Federal Court Cour fédérale

Date: 20210504

Docket: T-985-19

Citation: 2021 FC 397

Toronto, Ontario, May 4, 2021

PRESENT: Mr. Justice Andrew D. Little

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Plaintiff

and

BEZAN CATTLE CORPORATION,
BARBARA BEZAN AND LAYTON BEZAN

Defendants

JUDGMENT AND REASONS

[1] The plaintiff has moved for summary judgment under Rules 213-215 of the *Federal Courts Rules*, SOR/98-106 in the amount of $399,305.54, plus interest and costs, against the defendant Bezan Cattle Corporation ("BCC") and the individual defendants Barbara Bezan and Layton Bezan.

[2] The defendants requested that the Court dismiss the motion and the action against them entirely, or alternatively that the Court send the matter to trial.

[3] The defendants raise cattle in Saskatchewan. Each of the individual defendants is a 50% shareholder in BCC. Each is also a 50% shareholder in another company called Bezan Feeders Inc. ("BFI"). As described in detail below, the corporations made applications for an agricultural advance payment under the *Agricultural Marketing Programs Act*, RSC 1997, c 20 (the *"AMPA"*). Two advance payments were made. The plaintiff now seeks recovery of the aggregate sum paid, with accrued interest.

[4] For the reasons that follow, I conclude that there is no genuine issue for trial. Summary judgment is granted against BCC. Although the affidavits submitted by the defendants contained evidence of alterations to the application forms related to the loans, the uncontradicted evidence shows that that the claimed amounts were advanced and BCC clearly and unequivocally agreed to repay those amounts. It failed to do so and the plaintiff is entitled to judgment.

[5] The action against the individual defendants, Barbara Bezan and Layton Bezan, is dismissed. The Joint and Several Guarantees executed by the individual defendants are not enforceable as a result of subs. 31(2) of the *Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1.

I. **Events Leading to this Motion**

[6] The plaintiff's claim arises from two payments made under the *AMPA* in 2008. Manitoba Livestock Cash Advance Inc. ("MLCA") served as an administrator of advance payments made to agricultural producers under the *AMPA*. An advance payment program permitted livestock producers to receive advance payment for their animals before their sale. The amount of money advanced was based on the inventory of livestock during the relevant production period and had to be repaid within 12 to 18 months when the livestock was sold.

[7] The federal Minister of Agriculture and Agri-Food acted as guarantor of the advances. If the producer did not repay, MLCA could call upon the Minister to repay the amounts owing. When that payment occurs, under the *AMPA* the Minister becomes subrogated to the rights of MLCA and can seek repayment directly from the borrower: *AMPA*, subs. 23(2).

[8] In 2008, the defendants' livestock business was badly affected by reports of bovine spongiform encephalopathy ("BSE") in cattle – known by some as "mad cow" disease. The individual defendants caused their companies to make applications for two advance payments. The advances have not been repaid. The Minister has reimbursed MLCA and seeks payment from the defendants in this proceeding.

[9] The events relating to the two advances must be set out in detail to resolve the issues raised on this motion for summary judgment. The facts are taken principally from the Affidavit of Jo-anne Schell, a Program Manager for MLCA, sworn on July 7, 2020 and the affidavits of

Barbara Bezan and Layton Bezan, both sworn on September 14, 2020. Jim Juacalla, the administrator at MLCA, did not provide evidence on this motion.

[10] Neither party cross-examined any affiant.

The Emergency Advance Payment

[11] On April 9, 2009, the defendants Layton and Barbara Bezan submitted a written application to MLCA for an emergency advance payment (the “Emergency Advance” or “EA”) in the amount of $45,938.88 on behalf of BCC. That application included a Repayment Agreement stipulating that BCC was to repay the EA within 12 months of the advance being issued. The application also required the Bezans to execute a “Joint and Several Guarantee” in respect of the advance, which they executed on April 9, 2008 at Regina, Saskatchewan.

[12] On April 23, 2008, MLCA executed the EA application. The signatory was Jim Juacalla, who signed the Administrator Attestation portion of the EA application on behalf of MLCA.

[13] On April 24, 2008, MLCA made an Emergency Advance in the amount of $100,000, less a holdback, tags and an administration fee. MLCA deposited the payment into BCC’s bank account with the Bank of Montreal.

[14] Mr Bezan and Ms Bezan both testified on this motion that BCC “did not want to apply” for $100,000 but only for $45,938.88. However, Ms Bezan testified that their other company, BFI, was in “desperate need” of funds due to the volatility of the cattle market and effects caused by outbreaks of BSE. She testified that Jim Juacalla at MLCA advised her that he would get

them as much funding as he could; however, “because BFI was a new company, it might be hard to get an advance out quickly”. Ms Bezan testified that she told Mr Juacalla that BCC could not support more than the $45,938.88 applied for, so it had to be BFI that would apply for any additional advance (i.e., any additional amounts up to $100,000).

[15] Ms Schell testified that BCC was eligible up to $100,000 based on the information in the application about the quantity of livestock expected to be produced. Ms. Schell’s affidavit also advised that in her experience, it was not unusual for MLCA representatives to contact producers applying for an advance if it appeared the producer was eligible for a larger advance than the one they had requested. While she did not have first-hand knowledge of whether Mr Juacalla contacted either of the Bezans to obtain their permission, in Ms Schell’s view, there was no reason for him to alter their application without first doing so.

[16] Both Ms Bezan and Mr Bezan testified that they did not authorize any changes to the application form for the Emergency Advance, nor did they authorize the higher requested advance. However, neither one contested that the money was advanced, received and used. Neither of the Bezans testified that they raised any objection with MLCA to the quantum or to the transfer of the funds to BCC’s Bank of Montreal account (rather than to BFI) at the time in April 2008.

[17] Ms Bezan testified that she noticed that when the Emergency Advance funds were advanced to BCC, the amount was almost $100,000. She testified that “knowing the additional funds were for BFI, BCC made payments on behalf of BFI including an immediate payment on a

BFI account receivable". In addition, over "a couple of months, BCC paid over the excess advance amount to BFI".

[18] By letter to BCC dated May 21, 2008, MLCA confirmed the Emergency Advance payment in the amount of $100,000 ($98,513.50 net of holdback, administrative fee and tags) and enclosed a copy of the modified EA Application. The letter noted that the advance was a 12-month loan and would mature on April 24, 2009. The defendants' evidence did not contest that they received this letter.

The Continuous Flow Advance Payment

[19] On or around April 29, 2008, the Bezans submitted an application for another advance from the MLCA, this time on behalf of BFI for a Continuous Flow Operation Advance (the "CF Advance") for $200,521.64. Like the EA application, the CF Advance application also included a Repayment Agreement stipulating that BFI had to repay the CF Advance within 12 months. The application also required the Bezans to execute a "Joint and Several Guarantee" in respect of the advance, which they did on April 29, 2008 at Regina, Saskatchewan.

[20] On May 21, 2008, MLCA (Jim Juacalla) executed the Administrator Attestation portion of the CF application.

[21] At some point, someone modified the CF application to make BCC the producer applying for the advance instead of BFI. The application shows the use of white-out. The specific timing of this change is not in the evidence.

