COURT FILE NUMBER	2101-05682
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ATB FINANCIAL
DEFENDANTS	W.A. GRAIN HOLDINGS INC., 1309497 ALBERTA LTD. (o/a W.A. GRAIN & PULSE SOLUTIONS), NEW LEAF ESSENTIALS (WEST) LTD., NEW LEAF ESSENTIALS (EAST) LTD. and 1887612 ALBERTA LTD.
APPLICANT	BDO CANADA LIMITED, in its capacity as receiver and manager of W.A. GRAIN HOLDINGS INC., 1309497 ALBERTA LTD. (o/a W.A. GRAIN & PULSE SOLUTIONS), NEW LEAF ESSENTIALS (WEST) LTD., NEW LEAF ESSENTIALS (EAST) LTD. and 1887612 ALBERTA LTD.
DOCUMENT	**SUPPLEMENTAL BRIEF OF THE RECEIVER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP Barristers and Solicitors 2100, 222 3rd Avenue S.W. Calgary, Alberta T2P 0B4 Phone: 403.693.5420/4311 Fax: 403.508.4349 Attention: Ryan Zahara/Kaitlin Ward File: 128056.00003

Clerk's Stamp

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A. INTRODUCTION

1. This is a supplemental brief (the "**Supplemental Brief**") submitted on behalf of BDO Canada Limited, in its capacity as receiver and manager (the "**Receiver**") of W.A. Grain Holdings Inc., 1309497 Alberta Ltd. (o/a W.A. Grain & Pulse Solutions) ("**130 Alberta**"), New Leaf Essentials (West) Ltd., New Leaf Essentials (East) Ltd. and 1887612 Alberta Ltd. (collectively, "**WA Grain**" or the "**Company**") provided at the direction of the Court of Queen's Bench (the "**Court**") given at the last application (the "**December Application**") held on December 10, 2021.

2. At the December Application, the Receiver sought approval of an interim distribution order and approval of the Receiver's proposed disallowance of certain claims under section 81.2 of the *Bankruptcy and Insolvency Act* (the "**BIA**").[1] No parties opposed the relief sought by the Receiver. Notwithstanding there was no opposition to the December Application, the Court issued an order (the "**Court's Order**") partially adjourning the Receiver's application and directing the Receiver and any interested parties to provide further submissions to the Court addressing whether:

   (a) unpaid grain producers who delivered grain on April 9 or 11, 2021 are included in the remedy provided for under section 81.2 of the BIA;

   (b) 130 Alberta held the PER Inventory as a bailee, pursuant to a bailment relationship; or

   (c) whether it is possible to conclude the PER Holders can be determined to have sold the PER Inventory to 130 Alberta.

3. The Court's Order further directed the Receiver to submit a supplement to the Third Report, dated November 30, 2021 (the "**Supplemental Report**")[2] to address certain factual pieces of information in respect of the grain that was collected, stored and sold by 130 Alberta.

4. All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Supplemental Report.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") at **TAB 1** of the Authorities.
[2] Supplement to the Third Report of the Receiver, dated January 4, 2022.

B. ISSUE

5. This Supplemental Brief addresses the following issues:

(a) whether the Receiver should consider claims advanced under section 81.2 of the BIA[3] by producers who delivered grain on April 11, 2021 or April 9, 2021;

(b) whether the regulatory scheme of the *Canada Grain Act* (the "***Grain Act***")[4] provides a complete code for the transfer of grain between producers and licensed elevators or grain dealers; and

(c) in light of the regulatory scheme of the *Grain Act*, whether it is possible or appropriate to conclude that a bailment relationship formed between 130 Alberta and the PER Holders.

C. LAW AND ARGUMENT

(a) Period for Determining Claims under Section 81.2 of the BIA

6. Pursuant to subsection 81.2(1) of the BIA, where a grain producer has sold and delivered agricultural products to a purchaser "within the fifteen day period preceding" the first day on which a receiver is appointed over the purchaser, and is unpaid for its agricultural products, then that grain producer has a claim for the unpaid amount that is secured against all of the inventory held by the purchaser, and this security ranks above every other claim, right, charge or security.[5]

7. Under subsection 81.2(1)(d), grain producers must also file a proof of claim in respect of the unpaid amount "within thirty days" after the date of the receiver's appointment.[6]

8. The Receiver was appointed on April 26, 2021. In accordance with the terms of the BIA, the Receiver (in consultation with the Canadian Grain Commission (the "**CGC**")) counted back 15 days before its appointment (April 25, 2021 back to April 11, 2021, inclusive) (the "**15-Day 81.2 Period**"), and determined that the last day for producers to deliver their grain was on April 11, 2021.[7]

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[3] BIA, at s 81.2, at **TAB 1** of the Authorities.
[4] *Canada Grain Act*, RSC 1985, c G-10 (the "***Grain Act***"), at **TAB 3** of the Authorities.
[5] BIA, at s 81.2(1), at **TAB 1** of the Authorities.
[6] BIA, at s 81.2(1)(d), at **TAB 1** of the Authorities.
[7] Supplemental Report, at para 7.

