Federal Court of Appeal | Cour d'appel fédérale

Date: 20230509

Docket: A-283-20

Citation: 2023 FCA 96

CORAM: **RENNIE J.A.**
MONAGHAN J.A.
ROUSSEL J.A.

BETWEEN:

ALLEN BLAIR KILBACK and DENISE ANNE KILBACK

Appellants

and

HIS MAJESTY THE KING IN RIGHT OF CANADA

Respondent

Heard at Regina, Saskatchewan, on October 26, 2022.

Judgment delivered at Ottawa, Ontario, on May 9, 2023.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: RENNIE J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] The appellants, Allen and Denise Kilback, appeal a decision of the Federal Court (2020 FC 981 *per* Strickland J.) granting the respondent's motion for summary judgment against the appellants and Kilback Stock Farm Ltd. (Kilback Farm). Kilback Farm has not appealed. In the underlying action, the respondent sought to recover from Kilback Farm and the appellants certain

amounts the Minister of Agriculture and Agri-Food Canada (Minister) paid under the Advance Payments Program (the Program) established under the *Agricultural Marketing Programs Act*, S.C. 1997, c. 20 [*AMPA*].

I. Background

A. *Advance Payments Program*

[2] The Program allows producers of agricultural product to apply for advance payments from certain agricultural administrator organizations and facilitates access to credit for agricultural producers because the Minister takes on a substantial part of the lending risk: *Moodie v. Canada*, 2021 FCA 121 at para. 5. To participate in the Program, the producer must enter into a repayment agreement with the administrator, certain terms of which are mandated by the *AMPA*.

[3] Importantly for this appeal, a corporation is eligible to receive an advance under the Program only if its shareholders agree in writing to be jointly and severally liable with the corporation for its obligations to the administrator: *AMPA*, ss. 10(1)(*d*) and 22.

[4] If the producer defaults in its repayment obligations, the administrator may ask the Minister for repayment and, provided certain conditions are met, the *AMPA* requires the Minister to pay the administrator on behalf of the defaulting producer. However, the *AMPA* also authorizes the Minister to order any impending default by a producer stayed for a specified period on any terms and conditions the Minister may establish: *AMPA*, s. 21(2).

[5] Once the Minister pays the administrator, the Minister is subrogated to the administrator's rights against the producer and any person jointly and severally liable with the producer: *AMPA*, s. 23(2). However, the Minister cannot take any action to recover amounts owing after the six-year period beginning on the day the Minister becomes subrogated to the administrator's rights: *AMPA*, s. 23(4).

B. *Advances to Kilback Farm*

[6] In 2008, Kilback Farm applied for advance payments from Manitoba Pork Credit Corporation (MPCC) by completing an application and repayment agreement. MPCC advanced $400,000 (less certain fees deducted at source) to Kilback Farm over the period from April 30, 2008 to May 5, 2008. The repayment agreement stipulated that in all events the advances were to be repaid by September 30, 2009, the end of the 2008-2009 production period. However, it also required that 50% of the outstanding amount be repaid 15 days after the 12-month period following the day the advance was made, with the balance due 30 days later.

[7] As required by the *AMPA*, each of the appellants signed a "Joint and Several Guarantee" pursuant to which they agreed "to be jointly and severally liable to [MPCC], or the Minister of Agriculture and Agri-Food Canada, for any amount owing by [Kilback Farm] … pursuant to the [Program]".

> In March 2009, the Minister granted a stay of default to cattle and hog producers. By letter dated March 24, 2009, Kilback Farm was advised that, under the stay, qualifying producers were relieved from the obligation to make any repayments prior to September 30, 2010, but were required to repay 50% of the outstanding advances by October 15, 2010, and the balance by November 15, 2010. Kilback Farm was required to sign an acknowledgement indicating that it understood and

> accepted the terms of the stay and, on April 6, 2009, Mr. Kilback signed it on behalf of Kilback Farm.