[22] Mr Bezan and Ms Bezan both testified that they did not authorize any changes to the application documents nor did they authorize anyone at MLCA to substitute BCC as the borrower in lieu of BFI. The affidavits of both Mr Bezan and Ms Bezan acknowledged a telephone call between Ms Bezan and Mr Juacalla of MLCA concerning the amount of the CF Advance being limited to $200,000 because BFI was a “new entity”.

[23] MLCA’s files also contained handwritten notes, which were the subject of evidence from Ms Schell and from Jeff Rockburne, a Program Manager at Agriculture and Agro-Food Canada for the Advance Payments Program in the western Canadian provinces. I will return to this evidence below.

[24] On May 27, 2008, MLCA deposited the CF Advance in the amount of $200,000, less a holdback and administration fee, into BFI’s bank account at TD Canada Trust. No witness testified specifically about why the payment was made into BFI’s account rather than BCC’s. Ms Bezan did not testify about the use of that money by BCC or BFI or otherwise in the defendants’ business.

[25] By letter addressed to BCC dated August 25, 2008, MLCA confirmed the CF Advance of $200,000 ($197,200 net of holdback, administrative fee and tags) and enclosed a copy of the revised CF Advance application. The letter noted that the advance was a 12-month loan and would mature on May 27, 2009. The defendants’ evidence did not contest that they received this letter and its enclosure, or that the enclosure was the revised application.

Stays of Default and the Rollover Application

[26] No repayments were made on the advances by May 2009. The loans went into default.

[27] On May 19, 2009, BCC executed a Stay of Default Agreement, providing for a stay of default for the 2008 advances. This document was signed by both Mr and Ms Bezan for the producer, BCC.

[28] By letter dated November 30, 2010, MLCA advised BCC that it had determined that BCC had an advance from the 2008 production period and that the Minister had granted a new stay of default effective October 1, 2010. The letter set out the terms of repayment and the details of the 2008 advance:

- Advance outstanding: $300,000.00
- Interest outstanding to date on the interest-bearing portion: $10,509.47

[29] MLCA's letter requested that the Bezans read and sign the attached acknowledgement document. The letter advised that if the producer is a corporation, only the signing authority needed to sign it. The acknowledgement document had to be returned with an administration fee of $500 by no later than December 31, 2010.

[30] On December 20, 2010, Mr Bezan on behalf of "Layton & Barbara Bezan, BEZAN CATTLE CORP" signed the acknowledgement document securing a second stay of default. BCC's cheque for $500 payable to MLCA dated December 20, 2010 and signed by Ms Bezan is in the record.

[31] On May 6, 2011, MLCA sent a letter to BCC proposing the option of entering into a repayment schedule or completing an application for a rollover.

[32] On May 30, 2011, BCC submitted a Roll-over Application Form signed by Mr Bezan and Ms Bezan, asking to roll over $197,200 of the advances to the current production period. However, BCC did not submit all the paperwork required to formalize the rollover.

[33] Following written notices to BCC by letters dated August 25, 2011 and September 9, 2011 asking it to provide the required documentation, MLCA notified BCC by letter dated November 1, 2011 that it was in default of the EA and CF Advances.

[34] MLCA's letter dated November 1, 2011 also stated that "[c]urrently you owe $300,000, plus interest to-date in the amount of $17,977.12". The letter requested that an attached settlement agreement be completed to repay the outstanding advance within a five-year period.

The Settlement Agreement

[35] On November 1, 2011, BCC executed an "Advance Payments Program (APP) Settlement Agreement Between Defaulted Producer and MLCA" (the "Settlement Agreement"). Mr Bezan and Ms Bezan both signed on behalf of BCC.

[36] The Settlement Agreement confirmed that BCC owed MLCA $300,000 and interest at specified rates for specified periods. Repayment was to be made at a rate of $500 per month on the 15th of every month beginning on August 15, 2012, plus lump sum payments of $60,000 per year for 5 years when calves are sold.

[37] On August 29, 2012, MLCA received the executed Settlement Agreement and twelve monthly payment cheques from BCC. Ms Schell signed the Settlement Agreement on behalf of MLCA.

[38] From August 2012 to July 2013, BCC made the monthly payments of $500 payments to MLCA, consistent with the terms of the Settlement Agreement. It made no further payments to MLCA.

[39] Eleven of the monthly cheques are reproduced in the record for this motion. Each one bears the name “Bezan Cattle Corporation”. Each one is signed by Mr Bezan on behalf of BCC.

Enforcement Steps

[40] By letter dated May 30, 2014, MLCA advised BCC that it had requested that the Minister honour the guarantee of the 2008 advances and that the advance was now a debt payable to the Crown.

[41] On August 13, 2014, following a request by MLCA, the Minister paid out the guarantee to MLCA pursuant to subs. 23(2) of the *AMPA*.

[42] On June 18, 2019, the Minister brought its claim against the Defendants for $419,036.12, plus interest and costs.

II. **Summary Judgment under the *Federal Courts Rules***

Legal Principles

[43] If the Court is satisfied that there is no genuine issue for trial, it shall grant summary judgment under Rule 215(1) of the *Federal Courts Rules*. There is no genuine issue for trial if there is no legal basis to the claim, or if the judge has the evidence before him or her that is required to fairly and justly adjudicate the dispute: *Manitoba v Canada*, 2015 FCA 57 (Stratas JA), at para 15; *Burns Bog Conservation Society v Canada (Attorney General)*, 2014 FCA 170 (Gauthier JA), at paras 35-36; *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, at para 66.

[44] The onus is on the party seeking summary judgment to establish that there is no genuine issue for trial. Parties responding to motions for summary judgment are required to "put their best foot forward" in their response: *Gupta v Canada*, 2021 FCA 31 (Boivin JA), at para 29; *Milano Pizza Ltd. v 6034799 Canada Inc.*, 2018 FC 1112 (Mactavish J.), at paras 34, 112 and 148. Indeed, that is the burden on both parties: *Canmar Foods Ltd. v TA Foods Ltd.*, 2021 FCA 7 (de Montigny JA), at para 27; *Miller v Canada*, 2019 FCA 61 (Laskin JA), at paras 17 and 40. In *Canmar*, de Montigny JA observed that the responding party cannot rest on its pleadings and "must come up with specific facts showing that there is a genuine issue for trial" (at para 27). The Court "is entitled to assume that the parties to the motion have put their best foot forward and that, if this case were to go to trial, no additional evidence would be presented": *Milano Pizza*, at para 105 (quoting *Rude Native Inc. v Tyrone T. Resto Lounge*, 2010 FC 1278 (Russell J.), at para 16). This implies that the parties should adduce all of their evidence in support of or in response to the motion.