9. The Receiver has confirmed that April 11, 2021 was a Sunday, and there were no plant operations on the weekend, as staff were only onsite to receive grain from Monday through Friday. As a result, no grain was received by 130 Alberta on either April 11, 2021 or April 10, 2021.[8]

10. Under section 26 of the *Interpretation Act*, where a time limit for doing a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.[9] Section 35(1) of the *Interpretation Act* defines "holiday" as including Sunday.[10]

11. On that basis, the expiry of the 15-Day 81.2 Period would fall on the next day that is not defined as a holiday, which would be Saturday, April 10, 2021. Again, the Receiver confirmed that 130 Alberta did not have any grain dealer deliveries and transactions on this date.[11]

12. Further, at the Court's request, the Receiver reviewed the grain delivered on Friday, April 9, 2021, and determined that two producers delivered grain on that date, and were issued grain receipts in the total amount of $25,227.[12] However, these producers did not file a claim under section 81.2 of the BIA within 30 days of the Receiver's appointment and any claims that these producers might have had are now barred and out of time under the provisions of the BIA.[13]

13. As a result, no other grain producers would have claims within the 15-Day 81.2 Period than originally determined by the Receiver, either because the expiry date fell on Saturday, April 10, 2021 (and no grain was delivered on this date), or because the grain producers who delivered grain on April 9, 2021 did not file a proof of claim in the time provided under section 81.2 of the BIA.

(b) Application of *Grain Act* to Delivery of Grain

14. The *Grain Act* provides a complete code for the relationship between grain producers and licensed primary elevators, and further provides enhanced rights and remedies to

[8] Supplemental Report, at para 7.
[9] *Interpretation Act*, RSC 1985, c I-21 (the "***Interpretation Act***"), at s 26, at **TAB 2** of the Authorities.
[10] *Interpretation Act*, at s 35(1), at **TAB 2** of the Authorities.
[11] Supplemental Report, at para 7.
[12] Supplemental Report, at para 8.
[13] Supplemental Report, at para 9.

unpaid grain producers than would otherwise be available at common law. Due to the broad and comprehensive nature of the *Grain Act*, it would be inappropriate to apply common law theories of ownership to matters that are specifically legislated by Parliament. In particular, retroactively deeming a transaction as a bailment or a sale would compromise the commercial certainty of transactions that Parliament intended to regulate in a particular manner under the provisions of the *Grain Act*.

15. It is important to set out and consider the specific legislative scheme of the *Grain Act* as it applies first, to the transfer of property, and second, to the remedies available to unpaid producers. Jurisprudence supports that a broad and comprehensive legislative scheme of this nature will supersede the common law in the same area.

a. Regulatory Scheme of the *Grain Act* – Transfer of Property

16. With respect to transfer of property in grain, although the *Grain Act* imposes duties of care on elevator operators that are similar to bailment, the *Grain Act* does not create a bailment arrangement between elevator operators and grain producers. Instead, the *Grain Act* provides grain producers, and specifically PER Holders, a right to the return of like grain, while continuing to recognize the PER Holders' ownership interest in their delivered grain.

17. In the 1927 version of the *Grain Act*, section 213 deemed the delivery of grain for storage to be a bailment, rather than a sale, even though the common law elements of bailment were not satisfied. Section 213 read as follows:

> The delivery of grain to any warehouseman of a country, terminal, public or other elevator for storage, although it be mingled with other grain, and the shipping or removing of grain from its original place of storage in any of the elevators aforesaid, shall be deemed a bailment and not a sale.[14]

18. In *Busse v Edmonton Grain & Hay Co.*, the Alberta Court of Appeal confirmed that under section 213, a producer with an elevator receipt continued to have an ownership interest in grain stored in an elevator, such that the producer was entitled to insurance money for grain burned in a fire at the elevator.[15] The Court further noted that because

[14] *Canada Grain Act*, RSC 1927, ch 86, at s 213, at **TAB 4** of the Authorities.
[15] *Busse v Edmonton Grain & Hay Co.*, [1932] 1 WWR 296 (Alta CA) ("***Busse***"), at **TAB 5** of the Authorities.

the cost of the elevator's insurance was paid by the producer and payable to the grain producer, this indicated that property in the grain remained with the grain producer.[16]

19. Since the *Grain Act* was amended in 1952,[17] it no longer contains references to public warehousing or bailment, evidencing Parliament's intention to eliminate warehousing requirements from grain elevators and the deemed bailment of stored grain. However, the *Grain Act* continued to impose duties on elevator operators that are similar to a bailee, and which indicate that ownership to stored grain remains with grain producers.