[8] By letter dated December 3, 2010, Kilback Farm was advised that the Minister had granted a new stay of default effective October 1, 2010, extending the repayment deadline to March 31, 2013, with regular payments to commence in April 2012. The letter asked that each of the shareholders read the enclosed acknowledgment of the stay terms and conditions but stated that, if the producer was a corporation, only the signing authority need sign it before January 31, 2011. The terms of the stay also required Kilback Farm to negotiate an amended repayment agreement with MPCC by March 31, 2012. Mr. Kilback, on behalf of Kilback Farm, signed the acknowledgement on January 24, 2011 and the amending agreement on March 29, 2012.

[9] Kilback Farm did not repay the advances by March 31, 2013. In May 2013, MPCC advised Kilback Farm that it was in default. MPCC then sought repayment of the outstanding amount from the Minister and the Minister paid MPCC in February 2014.

[10] After several failed attempts to collect payment, in January 2019, the Minister brought an action in the Federal Court to recover the amount owing from Kilback Farm and the appellants. In July 2020, the Minister brought a motion in writing seeking summary judgment.

C. *The Motion before the Federal Court*

[11] Before the Federal Court, the appellants and Kilback Farm asked that the motion against the appellants be dismissed and that the claim against Kilback Farm be set down for trial. They

asserted that *The Limitations Act*, S.S. 2004, c. L-16.1, provides for a two-year limitation period, the agreements with MPCC were governed by Saskatchewan law, and they had not agreed to a limitation period other than the Saskatchewan limitation period.

[12] As to their personal liability, the appellants asserted that their guarantee arose on default, not demand. In their submission, even if Kilback Farm had extended its limitation period by acknowledging its debt, they did not. Consequently, the limitation period against them began to run on the original date of default, which they asserted was September 30, 2009.

[13] The appellants also asserted that, as guarantors, they had not agreed to the extensions of time for payment or the alterations to the original loan agreement and, as a result, the limitation period applicable to them expired. In the circumstances, they could not be held liable for Kilback Farm's indebtedness.

[14] The Federal Court described the issue before it as determining whether there was a genuine issue for trial, which "[turned] on the question of what limitation period applies, when that limitation period began to run and, with respect to the [appellants] as shareholders/guarantors, if the [s]tays of [d]efault and the [a]dvance [p]ayment [a]greement [a]mendment continued their surety obligations": reasons at para. 25.

(1) Kilback Farm's Limitation Period

[15] Dealing first with the limitation period, Kilback Farm argued that because the Minister's claim was a subrogated claim, the Minister could not be in a better position than MPCC. As the

repayment agreement with MPCC was governed by the laws of Saskatchewan, MPCC's time for making a claim had expired before the Minister paid MPCC and became subrogated to its claim.

[16] The Federal Court described this argument as follows (at paragraph 31 of its reasons):

> … [Subsection] 23(4) [of the *AMPA*] 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 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.

[17] However, the real debate was about the date of Kilback Farm's default. Kilback Farm and the appellants said it was September 30, 2009. The Federal Court disagreed. In doing so, the Federal Court reviewed the provisions of the *AMPA* and of the original repayment agreement: reasons at paras. 47-53. Based on the dates MPCC made the advances, the Federal Court concluded the original repayment dates would have been on or about May 15, 2009 and June 15, 2009, but no default occurred then because the Minister had granted stays that were acknowledged by Mr. Kilback on behalf of Kilback Farm: reasons at paras. 53-54.

[18] The Federal Court found "[b]ased on these facts, default did not occur prior to March 31, 2013": reasons at para. 54. As "MPCC had no cause of action before that date" and "the Minister made the guarantee payment to MPCC on February 14, 2014, which was within two years of the default date… MPCC's cause of action was not statute barred by the Saskatchewan *Limitation Act* at that time": reasons at paras. 38 and 55.