[45] In *Milano Pizza*, Mactavish J. also set out the following summary judgment principles, at paragraphs 36-40 (citations excluded):

> [36] As noted above, to be "fair and just", the record before the motions judge must permit the judge to find the facts necessary to resolve the dispute: … Summary judgment should therefore not be granted where the necessary facts cannot be found, or where it would be unjust to do so.
>
> [37] The jurisprudence is clear that issues of credibility ought not to be decided on motions for summary judgment. Generally, a judge who hears and observes witnesses giving evidence orally in chief and under cross-examination will be better positioned to assess the witnesses' credibility and to draw the appropriate inferences than a judge who must depend solely on affidavits and documentary evidence: …
>
> [38] Without hearing oral evidence, a motions judge faced with a genuine issue for trial cannot properly assess credibility or sift through and weigh the evidence: … Consequently, cases should go to trial where there are serious issues with respect to the credibility of witnesses: …
>
> [39] That said, "the mere existence of apparent conflict in the evidence does not preclude summary judgment". Judges have to take a "hard look" at the merits of the case and decide if there are issues of credibility that need to be resolved: …
>
> [40] Judges dealing with motions for summary judgment must, moreover, proceed with care, as the effect of the granting of summary judgment will be to preclude a party from presenting any evidence at trial with respect to the issue in dispute. In other words, the unsuccessful party will lose its "day in court": …

See also *Rallysport Direct LLC v 2424508 Ontario Ltd.*, 2019 FC 1524 (Fuhrer J.), at para 42.

[46] As noted in *Milano Pizza*, at paragraph 39, the Court is required to take a "hard look" at the evidence on a summary judgment motion: see also *Manitoba v Canada*, at para 26. In *Suntec Environmental Inc. v Trojan Technologies Inc.*, 2004 FCA 140 (Pelletier JA), the Court of

Appeal confirmed the requirement to take a "hard look" at the merits and, if possible, make findings of fact and law if the materials allow it (at para 10).

[47] Where there are important factual disputes that cannot be resolved without determining questions of witness credibility and the inferences to be drawn from conflicting evidence, a trial is the preferable means to a sound resolution of the dispute, rather than summary judgment: *TPG Technology Consulting Ltd v Canada*, 2013 FCA 183 (Sharlow JA), at para 3. Thus, if there is a credibility issue to be resolved, it should not be decided on a summary judgment motion: *Newman v Canada*, 2016 FCA 213, at para 57; *MacNeil Estate v Canada (Indian and Northern Affairs Department)*, 2004 FCA 50, [2004] 3 FCR 3 (Sharlow JA), at para 32; *Suntec Environmental*, at paras 20 and 28-29. A credibility issue arises when an issue must be decided by selecting the evidence of one witness over another (*Suntec Environmental*, at paras 23 and 27-28) or if the credibility of a witness is put into issue through cross-examination and the witness's evidence must not be believed to reach a conclusion (at paras 25-26).

The Plaintiff's Motion for Summary Judgment

[48] The plaintiff submitted that there are no genuine issues for trial and that judgment should be granted against the defendants. On the merits of its claim, the plaintiff referred to fundamental contract law doctrines of offer, acceptance and consideration to support its position that the agreements between MLCA and the defendants are valid and enforceable. According to the plaintiff, the defendants applied for the advances, in effect making an offer. The modifications to the loan applications (principally, the increase from $45,938.88 to $100,000 in the EA application and the replacement of BFI with BCC in the CF Advance application) constituted a counteroffer from MLCA to the defendants backed by the advances as consideration. On this

view, the defendants accepted the counteroffer by their subsequent conduct, namely the execution of several documents agreeing to be responsible for the advance payments, including the stay of default agreement, the acknowledgment document, the Settlement Agreement and by BCC making payments under the Settlement Agreement.

[49] In response, the defendants submitted that this Court should deny the request for summary judgment and summarily dismiss the claim in its entirety. In the alternative, they plead that the case presents genuine issues for trial. On the merits, the defendants submitted that the agreements in relation to the advance payments are void because MLCA made unilateral and material alterations to the agreements, to which the defendants did not consent. Those alterations included the amount of the EA Advance and the change from BFI to BCC as the Producer (borrower) in the CF Advance documentation. In their written submissions on this motion, the defendants characterized those alterations as fraudulent.

Is there a genuine issue for trial?

[50] The defendants' written submissions did not identify any credibility issues that would preclude summary judgment in this matter. In arguing that summary judgment was not warranted, the defendants listed certain "evidentiary issues" that they argued should "shake the confidence of the Court":

- neither Mr Juacalla nor another employee of Agriculture and Agri-Food Canada provided an affidavit. Mr Juacalla is easily accessible, despite the fact that he no longer works for MLCA. Adverse inferences should be drawn against the plaintiff for failing to provide those affidavits;

- the plaintiff claimed that the handwritten notes in MLCA's files from May 2008 were purportedly written by Mr Jim Juacalla, but the notes also refer to "Jim" and it is unlikely that the author would refer to himself in the third person;
- Ms Schell commented on the handwritten notes in her affidavit, but she did not provide evidence about her own memories even though she appears to have participated in one of the telephone calls described in the notes;
- Mr Rockburne did not testify about an important point he appeared to make (according to the notes) concerning paying all of the CF Advance to BCC;
- there was an unexplained discrepancy between the amount owed (about $342,000) and the amount MLCA requested from the Minister (about $320,000);
- the defendants suggested that additional evidence may have been withheld because the plaintiff omitted to present evidence that the CF Advance was paid to BCC (rather than to BFI).

[51] In my view, none of these points precludes the Court from granting summary judgment. None of the points raises any issues of credibility or presents an issue of fact or law that cannot be determined with confidence on this motion. I note:

- the defendants did not articulate exactly what inference the Court should draw against the plaintiff for the absence of certain witnesses' evidence;
- the unexplained discrepancy in the amount owing is not relevant or material. As the plaintiff submitted in reply, it is apparently a result of differing interest rates agreed between different parties; and
- the defendants' point about withheld evidence is speculation.

[52] The defendants' "evidentiary issues" arising from the May 2008 handwritten notes can be addressed together. The handwritten notes state:

> May 23/08
>
> Spoke to Jeff about Bezan Feeders Inc. and Bezan Cattle Corporation. Two companies are applying for an advance with the two same shareholders for both company (sic). Jeff said to relate the two companies and that they only get a max of $400,000.00 for both. Jeff suggested to do advance on Bezan cattle Corp so that it doesn't require to be related
>
> May 26/08
>
> Jim and Jo-anne spoke to Jeff regarding the attributions with the company. Jeff said that they can only get $200,000.00 int bear. Producers is owing an APP $100,000.00
>
> May 26/08
>
> Spoke to Producer about advancing $200,000. Producer agreed to the amount.

[53] These notes appear to suggest that MLCA was considering both BFI and BCC together in late May 2008 and that the suggestion to make BCC the borrower for the CF Advance may have come from MLCA, not the Bezans. The second entry on May 26, 2008, appears to corroborate the Bezans' testimony about a call between Ms Bezan and Mr Juacalla concerning the amount of the CF Advance just before the funds were transferred on May 27, 2008.

[54] Although the defendants did not object the admissibility of the handwritten notes, the notes have not been authenticated by their author. They appear on their face to have been made in late May 2008 in the ordinary course of business. I am also aware of the limitations on a witness refreshing their memory from another person's notes and the requirements for notes to constitute a past recollection recorded.

[55] Although neither Ms Schell nor Mr Rockburne wrote the notes, both commented on their contents, Ms Schell to advise about their likely author (Mr Juacalla) and to comment on the contents based on her own experience dealing with producers and advance payments, and Mr Rockburne to say that he had no memory of the conversations but that what was recorded in the notes was consistent with what he usually would have said.