20. For example, section 59 of the *Grain Act* requires licensed elevator operators to "exercise reasonable care and diligence to prevent any grain in the elevator from suffering damage or from deteriorating or going out of condition."[18] Further, section 49(8) provides that the CGC can require applicants to obtain insurance as a pre-condition of their grain licence to insure "against loss of or damage to the grain stored in the elevator."[19] Because such insurance against loss or damage to stored grain is payable to a producer rather than an elevator operator, this arrangement suggests that producers retain an ownership interest in the grain they have delivered and when an elevator receipt is issued pursuant to the *Grain Act*.

21. Under the current *Grain Act*, when a grain producer delivers grain to a licensed primary elevator, the grain producer will either receive a cash purchase ticket or a primary elevator receipt ("**PER**").[20] A cash purchase ticket is defined as a document issued by a primary elevator as "evidence of the purchase of grain by the operator of the elevator or the grain dealer and entitling the holder of the document to payment".[21]

22. A PER is defined as a document issued by a primary elevator "in respect of grain delivered to an elevator acknowledging receipt of the grain" that entitles the holder to either the delivery of grain of the same kind, grade and quantity ("**Like Grain**") as the grain referred to in the document, or in the case of specially binned grain, the delivery

[16] *Busse*, at para 19, at **TAB 5** of the Authorities.
[17] *Canada Grain Act*, SC 1952, c 5.
[18] *Grain Act*, at s 59, at **TAB 3** of the Authorities.
[19] *Grain Act*, at s 49(8), at **TAB 3** of the Authorities.
[20] *Grain Act*, at s 61(1), at **TAB 3** of the Authorities.
[21] *Grain Act*, at s 2, at **TAB 3** of the Authorities.

of identical grain.[22] A PER gives grain producers the right to demand delivery of the Like Grain, a right which can be waived by the grain producer under section 66(1) of the *Grain Act*.

23. If grain producers fail to take delivery of their Like Grain in accordance with the *Grain Act* and later demand delivery of the Like Grain, the elevator operator has the option to either deliver the Like Grain or provide payment of the market price for the Like Grain.[23]

24. Additionally, section 68 of the *Grain Act* states that if a licensed primary elevator operator purchases an elevator receipt it issued, it must provide a cash purchase ticket to the holder of the elevator receipt.[24] In other words, when an elevator operator purchases an elevator receipt, the title to the grain passes from the producer/holder of the elevator receipt to the elevator operator, and the transfer of ownership is evidenced by the issuance of a cash purchase ticket. This further indicates that the grain producer owns the Like Grain it delivers under a PER.

25. By specifically mandating the issuance of either a cash purchase ticket or a PER based upon the nature of the transaction entered into between the elevator operator and the grain producer, Parliament intended that each grain producer be treated differently. While a cash purchase ticket is issued as "evidence of a purchase", a PER is issued as evidence of a delivery of specific grain for storage and that title to Like Grain is specifically retained by the grain producer.

26. At the time of all of the transactions between 130 Alberta and each PER Holder, those grain producers elected not to sell their grain to 130 Alberta (and receive a cash purchase ticket) but instead, elected to obtain a PER and the enhanced protections and benefits provided to PER Holders under the *Grain Act*. It is not factually possible to change the nature of that transaction between 130 Alberta and each PER Holder retroactively by re-examining that transaction under the common law principles of bailment due to the mandatory nature of the *Grain Act* (as described in more detail below). Further, deeming the delivery of grain in exchange for a PER as a sale undermines Parliament's careful and deliberate treatment of this type of transaction.

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[22] *Grain Act*, at s 2, at **TAB 3** of the Authorities.
[23] *Grain Act*, at s 65(3), at **TAB 3** of the Authorities.
[24] *Grain Act*, at s 68, at **TAB 3** of the Authorities

27. If Parliament intended title to pass with the issuance of a PER (similar to a sale), it would have set that out explicitly in the legislation. Instead, it set out a number of specific rights and remedies to PER Holders that indicate each PER Holder retains an ownership interest in the Like Grain and that would not otherwise be available at common law.

b. Regulatory Scheme of the *Grain Act* – Remedies for Unpaid Producers

28. With respect to remedies, where, as in these circumstances, grain producers are unpaid for their grain by a licensed elevator operator or grain dealer, Parliament created a complete code under the *Grain Act* to protect unpaid producers. This is accomplished in two ways: first, by the mandatory nature of the *Grain Act*; and second, through the *Grain Act's* requirement for elevator operators and grain dealers to post security as a condition of obtaining a licence to secure a licensed entity's performance of its obligations to grain producers.