[19] The Minister commenced the action in the Federal Court less than six years after becoming subrogated to MPCC's rights and so within the six-year limitation period set out in the *AMPA*. Thus, the Federal Court was satisfied MPCC's limitation period had not expired when the Minister paid MPCC, and the Minister's limitation period had not expired when the action was commenced against Kilback Farm and the appellants: reasons at paras. 38-39.

(2) The Guarantors

[20] In support of their submission, that any actions by Kilback Farm to extend its limitation period were not binding on them with the result that MPCC's limitation period as against them began to run on the date of the original default (September 30, 2009), the appellants relied on *Walters v. Meiner et al.,* 2004 BCSC 393 [*Walters*] and *Continental Steel Ltd. v. CTL Steel Ltd.*, 2015 BCSC 1672, aff'd 2018 BCCA 82 [*Continental Steel*].

[21] The Federal Court disagreed that Kilback Farm extended the limitation period by acknowledging or confirming the debt. Rather, "because of the [s]tays of [d]efault as permitted by the [*AMPA*] and acknowledged on behalf of Kilback Farm, the limitation period had simply not started to run until default on March 31, 2013" and thus "[t]here was no extension": reasons at para. 57. In these circumstances, said the Federal Court, the question of whether the limitation period was similarly extended as against the individual guarantors did not arise.

[22] The appellants also argued that the three amendments to terms of the debt between MPCC and Kilback Farm discharged them as guarantors because the changes were material and they did not consent to them, citing *Manulife Bank of Canada v Conlin*, [1996] 3 S.C.R. 415, 139

D.L.R. (4th) 426 at paras. 2-4 [*Manulife*]; *Turfpro Investments Inc. v. Heinrichs*, 2014 ONCA 502; and *GMAC Leaseco Corporation v. Jaroszynski*, 2013 ONCA 765.

[23] The Minister agreed that the principle in *Manulife* can be justified because a guarantor should be aware of and have the right to consent to material changes that affect the guarantor's risk. However, said the Minister, consent can be inferred where a person has many roles; the knowledge acquired in one role can be applied to them in all of their capacities, citing *Royal Bank v. 338390 Alberta Ltd*., (1997) 210 A.R. 148, 56 Alta. L.R. (3d) 258 (ABQB) at paras. 34-40; *Co-operative Trust Company of Canada v. Kirby and Thorpe*, [1986] 6 W.W.R. 90, 51 Sask. R. 298 (SKQB); and *Montreal Trust Co. of Canada v. Jaynell Inc.*, (1993) 111 Sask. R. 178, [1993] S.J. No. 274 (QL) (SKQB) at para. 44, aff'd 116 Sask. R. 13.

[24] The Federal Court agreed that the amendments in question were material: reasons at para. 86. However, as an authorized signing officer, Mr. Kilback had knowledge of and agreed to them on behalf of Kilback Farm. The Federal Court said he not only must have known of them, but actively participated in them, so that his consent could be inferred: reasons at paras. 77-78.

[25] While acknowledging that Ms. Kilback pleaded she was not aware of, and did not agree to, the terms of the stays or the amendments, the Federal Court observed that she did not file an affidavit or any evidence in response to the motion for summary judgment. After stating that "[p]arties responding to a motion for summary judgment must put their best foot forward, or risk losing", the Federal Court concluded that, given Ms. Kilback's status as shareholder, Vice-

President, and Chief Financial Officer of Kilback Farm, consent to the stays and amendments could be inferred in the circumstances: reasons at para. 85.

(3) Summary Judgment Granted

[26] Satisfied, based on the evidence and the law, that there was no genuine issue for trial and that the case was an appropriate one for summary judgment, the Federal Court granted the Minister's motion for summary judgment against Kilback Farm and the appellants.