[56] I do not find the evidence in or concerning the notes to be salient, especially given the contents of Mr Rockburne's and Ms Schell's affidavits. As a result, any possible additional evidence that the plaintiff allegedly could or should have filed arising from the notes, or the witnesses' testimony about them, would be of little value. The absence of this possible evidence as raised by the defendants in their list of "evidentiary issues" does not cause me to lose confidence in the other evidence in the record for this motion.

[57] Returning to the broader issue of a genuine issue for trial, the defendants have not raised any argument that there is a credibility issue to decide as between the evidence of the two witnesses, or that another genuine and appropriate issue exists for a trial. Considering also the record on this motion and the parties' submissions, it would be an unnecessary use of the parties' time and resources, as well as the Court's, to send this matter to trial. Given the legal obligation on each party to put their best foot forward, and the contents of the motion records filed by the parties, the Court has the evidence to adjudicate this dispute fairly and justly on the record.

III. **Should Judgment be granted against BCC on the merits?**

[58] The plaintiff contends that after the defendants completed the application forms for the CF Advance, MLCA made a counteroffer that specified the amount of the advance and stated that BCC would be responsible for repayment, to which the plaintiffs agreed. The defendants submit that the agreements are void because MLCA unilaterally and fraudulently made material alterations to the terms of the two Repayment Agreements. The defendants also raise issues of economic duress and an unconscionable bargain. I will address these issues in turn.

Was there an enforceable agreement between BCC and MLCA?

(i) Did BCC's conduct demonstrate an agreement with MLCA?

[59] The plaintiff relied on *Saint John Tug Boat Co. v. Irving Refining Ltd.*, [1964] SCR 614 to support its position that BCC's conduct constituted acceptance of MLCA's counteroffer. In that decision, the Supreme Court of Canada concluded that an objective approach is required to determine whether a course of conduct constitutes acceptance of an offer. On the facts, a contract had been formed as a result of an oil refinery operator, Irving Refining Ltd., acquiescing to the continued provision of a tug boat's services after an express agreement between them had expired (as summarized by the Supreme Court recently in *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*., 2020 SCC 29 (Côté J., for the majority), at para 30).

[60] In the *Strata Plan* decision, after referring to *Saint John Tug Boat*, the Supreme Court stated that parties' reasonable expectations are generally protected in the common law of contracts, which means that "a subjective mutual consensus is neither necessary nor sufficient for the creation of an enforceable contract" and that "a person may be bound by contractual

obligations that she did not intend (subjectively) to assume": *Strata Plan*, at para 31, citing Waddams, *The Law of Contract* (7th ed. 2017), at §§92 and 146. The Supreme Court observed that at common law, the risk arising from one party's reasonable reliance on the existence of an agreement is allocated to the party whose conduct gave rise to a reasonable expectation that a contract between the parties would be legally binding: at para 31.

[61] In *Saint John Tug Boat,* the parties had an agreement for standby tug services in June and July 1961 based on terms in letters in March of that year. Irving had not accepted the proposed terms but did pay the plaintiff's invoices as rendered. From July 31, 1961, to February 28, 1962, the tug boat company provided further standby service and issued invoices. Irving did not pay those invoices. The trial judge found requests for payment from the tug boat company and no written or verbal notification from Irving that it refused to pay during that period. The trial judge concluded that Irving had acquiesced to have the tugs on standby service on the terms set out in the earlier agreement, to avoid demurrage charges on Irving's tankers.

[62] At the Supreme Court, the question to be determined in *Saint John Tug Boat* was whether Irving's course of conduct from the end of July to February of the following year constituted a continuing acceptance of the offer so as to give rise to a binding contract to pay for the stand-by tug services at the rate specified in the invoices. At pages 621-622, Ritchie J. concluded that Irving "must be taken to have known" that the tug was being kept standing by for Irving's use until the end of February 1962 and that the tug company expected to be paid as set out in the monthly invoices. From Irving's course of conduct, it was reasonable to conclude that it accepted the continuing services on the terms proposed in the March 1961 correspondence. The tug

company was entitled to recover the sums charged in the invoices as being "money due pursuant to a contract which was concluded by [Irving's] own acquiescence".

[63] This Court has applied or referred to the contract law principles in *Saint John Tug Boat* in *Ehler Marine & Industrial Service Co. v "M/V Pacific Yellowfin" (The)*, 2015 FC 324 (Simpson J.), at para 26; *Blais v Canada (Attorney General)*, 2004 FC 1638 (Harrington J.), at para 26; and *Trans Tec Services Inc. v. LYUBOV ORLOVA (The)*, 2001 FCT 958 (Mackay J.), at paras 14-18.

[64] In the present case, the evidence demonstrates much more than the acquiescence that gave rise to contractual obligations in *Saint John Tug Boat*. The Bezans took action themselves – positive steps – that affirmed that it was BCC's obligation to repay the total amounts owed to the plaintiff under the EA Advance and the CF Advance. There is clear and unequivocal, repeated evidence over a long period of time demonstrating that both parties reasonably expected, and BCC agreed in substance, that BCC would be legally responsible to repay (as discussed further below). In addition, the defendants did not raise any issue as to the amount owing or whether BCC was the correct borrower before the commencement of this proceeding, despite many opportunities to do so. The Bezans' testimony on this motion also did not question that MLCA advanced the money in the quantum claimed for repayment.

[65] I will not repeat the chronology of events set out already. Instead, I will highlight the following.

[66] By the end of April 2008, the Bezans had caused BCC to apply for emergency funding and MLCA had transferred the EA Advance of almost $100,000 to BCC. At least some of that money had “immediately” been used to pay an account receivable of BFI. From the Bezans’ perspective, money advanced to one of their companies (BCC) could be used by another company (BFI) even while the first was contractually responsible for repayment.

[67] Starting in May 2008, MLCA sent correspondence to BCC (to the attention of the Bezans) that confirmed BCC’s responsibility to repay the two advances. The correspondence started with MLCA’s confirmation letters dated May 21 and August 25, 2008, with enclosures. In total there are eight letters addressed to BCC from MLCA concerning its liability to repay money advanced.

[68] In addition, the Bezans caused BCC to be bound by signing legal documents in relation to the stays of default, the acknowledgement agreement and the Settlement Agreement. Those documents confirm not only the quantum of money owed, but that BCC is required to repay that amount. In total, there are four documents executed by one or both of Mr Bezan and Ms Bezan that confirmed that BCC was responsible to repay the advances, not counting the executed applications for the EA Advance and the CF Advance in April/May 2008. Those four documents are dated in May 2009, December 2010, May 2011 and November 2011.

[69] The terms of the Settlement Agreement, executed by the Bezans on behalf of BCC, included the following clear and substantive provisions that confirmed the parties’ respective understanding and agreement:

> **Between** (Name of Producer): **Bezan Cattle Corporation**
>
> **And** (Name of Administrator): **Manitoba Livestock Case Advance, Inc.**
>
> **Settlement Agreement**
>
> Whereas the Producer has defaulted with respect to the advance given to the Producer by the Administrator in the amount of **$300,000** dollars for the agricultural product in the 2008 production period …
>
> Whereas the Producer owes the Administrator the amount of **$300,000** dollars including interest on any interest-free advances from the date of the advance (May 26, 2008) to the date of default (July 1, 2011) …
>
> […]
>
> Repayment of debt shall be made as follows:
>
> $500.00 dollars on the 15th day of each month beginning on AUGUST 15, 2012 + LUMP-SUM PAYMENTS OF $60,000/YEAR FOR FIVE YEARS WHERE CALVES ARE SOLD (USUALLY IN THE DECEMBER TO FEBRUARY TIMEFRAME NORMALLY DECEMBER OR JANUARY)
>
> […]
>
> Where the Producer has breached any term of this settlement agreement, the Producer shall consent to the Administrator taking judgement against the Producer in the amount of **$300,000** representing the amount of the principal owing on the advance and accumulated interest to the day of the breach, plus interest at a rate…
>
> [Original emphasis throughout.]