29. Both sections 44 and 83 demonstrate the mandatory application of the *Grain Act*. Pursuant to section 44 of the *Grain Act*, no person can operate an elevator or carry on business as a grain dealer unless that person holds the relevant licence from the CGC.[25] Section 83 of the *Grain Act* further requires that only those licensed under the *Grain Act* can purchase grain in Western Canada.[26]

30. In *Chaplin Grain Corp. v Antelope Creek Enterprises Ltd.* ("***Chaplin***"), the Saskatchewan Court of Queen's Bench confirmed that the *Grain Act* is a mandatory regime that was enacted by Parliament to ensure "the protection of the unpaid producer who has relinquished the grain to the buyer."[27]

31. The mandatory nature of the *Grain Act* is such that in *Northern Sales Co. Ltd. v Degelman Farms Ltd.*, the Court held that an oral contract that was not in a form prescribed or authorized by the CGC, was illegal and unenforceable.[28]

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[25] *Grain Act*, at s 44, at **TAB 3** of the Authorities.
[26] *Grain Act*, at s 83, at **TAB 3** of the Authorities.
[27] *Chaplin Grain Corp. v Antelope Creek Enterprises Ltd.*, 2018 SKQB 304 ("***Chaplin***"), at para 52, at **TAB 6** of the Authorities.
[28] *Northern Sales Co. Ltd. v Degelman Farms Ltd.* (1989), 76 Sask R 187 (Sask QB), at para 6, at **TAB 7** of the Authorities.

32. In addition to the mandatory nature of the *Grain Act*, under section 45 of the *Grain Act*, the CGC can require all elevator operators and grain dealers to post security as a pre-condition of obtaining a licence from the CGC.[29] Pursuant to section 49(3) of the *Grain Act*, if a licensed primary elevator or grain dealer fails to meet its delivery obligations to a PER Holder, that PER Holder is entitled to realize or enforce against the security posted under section 45.[30]

33. The Canada Grain Regulations further provide that grain producers are entitled to realize up to 100% of their claims from the security provided under section 45, provided such claims do not exceed the value of the security.[31]

34. *Chaplin* confirmed that the requirement to post security under section 45 of the *Grain Act*, in conjunction with the restriction under section 83, is designed to protect unpaid grain producers:

> Section 83 of the CGA prohibits the buying of grain in western Canada without a licence, subject to a number of specific exceptions. The requirement is part of a larger regulatory regime, designed, at least in part, to protect grain producers. One aspect of this is that, pursuant to s. 45(1) of the CGA, grain dealers must post a bond to secure their obligations to make payment to producers who deliver grain.[32]

35. Here again Parliament has signalled an intention to provide different, and even enhanced, remedies to grain producers than would otherwise be available at common law, as there is no requirement for grain producers to advance litigation against licensed elevators to enforce their rights, and the remedy is payment up to 100% for the outstanding obligation (up to the amount of the available security posted by the operator).

36. To facilitate grain producers' claims against the security posted under section 45, the CGC has created the Safeguards for Grain Farmers Program (the "**SGFP**"). Under the SGFP, if a licensed elevator operator or grain dealer fails to pay a producer for its grain, that producer can submit a request for compensation from the CGC, and the CGC will enforce the security posted under section 45. If the producer is eligible under

[29] *Grain Act*, at s 45, at **TAB 3** of the Authorities.
[30] *Grain Act*, at s 49(3), at **TAB 3** of the Authorities.
[31] Canada Grain Regulations, CRC, c 889 (the "**Grain Regulations**"), at s 19, at **TAB 8** of the Authorities.
[32] *Chaplin*, at para 26, at **TAB 6** of the Authorities.

the SGFP, the CGC will make a claim on the security on the producer's behalf, and upon receiving payment, administer payment to the producer.[33]

37. In order for PER Holders to be eligible to successfully claim through the SGFP, the following events must have occurred:

(a) grain producers delivered regulated grain to a licensed primary elevator;

(b) the primary elevator issued a primary elevator receipt;

(c) the primary elevator failed to deliver grain within 90 days of issuing the primary elevator receipt; and

(d) the grain producer provided written notice of the primary elevator's failure to deliver grain within 30 days of the failure,[34] although in these circumstances, because the CGC suspended 130 Alberta's grain licences, there was no need for grain producers to notify the CGC that 130 Alberta failed to meet its delivery requirements.