II. The Appeal

[27] The appellants appeal the Federal Court's judgment, asserting that the Federal Court erred:

1. by relying on hearsay to find as a fact that the Minister stayed the default in 2009;
2. by finding that Kilback Farm had not defaulted before March 31, 2013;
3. in concluding that *The Limitations Act* did not apply to the Minister's subrogated claim; and
4. by finding Ms. Kilback consented to the amendments to the original agreement.

[28] The appellate standard of review applies to this appeal. Thus, questions of law are to be determined on the correctness standard, and questions of fact or mixed fact and law (excluding extricable questions of law) are to be determined on the standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

[29] For the reasons that follow, I would dismiss the appeal.

III. New Issues

[30] As a preliminary matter, the appellants raise a number of issues not raised before the Federal Court. Ordinarily a new issue may not be raised on appeal, although an appellate court may depart from this ordinary rule where the interests of justice require it and where the Court has a sufficient evidentiary record and findings of fact to do so: *Quan v. Cusson*, 2009 SCC 62 at paras. 36-39.

[31] Before I explain why I would not depart from the ordinary rule in this case, it is helpful to review the principles that govern a motion for summary judgment in the Federal Court. These were described in detail in *Milano Pizza Ltd. v. 6034799 Canada Inc.*, 2018 FC 1112 at paras. 25-40 [*Milano Pizza*], recapitulated in *Rallysport Direct LLC v. 2424508 Ontario Ltd.*, 2019 FC 1524, and cited with approval by this Court in *ViiV Healthcare Co. v. Gilead Sciences Canada, Inc.*, 2021 FCA 122 at para. 39. See also *Gemak Trust v. Jempak Corporation*, 2022 FCA 141 at paras. 62-67.

[32] Although the Minister bore the burden of establishing there was no genuine issue for trial by presenting the evidence needed to make the necessary factual findings, once that burden was met, the evidentiary burden fell on the responding party, here Kilback Farm and the appellants: *CanMar Foods Ltd. v. TA Foods Ltd.*, 2021 FCA 7 [*CanMar*] at para. 27. The responding party cannot rest on mere allegations or its pleadings, but must come up with specific facts showing that there is a genuine issue for trial: *Canada (Attorney General) v. Lameman*, 2008 SCC 14

[*Lameman*] at para. 11; *CanMar* at para. 27; and Rule 214 of the *Federal Courts Rules*, S.O.R./98-106.

A. *Hearsay Evidence*

[33] The appellants argue that the Federal Court erred in relying on hearsay evidence. In particular, they say the Federal Court found that the stays were granted on the terms outlined in the March 2009 and December 2010 letters sent to Kilback Farm that were exhibits to an affidavit in the respondent's motion record, notwithstanding that the affiant neither had personal knowledge of the terms nor attested that the letters contained the terms of the stay. As to this latter point, in fact the affiant attests that the March 24, 2009 document Mr. Kilback signed "set out the terms of a stay of default … granted by the Minister … extending the default date to September 30, 2010" and that the acknowledgment Mr. Kilback signed on January 24, 2011 "amended the terms and conditions of the [repayment agreement] and set out the new default date of March 31, 2013" (Appeal Book at p. 79).

[34] The appellants did not suggest to the Federal Court that those documents did not reflect the terms of the stay. Mr. Kilback's affidavit attests to his view of the government's motivations for the amendments and extensions, but nowhere does he suggest the stays were incorrectly described.

[35] Moreover, nothing in their pleadings suggests the appellants contested the existence of the stays or their terms. Indeed, in their statement of defence, the appellants admit a number of the allegations made in the statement of claim including that, on January 24, 2011, Mr. Kilback,

on behalf of Kilback Farm, "signed an acknowledgement and stay of default document … amending the terms and conditions of the [repayment agreement]" and, on March 29, 2012, "signed an [a]mendment to the [repayment agreement] on behalf of [Kilback Farm]" which amendment, "agreed to by" Kilback Farm, contained a term under which it "undertook to repay the [a]dvance [p]ayment together with all interest accrued thereon by the date of default" which was "April 1, 2013" (Appeal Book at pp. 55-56, 74). These pleadings were before the Federal Court.