The words in capital letters in this excerpt and the reference to $500.00 were added in handwriting.

[70] As described already, BCC began to perform the terms of the Settlement Agreement. BCC made monthly payments of $500 by cheque to MLCA for a year, from August 2012 to July

2013. Eleven of the 12 monthly cheques were reproduced in the record for this motion. Each cheque bears the pre-printed name “Bezan Cattle Corporation”. Each one is made out in handwriting and is signed by Mr Bezan on behalf of BCC.

[71] Thus, on thirteen occasions, BCC paid MLCA by cheque either to pay down the advances or to pay an administrative fee. (The other was the administration fee mentioned above.)

[72] Despite all of these contacts with MLCA over the years, all with BCC, and in addition to signing documentation that bound BCC to repay, the defendants adduced no evidence that they ever raised any issue or objected to the quantum of the debt owed or about BCC being the primary obligor to repay the two advances.

[73] In addition, there is no evidence that either party considered BFI to be responsible for repayment of the two advances. There are no letters from MLCA to BFI, nor any letters or cheques from BFI to MLCA, nor any letters from either Mr Bezan or Ms Bezan to MLCA that refer to BFI as a borrower after May 2008.

[74] There is no documentary evidence – prior to this lawsuit – indicating that Mr Bezan or Ms Bezan ever advised MLCA or the Minister that they, or BCC, believed that BFI was the proper counterparty to MLCA for either of the Repayment Agreements.

[75] Applying the contract law principles set out in *Saint John Tug Boat* and *Strata Plan*, I conclude that BCC, by its conduct, agreed with MLCA to repay the EA Advance and the CF Advance in accordance with the terms of the Repayment Agreement.

(ii) The Defendants' Fraud Allegation

[76] The defendants alleged that MLCA's alterations to the application documents constituted a fraud and that the agreement was therefore void, referring to *Collins v Melfort Credit Union* (1995), 133 Sask R 166 (QB), aff'd (1996), 144 Sask R 67 (CA).

[77] The circumstances of *Collins* are markedly different from the present case. In *Collins*, the credit union altered documents when it discovered that a borrower/mother was in financial difficulty or when it was served with papers concerning the mother's insolvency, in order to enable the credit union to seize trust money of her children to repay the mother's loan. The credit union applied to the Court to rectify the documents in equity, which the Court denied because the documents had been altered after the fact in an effort to keep the money out of the bankrupt mother's assets. The Court also found the documents void, which led to the seized money being reinstated to the children's account.

[78] By contrast, in this case, the defendants received the EA Advance and the CF Advance that they requested under a statutory program designed to assist farmers in financial need. As Ms Bezan's affidavit confirmed, the effects of BSE had made their financial situation dire. There is no debate about whether MLCA advanced the money it now claims. There is no evidence that MLCA made alterations to the documents to obtain a financial benefit for MLCA or any individual. Any issue as to whether one corporation qualified for the advances under the

programs is a matter between MLCA and the Minister or MLCA and its employees. I am unable to conclude that the circumstances give rise to any fraud as understood in *Collins*.

[79] The defendants also referred to *CIBC v Skender* (1985), 67 BCLR 126 (CA), a decision concerning the enforceability of a guarantee when a bank employee filled in the blanks in a guarantee. While the precise issue and facts in *Skender* were different from the present case, the conclusion reached here is consistent with the reasoning of Lambert JA (at paragraphs 10-15).

(iii) The Evidence of Alterations to the Application Documents

[80] I acknowledge the Bezans' testimony that they did not authorize the changes to the application documentation in relation to the two advances. I accept that they did not "authorize" those changes. If a single post-advance confirmation letter from MLCA to BCC were the *only* evidence of BCC's alleged commitment to repay the funds and there were no documents signed by the Bezans on behalf of BCC, or payments by BCC, or letters to BCC about its liability to pay, or evidence that BFI was the borrower, the situation might be different and the evidence of oral discussions between the Bezans and MLCA representatives in May 2008 might arguably affect the outcome of this proceeding.

[81] But that is not the evidence before the Court on this summary judgment motion. The Court is required to have a hard look at all of the evidence and must assume that both parties have presented all the evidence they can to advance their positions. The Bezans did not testify as to conversations in May with MLCA representatives (with one exception, as noted above). The Bezans' evidence about unauthorized alterations to the application documents does not affect the

overwhelming weight of the documentary evidence that through their own actions after May 2008, they agreed that BCC was the entity that was legally responsible for repayment. In short, their alteration evidence on this motion does not alter the substance of the legal agreement between the parties, either as to the quantum to be repaid or as to which corporate entity must repay it.

[82] I note also that the evidence disclosed that the Bezans were aware of the corporate entities they used. They operated their farming business through at least three different corporate entities, including BCC and BFI (see Ms Bezan's letter dated April 29, 2008). They do not suggest in their submissions or evidence that they did not understand the different obligations agreed to by the different corporations; to the contrary, their evidence and position about not authorizing changes to the application documents depends on that distinction.

[83] There is one other point to make before concluding this section. Mr Bezan and Ms Bezan both testified that they did not authorize changes to the documentation, to increase the quantum of the EA Advance, to substitute BCC for BFI on the CF Advance and to make other alternations to the documentation associated with those two changes. I have considered whether, in coming to conclusions for the reasons just described, it was necessary to disbelieve the Bezans' testimony. Was it necessary to make a negative conclusion as to their credibility which should be done by a trial judge after hearing oral testimony?

[84] I do not believe so. In my view, the Bezans' evidence can be (and is) accepted, so far as it goes. It is not inconsistent to accept their evidence that they did not authorize the alterations to

the documents in April/May 2008, but also to conclude that their own subsequent actions caused BCC to accept legal responsibility for repaying the two advances. By any objective measure, and considering both parties' reasonable expectations as may be considered based on the evidence, BCC is contractually responsible for repayment. It is apparent from the course of dealings that both MLCA and the Bezans agreed that BCC was responsible for repaying all of the funds advanced. MLCA could have had no other reasonable expectation based on BCC's and the Bezans' conduct.

The Defendants' Positions on Unconscionability and Duress

[85] The defendants submitted that the agreements with MLCA were "void for public policy reasons". They made submissions on the imbalance of power in the contract negotiations, the alteration of the documents (as already addressed) and how the wording of MLCA's agreements, if accepted as outside the protection of the *Saskatchewan Farm Security Act*, could put farmers into financial ruin. I address the *Saskatchewan Farm Security Act* below. In this section, I will address the two contract law doctrines raised by the defendants, unconscionability and duress.