38. The Receiver confirmed that as a condition of issuing licences to 130 Alberta, the CGC required 130 Alberta to maintain sufficient Like Grain in its possession to cover all outstanding PERs, and to post security in the amount of $4 million (the "**Security**"), which took the form of payables insurance held by Intact Insurance.[35] The Security is not available to any other creditors of 130 Alberta, and is only available to eligible, unpaid grain producers who delivered grain to 130 Alberta.

39. The Receiver has been working with the CGC to maximize recovery to the PER Holders pursuant to the *Grain Act*, and the parties have agreed that:

(a) first, the Receiver would distribute the approximately $1.5 million in funds the Receiver generated from the sale of Like Grain to the CGC for PER Holders entitled to the return of that Like Grain; and

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[33] H Lance Williams and Forrest Finn, "Caught in the Rye: The *Canada Grain Act*, Security, Title and Insolvency Proceedings", 2020 18th *Annual Review of Insolvency Law* 284, 2020 CanLIIDocs 3605 ("**Caught in the Rye**"), at p 292, at **TAB 9** of the Authorities.
[34] *Grain Act*, at s 49(3), at **TAB 3** of the Authorities; Grain Regulations, at s 17(a), at **TAB 8** of the Authorities.
[35] Supplemental Report, at para 18.

(b) second, once that distribution is complete, the CGC would administer the remaining claims of all grain producers holding PERs or grain receipts from the $4 million Security and the $1.5 million from Like Grain.

c. *Grain Act* Supersedes Common Law Remedies

40. The *Grain Act* regulates the entire relationship between grain producers and licensed elevators or grain dealers, and it is the *Grain Act* that ultimately dictates when property to grain passes between grain producers and elevators. To the extent the Court has asked whether title to the grain remained with the PER Holders pursuant to a bailment, or passed to 130 Alberta pursuant to a sale, this question is completely answered by the *Grain Act*. The *Grain Act* supersedes whatever common law theories of ownership may apply to the delivery of grain to a licensed primary elevator, and in fact, provides superior rights and remedies to grain producers than would otherwise be available at common law.

41. In *Jackson v Canadian National Railway* ("***Jackson***"), the Alberta Court of Appeal considered whether legislation that provided grain freight rates superseded the common law obligation to only charge fair and reasonable rates.[36] The Court held that the question was ultimately one of statutory interpretation, and that the statute should be interpreted in light of the principle that, "legislation is paramount, so that if it clearly expresses an intention to override or displace the common law, this effect must be given to the statute."[37]

42. The Court in *Jackson* also cited to Ruth Sullivan's *Sullivan on the Construction of Statutes* for the following two principles: (1) in interpreting a code, concern for the internal coherence of the statute takes precedence over the presumption against changing the common law; and (2) it is inappropriate to resort to the common law when the legislation to be applied is broad and detailed enough to provide a comprehensive regulation of the matter in question.[38]

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[36] *Jackson v Canadian National Railway*, 2013 ABCA 440 ("***Jackson***"), at para 38, at **TAB 10** of the Authorities.
[37] *Jackson*, at para 38, at **TAB 10** of the Authorities.
[38] *Jackson*, at para 38, at **TAB 10** of the Authorities, citing to Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008), at 439 and 442.

43. In light of the these principles, the Court noted that the legislated rate formulas in question entitled the railway to set and recover maximum rates without having to determine whether the rates were fair and reasonable at common law. The Court ultimately concluded that the legislation in question superseded the common law, holding that:

> We find it inconceivable that Parliament enacted legislation containing complex formulas for calculating rates and revenues, and then delegated authority for enforcement to a specialized body with expertise in matters of transportation, with the parallel intention that the common law courts would also be left with the task of determining whether the rates charged by the railways under that regulatory scheme were ultimately fair and reasonable. The role of the Agency would be undermined and the courts would be left with a task for which they are ill equipped.[39]

44. In *Roberts Properties Inc. v Saskatchewan Power Corp.*, the Saskatchewan Court of Appeal confirmed the chambers judge's decision that a common law duty of fairness was superseded by legislation that provided authority for the basic monthly charge levied against bulk-metered service corporations.[40] The Court noted that courts have rejected the proposition that common law obligations can modify valid statutory authority,[41] and that legislation supersedes the common law where that intention is clear from the particular provision.[42]

45. *Chaplin* confirmed that Parliament enacted the *Grain Act* to protect unpaid grain producers.[43] In particular, section 49(3) of the *Grain Act* provides that the security provided under section 45 is available to grain producers with primary elevator receipts who meet the above-noted requirements of the *Grain Act*. Nothing in section 49 requires grain producers to establish whether a bailment or a sale existed; grain producers are entitled to pursue payment from the security posted under section 45 so long as they comply with the requirements of the *Grain Act*.