[36] The appellants concede they did not challenge the admissibility or reliability of this hearsay evidence before the Federal Court and acknowledge not all hearsay is inadmissible; there are both common law and statutory bases for admitting hearsay evidence: *Pfizer Canada Inc. v. Apotex Inc.*, 2014 FCA 54. The time for the appellants to raise questions about the adequacy and reliability of the evidence was at the Federal Court. It would not serve the interests of justice for this Court to consider this issue on appeal.

B. *New Date of Default*

[37] Before the Federal Court, the appellants submitted that the default occurred on September 30, 2009: reasons at paras. 41, 47, 56, 58 and 95. The Federal Court reviewed the provisions of the *AMPA* and the repayment agreement concerning defaults in some detail: reasons at paras. 48-53. The Federal Court found no default occurred on September 30, 2009: reasons at para. 56.

[38] The appellants now submit that Kilback Farm's default occurred no later than January 1, 2009, because Kilback Farm ceased operations in 2008 and advised MPCC that it had

done so. That fact, the appellants say, required Kilback Farm to immediately repay the advances and, having failed to do so, it was in default no later than January 1, 2009. Thus, say the appellants, MPCC's limitation period commenced no later than January 1, 2009.

[39] I am far from convinced that there is any merit to the appellants' position concerning January 1, 2009 as a default date, given that not every breach of the repayment agreement automatically constituted a default. But, more importantly, the time for establishing a genuine issue for trial was before the Federal Court. The Federal Court addressed the only alternative default date the appellants suggested. The date of default is a finding of fact and it is too late to raise a new date on appeal.

C. *Condition Precedent to Stay being Effective*

[40] The appellants also submit that, notwithstanding that Kilback Farm was advised that the Minister had granted a new stay effective October 1, 2010, that stay was not effective until Kilback Farm signed and returned the acknowledgement in January 2011. In other words, Kilback Farm's acknowledgment was a condition precedent to the stay being effective, such that if a default did not occur in 2009, one occurred on October 15, 2010, when Kilback Farm did not repay 50% of the outstanding amount as required under the terms of the first stay.

[41] This argument was neither raised before the Federal Court, nor raised in the appellants' memorandum of fact and law. Only arguments included in a party's memorandum should be advanced in oral argument: *Bridgen v. Canada (Correctional Service)*, 2014 FCA 237 at para 35; *Sandhu v. Canada (Citizenship and Immigration)*, [2000] F.C.J. No 902 (QL), 184 F.T.R. 30

(CA) at para 4; *Sibomana v. Canada*, 2020 FCA 57 at para. 6. Accordingly, it would be inappropriate for us to consider this new argument, particularly in the context of an appeal of a summary judgment; genuine issues for trial must be raised before the motion judge.

IV. Analysis

[42] I turn now to the issues that are properly considered on this appeal.

A. *Did the Federal Court Err in its Analysis of the Limitation Period Issue?*

[43] There are two aspects to the appellants' argument regarding the limitation period. First, they assert that the Federal Court erred in determining that *The Limitations Act* did not apply to the claim. Second, they assert that they, as guarantors, had a separate limitation period from Kilback Farm and their limitation period had expired.

[44] With regard to the first alleged error, the appellants point to two statements in the Federal Court's reasons—that "s 23(4) of the [*AMPA*] displaces the Saskatchewan limitation period which might otherwise apply to the Minister's right of action" and that "the Minister's right of action is distinct from the administrator's, the MPCC in this case": reasons at paras. 34 and 37.

[45] The appellants submit that the *AMPA* does not displace anything and the Minister's right of action is not distinct, but a subrogated right. Because MPCC's claim was contractual, not statutory, if its "limitation period under the provincial statute [had] run out before the Minister makes payment, [MPCC] [had] no further rights, and thus there [was] no claim to become

subrogated" (Appellants' MFL at para. 20). But, the Federal Court did not find otherwise. The appellants are focused on word choice, not what the Federal Court actually decided.