[86] First, the defendants relied on *Uber Technologies Inc. v Heller*, 2020 SCC 16 with respect to the doctrine of unconscionability. The Supreme Court held that unconscionability has two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant; and an improvident transaction: *Uber*, at paras 62, 65 and 79. An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process: *Uber*, at paras 66 and following. A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable party: *Uber*, at paras

74 and following. On the element of an improvident bargain, the Supreme Court stated at paragraph 76:

> For a person who is in desperate circumstances, for example, almost *any* agreement will be an improvement over the status quo. In these circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. This could occur where the price of goods or services departs significantly from the usual market price.
>
> [Original italics.]

[87] Second, the defendants raised economic duress in their Statement of Defence. Anticipating the defendants' position on this motion, the plaintiff referred to *Gordon v Roebuck* (1992), 9 OR (3d) 1 (CA), which adopting the test for duress from *Pao On v Lau Yiu*, [1979] 3 All ER 65 (PC)**.**

[88] Duress has been described as the coercion of a person's will through illegitimate pressure, with one party dominating the will of another at the time that a contract is executed: *Ramdial v Davis*, 2015 ONCA 726, at para 42. Three elements must be established to vitiate an agreement for duress:

1) The pressure must amount to coercion of the will;
2) The pressure must be illegitimate; and
3) The party seeking relief must have taken steps to avoid the act complained of.

See *Westshore Terminal LP v Leo Ocean SA,* 2014 FC 136 (Heneghan J.), at paras 41, 54 and 61 (aff'd without comment on this issue 2014 FCA 231, [2015] 3 FCR 712); *McNeil v Canada (Secretary of State)* (2000), 193 FTR 88, [2000] FCJ No. 1477 (Fed. T.D.) (Heneghan J.), at para

38; *Stott v. Merit Insurance Corporation* (1988), 63 OR (2d) 545; *Dairy Queen Canada Inc. v MY Sundae Inc.*, 2017 BCCA 442 at paras 48-51 (leave to appeal to the SCC refused, SCC No. 38060 (November 15, 2018)). These elements were also acknowledged in *Gordon v Roebuck*, at para 3.

[89] In *Pao On*, Lord Scarman set out four factors to consider in determining if a party's will has been coerced: (i) did the party protest? (ii) was there an alternative course open to the party? (iii) was the party independently advised? (iv) after entering the contract, did the party take steps to avoid it? (*Pao On,* at p. 78.) See also *Gordon v Roebuck,* at paragraphs 3 and following.

[90] In the present case, the evidence does not support a finding of economic duress or justify a conclusion that the bargains entered between the Bezans, BCC and MLCA should not be enforced due to unconscionability.

[91] Ms Bezan testified that in spring 2008, BFI was in "desperate need for an advance" due to the effects of BSE on the cattle market. However, there is no evidence of MLCA putting illegitimate pressure on the Bezans or evidence that their wills were coerced when they made the applications for the two advances under the program administered by MLCA. The Repayment Agreement terms and conditions and the Joint and Several Guarantees are in standard form for the programs administered by MLCA. The Bezans did not testify in their affidavits about any facts that might support a finding of MLCA exerting illegitimate pressure or coercing their wills, nor is there evidence of any protests (before this proceeding) about the entry into, existence of, or terms of the Repayment Agreements, or the Joint and Several Guarantees.

[92] The Bezans also caused BCC to enter into the Settlement Agreement and BCC made a year of payments under it, agreeing to repay the money owed from the sale of livestock in annual lump sums. There was no protest at this time either, nor any evidence about illegitimate or unlawful means to induce the Settlement Agreement. Overall, the Bezans had several years to raise some sort of concern about the agreements. They did not do so during that time and did not point to any action in the relevant time period that would justify a finding in their favour.

[93] Finally, I am unable to conclude that the bargain entered by the Bezans was improvident, as the unconscionability test in *Uber* requires. It appears from all the evidence that the two advances provided some financial relief that was needed in the Bezans' cattle business, even if the money did not solve all their financial difficulties. There is no evidence that MLCA was unduly advantaged or unjustly enriched, that the money advanced was too much, or that the interest rates or administration fees were too high.

[94] Ms Bezan testified that in December 2010, the Bezans received the stay of default documents around Christmas time. With the holidays, they had very little time to review the documents. They felt they were on the "brink of financial ruin". In addition, both Ms Bezan and Mr Bezan testified in their affidavits (in virtually identical language) that in May 2011, MLCA advised the Bezans that they needed to make payments or apply for a rollover. They "questioned why it would be BCC and not BFI" making the agreements but "were never provided satisfactory answers". They had "massive financial struggles". MLCA was "very aggressive". The Bezans felt "a great deal of pressure and intimidation" and "like we had no options which

seems silly looking back that we could have simply made $100.00 per month payments to avoid default”.

[95] I am unable to conclude, on a balance of probabilities, that this evidence is sufficient to render the Repayment Agreements or the Joint and Several Guarantees unenforceable or void in law, or for that matter to render void the documents executed in December 2010 and May 2011. The affidavits contain no factual details or any elaboration of the statement that MLCA was “very aggressive” that might support an allegation of MLCA placing illegitimate pressure on the Bezans. The evidence also does not contain any details about the Bezans’ or their corporations’ financial circumstances at any time (whether in spring 2008, December 2010 or May 2011). The defendants did not suggest that rolling over the payment obligation to a new production period, or otherwise delaying repayment, did not benefit them or was improvident. While I have no doubt the Bezans were feeling the financial pressure as they describe, the evidence in the record does not support the legal conclusion that the agreements should not be enforced on the grounds of economic duress as set out in the case law, or due to unconscionability on the elements confirmed by the Supreme Court in *Uber*.

The Defendants’ Subrogation Arguments

[96] The defendants submitted that the plaintiff could not properly be subrogated to MLCA’s position, and therefore could not sue them, because MLCA had no legal rights to pass on to the plaintiff because the agreements were void, owing to the fraudulent alteration of the documents.

[97] Having concluded already that the defendants’ position on fraud cannot succeed, I conclude that the defendants’ arguments on subrogation also cannot succeed.

Conclusion on Judgment against BCC

[98] I conclude that BCC agreed with MLCA to repay the amounts claimed and that there is no genuine issue for trial as to the quantum to be repaid, or as to whether BCC is the correct entity against which a Judgment may be entered. It has failed to repay the amounts in the EA Advance and the CF Advance plus interest as agreed in the Repayment Agreement (and as confirmed in subsequent documents executed on behalf of BCC).

[99] Judgment will therefore be granted against BCC. The quantum of the judgment will be addressed below.

IV. **Should Judgment be granted against Layton and Barbara Bezan personally?**

[100] The other major issue on this application is whether judgment should be granted against the Bezans personally under the Joint and Several Guarantees they executed in relation to both the EA Advance and the CF Advance.

[101] The plaintiff argued that Mr Bezan and Ms Bezan are personally liable because they agreed to be jointly and severally liable as primary obligors for repayment of the advance, together with BCC. On this view, the contractual clauses in the Joint and Several Guarantees are not guarantees contingent upon default and the *Saskatchewan Farm Security Act* does not apply. By contrast, the defendants submitted that Mr Bezan and Ms Bezan are not personally liable because the Joint and Several Guarantees are each a “guarantee” as defined in s. 31 of the *Saskatchewan Farm Security Act* that are of no effect for failure to comply with the requirements

of subs. 31(2) and (3). On the defendants' view, any attempt to limit the application of that legislation is a waiver not permitted by subs. 105(2).