46. As set out in *Jackson*, where Parliament has enacted legislation that provides a specific scheme, and appointed a regulatory body to oversee the administration of that scheme, that legislation will supersede the common law in that area. Similarly, the

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[39] *Jackson*, at para 41, at **TAB 10** of the Authorities.
[40] *Roberts Properties Inc. v Saskatchewan Power Corp.*, 2016 SKCA 31 ("***Roberts***"), at para 15, at **TAB 11** of the Authorities.
[41] *Roberts*, at para 18, at **TAB 11** of the Authorities.
[42] *Roberts*, at para 20, at **TAB 11** of the Authorities.
[43] *Chaplin*, at para 26, at **TAB 6** of the Authorities.

Grain Act provides a specific remedy to PER Holders whose grain has been converted by a licensed elevator operator without any need for the grain producers to prove the existence of either a sale or a bailment. Parliament has further created the CGC to administer this remedy, as part of the CGC's mandate under the *Grain Act*.

47. Parliament created the regulatory regime of the *Grain Act* to protect unpaid producers by providing them with a remedy to full payment without having to personally pursue the licensed elevator operators or grain dealers. To borrow the language of Ruth Sullivan, in these circumstances, it is inappropriate to resort to the common law when the *Grain Act* is broad and detailed enough to provide a comprehensive regulation of the matter in question.

(c) Existence of a Bailment or a Sale between PER Holders and 130 Alberta

48. During the December Application, the Court raised the issue as to whether 130 Alberta held the PER Inventory on behalf of the PER Holders pursuant to a common law bailment relationship or whether 130 Alberta's practice of commingling the PER Inventory means 130 Alberta should be deemed to have sold the PER Inventory, which would require the Receiver to consider PER Holders' claims under section 81.2 of the BIA. Section 81.2 of the BIA only provides a remedy to grain producers who have sold and delivered their grain to 130 Alberta within 15 days of the Receiver's appointment, and not to those who have only delivered their grain.

49. As set out above, the *Grain Act* supersedes the piecemeal common law remedies that the grain producers would have to advance on their own by ensuring that should an elevator operator or grain dealer become insolvent, grain producers can obtain full payment (up to the amount of the security available) for their grain by advancing claims against the security bond 130 Alberta was required to post as a pre-condition of obtaining its grain licences from the CGC.[44]

a. Existence of Bailment

50. With respect to bailment, it is typically defined as the delivery of personal chattels on trust on the condition that the same chattels be returned, either in their original or

[44] *Grain Act*, at s 45, at **TAB 3** of the Authorities; Caught in the Rye, at p 292, at **TAB 9** of the Authorities.

altered form.[45] The bailor bears the burden of establishing a bailment existed, and once it does so, the burden shifts to the bailee to prove, on a balance of probabilities, it met the requisite standard of care.[46] The standard of care requires the bailee take the same care of the goods that a prudent owner, acting reasonably, would take of its own chattels, and to take reasonable care to ensure the chattels are in proper custody.[47]

51. If a bailee loses the bailed chattels during the bailment relationship, the bailor is typically entitled to payment based on the market value of the bailed chattels, such that the bailor is returned to as good a position as if the property had not been lost.[48]

52. According to the authors of "Caught in the Rye: The *Canada Grain Act*, Security, Title and Insolvency Proceedings" ("**Caught in the Rye**"), when a primary elevator issues an elevator receipt, title to the grain remains with the producer, which creates a bailment relationship that continues until a valid cash purchase ticket is issued.[49] In support of this statement, the authors cite *NM Patterson & Co. v Carnduff*, which held that,

> Although grain delivered against storage receipts is mingled with other grain, loses its identity and is shipped to terminals, the relation of bailor and bailee in respect to the transaction is created between the elevator company and the person delivering the grain by sec. 213 of the Canada Grain Act, R.S.C., 1927, ch. 86.[50]

53. The authors of Caught in the Rye acknowledge that section 213 of the *Grain Act* has since been repealed, and simply note that other provisions of the *Grain Act*, such as sections 19 and 59, which impose a duty of care on elevator operators towards producers, support the existence of a bailment relationship.[51]

54. It is important to note that all of the cases relied upon by the authors of Caught in the Rye pre-date the removal of the bailment and warehouseman language from the *Grain Act* by Parliament. The authors of Caught in the Rye also do not consider that the *Grain Act* is a comprehensive legislative scheme that has been enacted to specifically