[46] The appellants concede that "where the [M]inister pays the guarantee at a point in time when the administrator has a cause of action, the [M]inister becomes subrogated and has the limitations period prescribed by the *AMPA* (6 years)" (Appellants' MFL at para. 20). The Federal Court agreed (reasons at paragraph 38):

> … [Kilback Farm and the Kilbacks] 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 [Minister] 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 [*AMPA*].

[47] In other words, the appellants and Federal Court are in agreement with respect to the relevant principle. The disagreement concerns the date of default—the date the limitation period started to run. I see no error in the Federal Court's finding that the default date was March 31, 2013.

[48] Turning to the second alleged error, the appellants submit that the stays did not stay the default of the guarantors and the cause of action against them was separate from the cause of action against Kilback Farm, leading to separate limitations periods.

[49] The appellants, having argued that their liability under the joint and several guarantee arose on default, are unable to point to a default that commenced their limitation period. Given the Federal Court's finding that no default occurred before March 31, 2013, it is unclear what default the Kilbacks suggest commenced their limitation period. While I agree that the *AMPA* authorizes the Minister only to stay the default of the producer (here Kilback Farm), as a result of the stays and the repayment agreement amendment the Federal Court concluded Kilback Farm had no obligation to make payments until March 31, 2013. If Kilback Farm was not obligated to pay until March 31, 2013, the appellants, who "[agreed] to be jointly and severally liable to [MPCC], or the Minister … for any amount owing by [Kilback Farm]", similarly would not be obliged to make payment before March 31, 2013. Put another way, it is inconceivable that MPCC could have pursued the appellants for payment before any amount was due under Kilback Farm's agreement with MPCC.

[50] Finally, the appellants again argue that their situation is analogous to *Walters* and *Continental Steel*. The Federal Court explained why those cases did not assist the appellants: reasons at paras. 41-46. The appellants have not pointed to any error in that analysis and I see none.

[51] Thus, the appellants have not persuaded me that the Federal Court erred regarding the limitation period.

B. *Did the Federal Court Err in Finding that Ms. Kilback Consented to the Amendments to the Repayment Agreement?*

[52] Unlike Mr. Kilback, Ms. Kilback did not sign the acknowledgements or the amending agreement on behalf of Kilback Farm. Nonetheless, the Federal Court said it could infer her consent to those changes based on the facts before it. The appellants say that although the Federal Court said it was inferring Ms. Kilback's consent, what it actually did was impute her consent and this is an error of law.

[53] It is true, as the appellants suggest, that there is no evidence of Ms. Kilback's actual consent or knowledge, but the Federal Court did not suggest otherwise. However, the Federal Court emphasized that, under the language of the joint and several guarantee, in consideration for the Minister guaranteeing repayment to MPCC, the appellants agreed to be jointly and severally liable to MPCC and the Minister for any amount owing by Kilback Farm. It also noted that they acknowledged that they understood and agreed that action could be taken against them personally to repay the full amount of any defaulted advance: reasons at paras. 70-71.

[54] In addition, in support of its conclusion that Ms. Kilback's consent to the changes could be inferred, the Federal Court pointed to the following factors:

(i) Ms. Kilback was a shareholder of Kilback Farm when the applications were made and when they agreed to be jointly and severally liable to MPCC or the Minister for any amount owing by Kilback Farm pursuant to the Program: reasons at paras. 73-74.

(ii) Ms. Kilback, as Vice President and Chief Financial Officer of Kilback Farm, signed an assignment agreement over Kilback Farm's hogs: reasons at para. 75.

(iii) The second stay of default asked that shareholders read the acknowledgement of the stay: reasons at para. 76.