[102] The relevant provisions of the *Saskatchewan Farm Security Act* provide as follows:

> **Limits and acknowledgments of guarantees**
>
> 31(1) In this section:
>
> […]
>
> (b) **"guarantee"** means 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 this Act;
>
> (2) No guarantee has any effect unless the person entering into the obligation:
>
> > **a)** Appears before a lawyer or notary public;
> >
> > **b**) Acknowledges to the lawyer or notary public that he or she executed the guarantee; and
> >
> > **c)** In the presence of the lawyer or notary public signs the certificate in the prescribed form.
>
> (3) The lawyer or notary public, after being satisfied by examination of the person entering into the obligation that he or she is aware of the contents of the guarantee and understands it, shall issue a certificate in the form prescribed in the regulations.
>
> […]
>
> **No waiver**
>
> 105(2) Except as otherwise provided in this Act, every agreement or bargain, verbal or written, express or implied, entered into after May 24, 1988, that
>
> **a)** Either:
>
> > **(i)** This Act; or

> **(ii)** Any provision of this Act;
>
> shall not apply or that any benefit or remedy provided by this Act shall not be available; or
>
> **b)** In any way limits, modifies or abrogates or in effect limits, modifies or abrogates any benefit or remedy described in clause (a);
>
> is null and void and of no effect.

[103] It is not contested that the requirements of subs. 31(2) and (3) have not been met. The issues are whether the Joint and Several Guarantees are a "guarantee" as defined in paragraph 31(1)(b) and if so, whether the documents executed by the Bezans are enforceable.

Are the Joint and Several Guarantees a "guarantee" as defined?

[104] The relevant terms of the agreements executed by Mr Bezan and Ms Bezan provide as follows (in relevant part):

> JOINT AND SEVERAL GUARANTEE (for Cooperative, Partnership or Corporation with multiple shareholders)
>
> We, being shareholders […] of the corporation […] as stated in section 1.2 of this Application for an Advance, in consideration of an advance being made to the Corporation […] 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 […] pursuant to the APP.
>
> *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*.
>
> [Original italics; underlining added.]

[105] Section 5.0 of the Terms and Conditions of the Repayment Agreement concerns "Default" by a Producer in repaying the advance. Subsection 5.1 provides that a Producer (as defined) is in default if the Producer has not met all their obligations under the Repayment Agreement by the end of the production period. Upon default, the Producer is liable to the Administrator for the outstanding amount of the guaranteed advance and the interest payable on it (paragraphs 5.3(a) and 5.3(b)). Section 5.5 provides:

> 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 these Terms and Conditions and the costs incurred by the Minister to recover the amount, including legal costs.

[106] Section 5.0 does not contain terms concerning the liability of a person who executes a Joint and Several Guarantee.

[107] The definition of a "guarantee" in paragraph 31(1)(b) of the *Saskatchewan Farm Security Act* refers to a written agreement of an individual who 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". In my opinion, the Joint and Several Guarantees fall into that definition.

[108] The analysis requires a consideration of three elements:

- an obligation to answer for an act, default, omission or indebtedness;

- the definition of a "farmer;" and
- whether the obligation arises in relation "other assets used in farming."

The latter two elements are related and will be considered together.

[109] Do the Joint and Several Guarantees create an obligation to answer for an act, default, omission or indebtedness? They do. First, the express terms of the Joint and Several Guarantees create an obligation to answer for a producer that defaults in its repayment obligations. The terms expressly refer to liability under the default provision, Section 5.0, of the Terms and Conditions of the Repayment Agreement. The terms also expressly state that the repayment obligation is for "the full amount of any *defaulted* advance" (italics added).

[110] Second, the Joint and Several Guarantees exist in a statutory context. The *AMPA*, subparagraph 10(1)(*d*)(ii), requires each of the shareholders to agree in writing to be jointly and severally liable to the administrator for any liability of the producer under s. 22 of the *AMPA*. Section 22 provides that a producer "who is in default" under a repayment agreement is liable to the administrator for the outstanding amount of the guaranteed advance, interest and costs as described in the section. The Joint and Several Guarantees reflect the statutory requirement that shareholders answer for the default of the primary obligor (Producer) when the Producer is a corporation.

[111] Third, subsection 5.5 contemplates that the plaintiff will be subrogated to claims against the defaulted Producer "and against any other persons liable" under the Repayment Agreement. This language does not refer to an event of default committed by that "other person" – any

person other than a Producer – before enforcement action may be taken. This is consistent with such person not being primary obligors under the Repayment Agreement.

[112] Fourth, I note that the Joint and Several Guarantees are separately executed and physically separated from the terms and Conditions of the Repayment Agreement in the advance program application forms. If the Joint and Several Guarantees were intended to create primary obligations, rather than obligations that arise after default, it is more likely that they would be contained in the Repayment Agreement and that individuals would sign the Repayment Agreement alongside the Producer corporation through which they conduct business.

[113] Lastly, the language used in the Repayment Agreement and the Joint and Several Guarantee also does not place obligations of a primary obligor on Mr Bezan or Ms Bezan in their personal capacities. In particular, it is the Producer that has repayment obligations in Section 3 of the Terms and Conditions of the Repayment Agreement. The Bezans do not have to repay the advances absent a default by the Producer. The use of "joint and several" refers to the nature of their liability but does not inherently create a primary obligation to repay. The Joint and Several Guarantees are more likely a guarantee (consistent with their titles) rather than a primary obligation to repay by the Bezans. See *Communities Economic Development Fund v Canadian Pickles Corp.*, [1991] 3 SCR 388, at pp. 413-414.

[114] The next question is whether the two Joint and Several Guarantees executed by the Bezans require them to answer for an act, default, omission or indebtedness "of a farmer" in relation to "other assets used in farming." In my opinion, the answer is Yes. To reach this

conclusion, we must consider the definitions in the legislation with some care. Fortunately, a decision in the Saskatchewan Court of Queen's Bench has already addressed the issue.

[115] The *Saskatchewan Farm Security Act* defines a "farmer" for the purposes of Part II (which includes s. 31) to mean, except in sections irrelevant to this motion, "a mortgagor". The Act defines "mortgagor" in paragraph 2(1)(q) to <u>include</u> a purchaser under an agreement for the sale of farm land, a personal representative, successor or assignee of such a purchaser or a mortgagor, and a person claiming through such a purchaser or mortgagor.

[116] All three of these descriptions of a mortgagor relate to real property, but the definition in paragraph 2(1)(q) is not exhaustive – it uses the word "includes", not "means", when defining "mortgagor". A "farmer" as used in s. 31 could therefore mean more than the three descriptions of a "mortgagor" in paragraph 2(1)(q).