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[45] *Tarpon Energy Services Ltd. v Lal*, 2020 ABQB 317 ("***Tarpon***"), at para 38, at **TAB 12** of the Authorities.
[46] *Tarpon*, at para 41, at **TAB 12** of the Authorities.
[47] *Tarpon*, at para 42, at **TAB 12** of the Authorities.
[48] *Gravina v. Welsh*, 2018 ONSC 5638, at para 57, at **TAB 13** of the Authorities.
[49] Caught in the Rye, at p 296, at **TAB 9** of the Authorities.
[50] *NM Patterson & Co. v Carnduff*, [1931] 2 WWR 221 (Sask CA), at para 3, at **TAB 14** of the Authorities.
[51] Caught in the Rye, at p 296, footnote 51, at **TAB 9** of the Authorities.

deal with the ownership, transfer of title and payment for grain delivered by producers to licensed elevator operators.

55. Accordingly, because Parliament specifically removed the bailment language from the *Grain Act*, it is clear that Parliament did not intend to allow grain producers to invoke the common law relationship of bailment with respect to grain delivered for storage to licensed operators.

56. However, the rest of the *Grain Act* continues to treat stored grain delivered pursuant to a PER as the property of the PER Holders (who retain ownership rights in respect of Like Grain), without individual grain producers having to resort to the common-law rights available under bailment. Again, this would include the statutory duty of care owed by elevator operators to grain producers with respect to stored grain, as well as the requirement to pay insurance proceeds for the benefit of grain producers should their stored grain suffer damages.

57. In light of the statutory scheme of the *Grain Act*, and Parliament's intention to remove bailment language from the *Grain Act*, it would be in direct contravention of the clear statutory provisions of the *Grain Act* to retroactively deem the delivery of grain for storage (and receipt of a PER) by the PER Holders as a bailment.

b. Existence of a Sale

58. With respect to whether the delivery of grain for storage amounts to a sale, pursuant to *Crawford v Kingston* ("***Crawford***"), a case raised by the Court during the December Application, if goods are delivered under a contract that does not require the return of the exact goods, but rather goods of equal value or payment for the fair market value of those goods, then the transaction is treated as a sale, rather than a bailment.[52]

59. Citing to *Crawford*, the Court in *Delta Smelting & Refining Co., Re* ("***Delta Smelting***"), held that:

> A bailment arises only where there is a delivery of property on the basis that the same property will be returned. Its form may be altered, but it must be the same property. Thus where the material delivered is mixed with other material, on the

[52] *Crawford v Kingston*, [1952] 4 DLR 37 (Ont CA) (***Crawford***"), at **TAB 15** of the Authorities.

> basis that an equivalent quantity of the same type of material will be returned, the contract is one of sale, not bailment.[53]

60. The Receiver has confirmed that 130 Alberta commingled the PER Inventory, as 130 Alberta stored grain by commodity and grade and not by producer.[54] The Receiver has further confirmed that 130 Alberta commingled the proceeds realized from its disposal of PER Inventory, and 130 Alberta immediately used such proceeds to reduce its operating line of credit with ATB Financial.[55]

61. However, the delivery of grain to a licensed elevator cannot be deemed a sale, as the *Grain Act* makes it unnecessary to do so.

62. Under the common law theory of a sale, if the buyer does not, or cannot, pay for the market value of the chattels, the seller's remedy would be a personal claim against the buyer, and the seller's remedy would be restricted by its ability to enforce a judgment against the buyer (if it can show it is entitled to judgment). The *Grain Act* goes further than the common law principle of a sale in that it provides a remedy for unpaid PER Holders against the security posted under section 45, and does not require the PER Holder to individually file claims against the licensed elevator operator (they can submit claims directly to the CGC). Those are the enhanced rights granted to grain producers who choose to deal with licensed elevator operators.

63. Deeming the delivery of grain for storage under a PER as a sale would create internal inconsistencies and redundancies within the *Grain Act*. Again, Parliament intended two different outcomes with the issuance of either a cash purchase ticket or a PER. The issuance of a cash purchase ticket is evidence of a purchase and entitles the grain producer to payment, while the issuance of a PER is evidence of delivery of grain for storage, with a number of specific rights and remedies flowing to the holder of a PER. To retroactively deem the delivery of grain under a PER as a sale would mean title to grain would transfer to the elevator, without entitling the PER Holder to immediate payment, and would be contrary to Parliament's opposite intention to treat delivered grain for storage as the property of PER Holders.