(iv) Mr. Kilback's affidavit stated that the fact that MPCC did not require his or Ms. Kilback's signature and did not mention their personal guarantees led ***them*** to believe MPCC was not pursuing them on the personal guarantee: reasons at para. 80.

(v) Ms. Kilback did not file an affidavit or any evidence in response to the motion and, although she pleaded she had no knowledge about the amendments, a pleading is not evidence: reasons at para. 85.

[55] The Federal Court was not, as the appellants assert, suggesting that because Ms. Kilback was an officer and shareholder, Kilback Farm was her agent, but rather that, in the context of the terms of the joint and several guarantee, her status as officer and shareholder supported an inference that she consented to the terms and conditions of the stays and the amending agreement. As the Federal Court pointed out, "[t]his is not a situation where the guarantor was an arm's length third party": reasons at para. 78.

[56] The Federal Court observed that the terms of the amending agreement expressly stated that all of the terms of the application and repayment agreement that were not modified by the amending agreement or the stays remained in full force and effect. This included the requirement

for the shareholder guarantees mandated by the *AMPA* that the appellants signed and the acknowledgement of the Minister's six-year limitation period commencing with the day the right of subrogation arose: reasons para. 83.

[57] I agree with the appellants that there was no evidence Ms. Kilback knew the details of the stays and amendments. I also agree that MPCC's request that the shareholders read the acknowledgement does not mean Ms. Kilback read it, and there is no evidence she did. And I agree there was no evidence that Ms. Kilback remained a shareholder or officer of Kilback Farm when the acknowledgements and amending agreement were executed.

[58] However, it is equally true there is no evidence she did not have knowledge about the details of the stays and amendments, did not read the acknowledgement, or was no longer a shareholder or officer of Kilback Farm. Why? Because the only parties who might have that evidence—the appellants—did not bring it forward.

[59] Notably, Mr. Kilback's affidavit—the only evidence led by the appellants—does not attest that Ms. Kilback had no knowledge concerning the stays or the amending agreement notwithstanding the pleading to that effect. He does not attest that Ms. Kilback was not a shareholder or officer of Kilback Farm. He does not attest to her not having read the acknowledgement notwithstanding the request she do so. He does not attest to her not having agreed to Kilback Farm acknowledging the stays or executing the amending agreement.

[60] In my view, to the extent that Mr. Kilback's affidavit refers to Ms. Kilback, it could be viewed as more supportive of her having at least some knowledge of the relevant circumstances—"When MPCC sent its amendment and extension agreements, they never said anything about pursuing me or Denise Kilback personally on our guarantees … [leading] us to believe they were not pursuing us on the personal guarantee" and "having heard nothing from MPCC to indicate that it was pursuing us on our personal guarantees, [we] began to pursue new endeavours in the belief that we had no further personal liability" (emphasis added) (Appeal Book at p. 139).

[61] A failure to file evidence on the points in issue without a reasonable explanation may lead to an adverse inference: *Apotex Inc. v. Merck & Co. Inc.*, 2004 FC 314 at para 28, aff'd 2004 FCA 298; *Riva Stahl Gmbh v. Bergen Sea (The)*, [1999] F.C.J. No. 762 (QL), 243 N.R. 183 (CA) at para. 11. The judge may make inferences of fact based on undisputed facts before the Court, provided they are strongly supported by the facts: *Lameman* at para. 11, citing *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1 at para. 30.

[62] The missing evidence was significant to the Federal Court— there was "no evidence that Allen Kilback or Denise Kilback at any time sought confirmation … of their stated belief that they would not be held responsible for the debt that they guaranteed" or "indicating that Allen Kilback would not have signed the [acknowledgements of the stays and the amendment], on behalf of Kilback Farm, had [the appellants] known their existing shareholder guarantee would be enforced on default": reasons at para. 84. Because "[p]arties responding to a motion for

summary judgment must put their best foot forward, or risk losing", the Federal Court concluded that "[a]bsent any evidence to the contrary, as a shareholder, Vice President, and Chief Financial Officer of Kilback Farm, consent by Denise Kilback … can, in these circumstances, be inferred": reasons at para. 85.