[117] In *Prairie Centre Credit Union Ltd. v River Ridge Cattle Corp.*, 2010 SKQB 135, Keene J. considered this question and concluded that "farmer" in s. 31 does have an expansive meaning beyond real property and that "farming" includes the raising of livestock. After setting out the definitions already mentioned, Keene J. stated at paragraphs 23-29, referring to the *Saskatchewan Farm Security Act*:

> … the clearest expression of the legislation's intent is found in the wording of s. 31(1)(b) itself:
>
>> **31**(1)(b) ... in relation to farm land <u>**or other assets used in farming**</u>, but does not include guarantees entered into prior to the coming into force of this Act;
>>
>> [Emphasis added]

> [24] In my view the wording of the section clearly is meant to expand the use of guarantees beyond farm land situations to guarantees pertaining to non real property assets. There cannot be any other logical reason for including the words "or other assets used in farming" immediately after the word "land".
>
> [25] Accordingly, putting all the above together I find that a farmer is a form of a mortgagor (that can be different than a real property mortgagor) who grants security over other assets used in farming (again other than or addition to farm land).
>
> [26] In this application the mortgagor or farmer is a corporation. However, whether the farmer is a person or a corporation is on the facts of this case immaterial.
>
> [27] However, the matter does not rest there. I have to complete the exercise by now analysing the final part of the relevant sentence in s. 31(1)(b) namely:
>
>> **31**(1)(b) ...or other assets used in farming, but does not include guarantees entered into prior to the coming into force of this Act;
>>
>> [Emphasis added]
>
> [28] The word farming is not defined under Part II but it is defined under s. 2(1)(g) of the Act as follows:
>
>> **2**(1)(g) “farming” includes livestock raising,...or any other activity undertaken to produce primary agricultural produce and animals;
>>
>> [Emphasis added]
>
> [29] In my opinion before the guarantee in question can be said to fall under s. 31 I must determine if the defendant […] was actually engaged in farming as defined by the Act. I say this because if the definition of farmer is a mortgagor: that in itself is not enough to fit into this section. Simply put that would mean all persons who pledge or give security over their assets for credit would be a farmer (i.e. mortgagor) however the qualifier of "used in farming" must be met.

[118] I agree and adopt this reasoning. To summarize, under s. 31 of the *Saskatchewan Farm Security Act*, a “farmer” is a form of a mortgagor (not necessarily a real property mortgagor) who

grants security over assets (other than real property) used in “farming”, a term that includes the raising of livestock.

[119] Returning to the present case, BCC was engaged in raising cattle. The Bezans’ declarations in making the applications for the advances confirmed that they were principally occupied in the farming operation. In addition, BCC granted MLCA a security interest over its cattle in the Repayment Agreements. In subsection 4.1 of that agreement, the Producer (here, BCC) agreed to grant a security interest over the Producer’s Agricultural Product as collateral to the Administrator (here, MLCA) in the amount of the Eligible Advance (here, the EA Advance and the CF Advance) plus interest and costs. The same provision provided that the Producer agreed that upon default, the Administrator has the right to seize the Producer’s Agricultural Product and any subsequent Agricultural Product produced by the Producer for the amount and until the full repayment of the Producer’s liability under the Terms and Conditions. In the *AMPA*, “agricultural product” means “an animal or a plant or a product, including any food or drink, that is wholly or partly derived from an animal or a plant”.

[120] I conclude therefore that the Joint and Several Guarantees executed by the Bezans are a “guarantee” as defined in paragraph 31(1)(b) of the *Saskatchewan Farm Security Act*.

Is the Joint and Several Guarantee enforceable against the Bezans?

[121] There is no evidence that either of the Bezans appeared before a lawyer or notary public, acknowledged that they executed the Joint and Several Guarantees or signed certificates in the form prescribed, all as required by subs. 31(2). Nor are there certificates from a lawyer or notary as contemplated by subs. 31(3) attesting that the requirements of subs. 31(2) had been fulfilled.

As those requirements have not been met, the Joint and Several Guarantees are not enforceable under subs. 31(2): *Prairie Centre Credit Union*, at paras 38 and 40(iii).

[122] The defendants also referred to s. 105 of the *Saskatchewan Farm Security Act*. As set out above, subs. 105(2) provides (in applicable part) that every agreement that "in any way limits, modifies or abrogates or in effect limits, modifies or abrogates any benefit or remedy described" in that legislation, or any provision of it, "is null and void and of no effect". The choice of law in subsection 7.8 of both Repayment Agreements, which contemplates that the agreement shall be governed by Manitoba law, therefore does not affect the application of the *Saskatchewan Farm Security Act*.

[123] The Joint and Several Guarantees in respect of the EA Advance and the CF Advance are therefore of no effect as against Layton Bezan and Barbara Bezan.

[124] Given my conclusion, I do not need to address the defendants' additional submissions that the individuals had no guarantee obligations based on *Bank of Montreal v. Aitken* (1990), 52 BCLR (2d) 211 (CA).

V. **Other Issues**

[125] The defendants raised a number of other issues in their Statement of Defence, including the expiry of limitation periods. These issues were not raised in argument on this motion and as such, I will not address them.

VI. **Quantum of Judgment and Interest**

[126] The plaintiff filed the affidavit of Shelley Warner, a paralegal at Justice Canada, to quantify the plaintiff's claims. That affidavit calculates a claim of $399,305.54, made up of outstanding principal and interest to July 1, 2011 in the amount of $313,422.25, less payments of $62,387.87, plus interest from July 11, 2011 to the date of the Statement of Claim of $148,271.16. The plaintiff also requested interest at a per diem rate of $43.09 from July 7, 2020 to the date of judgment. The defendants did not contest these calculations with responding evidence or submissions. I therefore accept them. At that daily rate, the amount of prejudgment interest up to May 4, 2021 is $12,970.09, which will be added to the net amount claimed, for a total judgment of $412,275.63.

[127] The plaintiff requested post-judgment interest at a flat rate of 5.00% *per annum* in accordance with the *Interest Act,* R.S.C., 1985, c. I-15. Section 3 of that statute provides that "[w]henever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum". The defendants did not respond to this submission. Post-judgment interest will therefore be granted as requested.

VII. **Conclusion**

[128] Judgment will be granted against BCC in the amount set out immediately above. The claims against Barbara Bezan and Layton Bezan in their individual capacities will be dismissed.

[129] The plaintiff requested that the Court fix costs and made brief submissions on the quantum of fees and disbursements. The defendants requested that costs be addressed after the determination of this motion.

[130] If the parties are unable to agree on the costs of the motion and the action, they may provide written submissions within 30 days of the release of these reasons. Such submissions are not to exceed five (5) pages and should enable the Court to fix costs under Rule 400(4) of the *Federal Courts Rules*.

JUDGMENT in T-985-19

THIS COURT'S JUDGMENT is that:

1. Bezan Cattle Corporation shall pay $412,275.63 to the plaintiff.
2. Post-judgment interest shall accrue from the date of this Judgment in accordance with s. 3 of the *Interest Act,* R.S.C., 1985, c. I-15.
3. The plaintiff's claims against Layton Bezan and Barbara Bezan are dismissed.
4. Costs of this motion and of the action are reserved pending receipt of submissions from the parties.

"Andrew D. Little"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-985-19
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA and BEZAN CATTLE CORPORATION, BARBARA BEZAN AND LASYTON BEZAN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	HEARD IN WRITING UNDER RULE 369
JUDGMENT AND REASONS:	LITTLE J.
DATED:	MAY 4, 2021

APPEARANCES:

Don Klaassen	FOR THE PLAINTIFF
Shawn Patenaude	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Don Klaassen Attorney General of Canada	FOR THE PLAINTIFF
Shawn Patenaude Shawn Patenaude Law	FOR THE DEFENDANTS