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[53] *Delta Smelting & Refining Co., Re*, [1989] BCWLD 203 (BC Sup Ct), at para 18, at **TAB 16** of the Authorities.
[54] Supplemental Report, at para 14.
[55] Supplemental Report, at para 21.

64. Deeming the delivery of grain under a PER as a sale would also render the duty of care imposed by section 59 meaningless; if the elevator owned the grain under a PER, there would be no need to impose a duty of care owed to grain producers with respect to stored grain.

65. As noted by the Court of Appeal in *Jackson*, in reference to Ruth Sullivan, in interpreting a legislative code, concern for internal coherence takes precedence over the presumption against applying the common law.[56] Deeming the delivery of grain for storage under a PER as a sale would render parts of the *Grain Act* meaningless, and further supports that the *Grain Act* is intended to apply as a complete code to the exchange of grain between grain producers and licensed elevator operators, to the exclusion of the common law.

66. In "Transfers of Investment Securities", a report by the Alberta Law Reform Institute, the authors note that the U.S. law has developed so that fungible property, including stock shares, may be bailed without the requirement for redelivery *in specie*.[57] The authors comment that the U.S. developed this law in response to the courts' reluctance to characterize the deposit of grain as a sale, but that Canada has not developed a similar law as the delivery of grain was addressed under the *Grain Act*:

> It seems unfortunate that Canadian law has failed to follow the U.S. position in this area. The U.S. position evolved in response to the commercial realities of grain storage. Huge quantities of grain were intermingled and stored in elevators. The courts were understandably reluctant to characterize the deposit of grain on such basis as a sale, so they changed the law respecting bailment of fungible goods. This same law was later conveniently applied to securities. In Canada, however, the grain situation was handled by the Canada Grain Act, so there has not yet been sufficient commercial pressure to produce a change in our common law of bailment.[58]

67. The authors' comments confirm that in Canada, the *Grain Act* regulated the deposit of grain, such that there was no need to develop the common law to accommodate the fact that grain was intermingled upon delivery. The authors further confirm that in the

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[56] *Jackson*, at para 38, at **TAB 10** of the Authorities, citing to Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008), at 439.
[57] Adelle Fruman, Glenda Campbell and William H. Smith, "Transfers of Investment Securities", Alberta Law Reform Institute, June 1993, Report No. 67 ("**Transfers of Investment Securities**"), at p 77, at **TAB 17** of the Authorities.
[58] Transfers of Securities, at p 76, at **TAB 17 of the Authorities.**

U.S. at least, the courts recognized it would be undesirable to characterize the delivery of grain as a sale.

68. Even if the Receiver were to assess grain producers' claims under the common law, as an officer of the court, it would be inappropriate for the Receiver to advance any litigation on behalf of the grain producers to demonstrate whether they delivered grain under a bailment or a sale. First, it is the bailors (and presumably the sellers) who bear the onus of establishing the existence of a bailment or a sale (to the extent that is even possible in light of the mandatory nature of the *Grain Act*).

69. Second, the authorities are inconsistent as to whether the delivery of grain is a bailment or a sale. The conclusions drawn by the authors of the 2020 Caught in the Rye article are inconsistent with the holdings of the *Crawford* and *Delta Smelting* decisions. Indeed, in *Coro (Canada) Inc., Re*, the Court commented that not all cases treat the delivery of commingled wheat as a sale:

> In the event of a bankruptcy or a loss of the wheat by the grain elevator some of the cases, but by no means all, have called the transaction a sale and not a bailment.[59]

70. Even if grain producers advanced claims and established their grain was held pursuant to a bailment or a sale, the majority of grain producers would only be entitled to unsecured claims.

71. More importantly, for the reasons set out previously herein, the *Grain Act* was intended to supersede the common law in this area, and assessing the PER Holders' claims under either bailment or sale would undermine the *Grain Act*. Further, treating the PER Holders' claims according to common law theories of ownership would put the PER Holders to unnecessary time and expense to prove their individual claims, when the *Grain Act* already provides a remedy for unpaid producers.

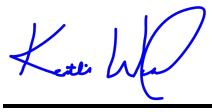
[59] *Coro (Canada) Inc., Re* (1997), 49 CBR (3d) 183 (Ont CJ), at para 21, at **TAB 18** of the Authorities.

D. RELIEF REQUESTED

72. The Receiver respectfully requests that this Honourable Court approve the Receiver's proposed distribution to PER Holders and grain producers that are eligible for the priority under section 81.2 of the BIA as originally sought at the December Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of January, 2022.

MLT AIKINS LLP



Ryan Zahara/Kaitlin Ward
Counsel for BDO Canada Limited, in its capacity as Receiver

LIST OF AUTHORITIES