[63] In my view, it was open to the Federal Court to infer Ms. Kilback's consent in the circumstances of this case. I see no reviewable error.

V. The Queen's Bench Act

[64] I wish to address one additional matter. Before hearing the appeal, we asked the parties for submissions on the potential application of section 69 of *The Queen's Bench Act, 1998,* S.S. 1998, c. Q-1.01. It provides:

> 69(1) Giving time to a principal debtor, or dealing with or altering the security held by the principal creditor, does not of itself discharge a surety or guarantor.
>
> (2) A surety or guarantor is entitled to set up the giving of time or the dealing with or altering of the security as a defence, but this defence shall be allowed only to the extent that it is shown that the surety or guarantor has been prejudiced by the giving of time or the dealing with or altering of the security.

[65] On its face, subsection 69(1) appears to support the Federal Court's determination that the appellants were personally liable for Kilback Farm's obligations despite the time granted to it to repay, subject to any defence they might have under subsection 69(2).

[66] While only the respondent provided written submissions regarding section 69, at the hearing of the appeal the appellants submitted that we should not consider this new issue. While

I agree that section 69 does not appear to have been raised before the Federal Court, the effect of the time given to Kilback Farm on the liability of the guarantors was squarely before the Federal Court – the appellants arguing it relieved them from liability. I also observe that the statement of defence alleges Ms. Kilback was prejudiced by the amendment of the repayment agreement, although it does not explain how.

[67] The respondent's view is that while section 69 may support the decision, it is not necessary because the Federal Court correctly found that the appellants consented to the changes. Moreover, the respondent explained that in the appeal of *Canada v. Bezan Cattle Corporation*, 2021 FC 397 [*Bezan Cattle*], the respondent was asserting that obligations under the joint and several guarantee are not in the nature of a guarantee or surety, but rather constitute an indemnity.

[68] While *Bezan Cattle* also concerned a joint and several guarantee signed by shareholders of a corporation that received an advance under the Program, the issue there was whether the joint and several guarantee was a guarantee as defined for purposes of section 31 of *The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, not section 69 of *The Queen's Bench Act*.

[69] This Court's decision in *Bezan Cattle* has been issued (2023 FCA 95). However, to decide that appeal, it was unnecessary to determine whether the joint and several guarantee is a guarantee or an indemnity. Similarly, because I see no reviewable error in the Federal Court's

conclusion about Ms. Kilback's consent, it is unnecessary to determine whether section 69 applies here.

VI. Conclusion

[70] The appellants have not persuaded me that the Federal Court made a reviewable error in granting summary judgment against them. Accordingly, I would dismiss the appeal.

[71] The respondent seeks costs of the appeal in accordance with the Tariff. In the exercise of my discretion I would award costs of $1,500.00 to the respondent.

[72] Finally, in the notice of appeal, Kilback Farm is named in the style of cause as a non-party. That same style of cause has been replicated in all materials filed on this appeal. Kilback Farm has not appealed. Accordingly, the style of cause in this appeal should be changed to remove the reference to Kilback Farm as a non-party, as has been done in these reasons.

"K.A. Siobhan Monaghan"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE STRICKLAND DATED OCTOBER 19, 2020, NO. T-122-19

DOCKET:	A-283-20
STYLE OF CAUSE:	ALLEN BLAIR KILBACK AND DENISE ANNE KILBACK v. HIS MAJESTY THE KING IN RIGHT OF CANADA
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	OCTOBER 26, 2022
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	RENNIE J.A. ROUSSEL J.A.
DATED:	MAY 9, 2023

APPEARANCES:

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Don Klaassen (by videoconference)	FOR THE RESPONDENT

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