilback to the Stays of Default and the Advance Payment Agreement Amendment can, in these circumstances, be inferred from her knowledge as a corporate officer.

[86] In sum, the Stays of Default and the Advance Payment Agreement Amendment did amend certain terms of the Advance Payment Agreement. Although they did not alter the existing obligation of the shareholder guarantors, they were material changes. However, I agree with the Plaintiff that that consent to these changes by the Individual Defendants may be inferred in these circumstances. Accordingly, Allen Kilback and Denise Kilback are not relieved of their liability as shareholder guarantors because of changes to the Advance Payment Agreement stemming from the Stays of Default and the Advance Payment Agreement Amendment.

Doctrine of Laches

[87] Allen Kilback and Denise Kilback, as guarantors, also invoke the doctrine of laches as a defence in equity. They submit that a defendant who invokes the doctrine is asserting that the claimant has delayed in asserting its rights and, because of this delay, it is no longer entitled to bring an equitable claim. Not only must there be delay, the consequence of the delay must be that it would be unfair for the court to give relief, usually because the defendant has changed its position because of the delay. According to the Defendants, the Minister stands in the shoes of the MPCC and the MPCC's actions led the defendants to believe that they would not be pursued personally. Legal action was not commenced until nearly 10 years after "the original date of default", well after the defendants altered their (unspecified) position and moved on with their lives.

[88] The Minister submits that laches is an equitable defence that is not available in the present case which is governed by a statutory limitation period. And, even if it could apply, the circumstances in this case would not justify it. The Stays of Default, acknowledged by Kilback Farm, reiterated that the Advance Payment had to be repaid. Thus, there is no basis for the Defendants to allege that they were prejudiced by the conduct of MPCC or the Plaintiff.

[89] In my view, the doctrine of laches has no application to this matter. The Supreme Court of Canada in *M.(K.) v M.(H.)*, [1992] 3 SCR 6 at pp 77-79 stated:

> The rule developed in *Lindsay* is certainly amorphous, perhaps admirably so. However, some structure can be derived from the cases. A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, *supra*, at pp. 755-65, where the authors distil the doctrine in this manner, at p. 755:
>
> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that

> the plaintiff, by delaying the institution or prosecution of his case, has either (*a*) acquiesced in the defendant's conduct or (*b*) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb. ...
>
> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

[90] As pointed out by the Plaintiff, case law has held that laches does not apply to a debt or loan situation. In *Walters v Talop Estates Ltd*, 2004 BCSC 879 at para 29, the Court stated that as the plaintiffs in that matter sued in debt – a legal right – the equitable principle of laches was not applicable. In *Power, Re* [2006] 18 CBR (5th) 265 (ONSC) at para 14, the Court stated that since debt is a contractual obligation, laches on the part of the creditor was not a reason to excuse the debt. In *Attorney General of Nova Scotia v City of Halifax* [1968] 2 DLR (3d) 576 (NSCA) at pp. 586-587, the Attorney General had sued the city for a debt imposed by statute. The court held that this was a legal cause of action and not a claim in equity and it therefore did not support the equitable defence of laches.

[91] Here, the Advance Payment was made in accordance with the AMP Act. Upon advance, the debt was owed by the Defendant to the MPCC and, as between those parties, the debt was governed by contract, effected pursuant to the AMP Act scheme. Accordingly, as a contractual debt, laches does not apply.

[92] Further, and also pursuant to the AMP Act, upon default by the Defendants and the honouring of the guarantee to MPCC by the Minister, the Minister became subrogated to the rights of the MPCC. This Court has previously held that Minister's claim in this circumstances is based on statute, it is not an equitable or contractual claim (*Klesse* at para 28).

[93] Finally, I note that this Court has also previously held that the doctrine of laches, which is based on the notion of unreasonable delay, does not apply when there is a statutory limitation period and a person asserts his or her right within that timeframe (*Remo Imports Ltd. v. Jaguar Canada Ltd*., 2005 FC 870 at para 51).

[94] In the result, laches, as an equitable doctrine, is not available to the Defendants.

Conclusion

[95] The Defendants' submission, in essence, is that the limitation period pertaining to the Individual Defendants as guarantors began to run on September 30, 2009, the "original default date", and expired on September 30, 2011. Therefore, the Minister's payment to MPCC after that date could not revive the expired claim.

[96] For the reasons set out above, this position cannot succeed. The second Stay of Default, to which the guarantors implicitly consented, extended the default date to March 31, 2013. The limitation period did not start to run until after March 31, 2013, the actual default date, being on or about April 1, 2013. The Minister made the guarantee payment on February 14, 2014, being within two years of the default date. Accordingly, the MPCC's cause of action as against the

Defendants was not statute barred when the Minister made the payment. The Minister's action was commenced on January 14, 2019, less than six years after the Minister became subrogated to the MCPP's rights and within the six-year limitation period set out in s 23(4) of the AMP Act.

[97] I am satisfied, based on the evidence and the law, that there is no genuine issue for trial arising from the Defendants' defence and that it is appropriate to grant summary judgment in this matter.

[98] The Defendants do not take issue with the amount of the debt as set out in the Warner Affidavit, as follows:

> The judgment sum as of March 10, 2020, calculated as follows:
>
> | | |
> |---|---|
> | Principal and Interest Outstanding at date of default as per Schedule B to the Statement of Claim | $ 438,379.80 |
> | Less any payments/set-offs from date of default (April 1, 2013) | ($ 4,978.78) |
> | Interest accrued from date of default to March 10, 2020 at prime plus 1.5% compounded monthly | $ 161,645.60 |
> | **TOTAL** | **$ 595,046.62** |

[99] The per diem rate of $88.85 is interest accrued on the judgment sum as of March 10, 2020 calculated at prime plus one and one-half (1.5%) percent.

[100] The Plaintiff requests that costs of $1,681.33 be fixed by the Court pursuant to Rule 400(4), in accordance with Tariff "B". Specifically:

> Disbursements
>
> | | |
> |---|---|
> | Filing of Statement Claims | $150.00 |

Filing of Motion of Summary Judgment	$300.0
Courier/Postage	$31.33
<u>Fees</u>	
For all services necessary to preparing:	
Statement of Claim, service of same (Column III 4 units)	$600.00
Motion for summary judgment (Column III 4 units)	$600.00
TOTAL COSTS	**$1681.33**

[101] The Plaintiff requests that post-judgment interest be fixed at an annual rate of 5.00% per annum, as set by the *Interest Act* R.S.C., cI-15, s3, from the date of judgment.

JUDGMENT IN T-122-19

THIS COURT'S JUDGMENT is that

1. The motion for summary judgment is granted in favour of the Plaintiff.

2. The Defendants shall pay to the Plaintiff the sum of $595,046.62.

3. The Defendants shall pay pre-judgment interest calculated from March 10, 2020, until the date of this judgment at a rate of $88.85 *per diem*.

4. The Defendants shall pay the Plaintiff's costs and disbursements in the amount of $1681.33.

5. Post-judgment interest is awarded at the rate of five (5) percent per annum, in accordance with the *Interest Act*.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-122-19
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v KILBACK STOCK FARM LTD., ALLEN BLAIR KILBACK, DENISE ANNE KILBACK
PLACE OF HEARING:	MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	OCTOBER 19, 2020

WRITTEN REPRESENTATIONS BY:

Don Klaassen	FOR THE PLAINTIFF
Yens Pedersen	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Attorney General of Canada Department of Justice Canada Saskatoon, Saskatchewan	FOR THE PLAINTIFF
Pedersen Law Professional Corporation Regina, Saskatchewan	FOR THE DEFENDANTS