APPENDIX

List of Authorities – Supplemental Brief of the Receiver

Tab	Authority
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Interpretation Act*, RSC 1985, c I-21
3.	*Canada Grain Act*, RSC 1985, c G-10
4.	*Canada Grain Act*, RSC 1927, ch 86
5.	*Busse v Edmonton Grain & Hay Co.*, [1932] 1 WWR 296 (Alta CA)
6.	*Chaplin Grain Corp. v Antelope Creek Enterprises Ltd.*, 2018 SKQB 304
7.	*Northern Sales Co. Ltd. v Degelman Farms Ltd.* (1989), 76 Sask R 187 (Sask QB)
8.	Canada Grain Regulations, CRC, c 889
9.	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
10.	*Jackson v Canadian National Railway*, 2013 ABCA 440
11.	*Roberts Properties Inc. v Saskatchewan Power Corp.*, 2016 SKCA 31
12.	*Tarpon Energy Services Ltd. v Lal*, 2020 ABQB 317
13.	*Gravina v. Welsh*, 2018 ONSC 5638
14.	*NM Patterson & Co. v Carnduff*, [1931] 2 WWR 221 (Sask CA)
15.	*Crawford v Kingston*, [1952] 4 DLR 37 (Ont CA)
16.	*Delta Smelting & Refining Co., Re*, [1989] BCWLD 203 (BC Sup Ct)
17.	Adelle Fruman, Glenda Campbell and William H. Smith, "Transfers of Investment Securities", Alberta Law Reform Institute, June 1993, Report No. 67
18.	*Coro (Canada) Inc., Re* (1997), 49 CBR (3d) 183 (Ont CJ)

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

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Definitions

(12) The following definitions apply in this section.

person who is subject to a receivership means a person in respect of whom any property is under the possession or control of a receiver. (*mise sous séquestre*)

receiver means a receiver within the meaning of subsection 243(2). (*séquestre*)

1992, c. 27, s. 38; 1999, c. 31, s. 23; 2005, c. 47, s. 66.

Special right for farmers, fishermen and aquaculturists

81.2 (1) Where

(a) a farmer has sold and delivered products of agriculture, a fisherman has sold and delivered products of the sea, lakes and rivers, or an aquaculturist has sold and delivered products of aquaculture, to another person (in this section referred to as the "purchaser") for use in relation to the purchaser's business,

(b) the products were delivered to the purchaser within the fifteen day period preceding

(i) the day on which the purchaser became bankrupt, or

(ii) the first day on which there was a receiver, within the meaning of subsection 243(2), in relation to the purchaser,

(c) as of the day referred to in subparagraph (b)(i) or (ii), the farmer, fisherman or aquaculturist has not been fully paid for the products, and

(d) the farmer, fisherman or aquaculturist files a proof of claim in the prescribed form in respect of the unpaid amount with the trustee or receiver, as the case may be, within thirty days after the day referred to in subparagraph (b)(i) or (ii),

the claim of the farmer, fisherman or aquaculturist for the unpaid amount in respect of the products is secured by security on all the inventory of or held by the purchaser as of the day referred to in subparagraph (b)(i) or (ii), and the security ranks above every other claim, right, charge or security against that inventory, regardless of when that other claim, right, charge or security arose, except a supplier's right, under section 81.1, to repossess goods, despite any other federal or provincial Act or law; and if the trustee or receiver, as the case may be, takes possession or in any way disposes of inventory covered by the security, the trustee or receiver is liable for the

Définitions

(12) Les définitions qui suivent s'appliquent au présent article.

mise sous séquestre En parlant d'une personne, mise de tout bien de celle-ci en la possession ou sous la responsabilité d'un séquestre. (*person who is subject to a receivership*)

séquestre Séquestre au sens du paragraphe 243(2). (*receiver*)

1992, ch. 27, art. 38; 1999, ch. 31, art. 23; 2005, ch. 47, art. 66.

Cas des agriculteurs, des pêcheurs et des aquiculteurs

81.2 (1) Par dérogation à toute autre loi ou règle de droit fédérale ou provinciale, la réclamation de l'agriculteur, du pêcheur ou de l'aquiculteur qui a vendu et livré à un acheteur des produits agricoles, aquatiques ou aquicoles destinés à être utilisés dans le cadre des affaires de celui-ci est garantie, à compter de la date visée aux sous-alinéas a)(i) ou (ii), par une sûreté portant sur la totalité du stock appartenant à l'acheteur ou détenu par lui à la même date; la sûreté a priorité sur tout autre droit, sûreté, charge ou réclamation — peu importe sa date de naissance — relatif au stock de l'acheteur, sauf sur le droit du fournisseur à la reprise de possession de marchandises aux termes de l'article 81.1; la garantie reconnue par le présent article n'est valable que si, à la fois :

a) les produits en question ont été livrés à l'acheteur dans les quinze jours précédant :

(i) soit la date à laquelle l'acheteur est devenu un failli,

(ii) soit la date à laquelle une personne a commencé à agir, à l'égard de l'acheteur, à titre de séquestre au sens du paragraphe 243(2);

b) les produits en question n'ont pas, à la date visée aux sous-alinéas a)(i) ou (ii), été payés au complet;

c) l'agriculteur, le pêcheur ou l'aquiculteur a déposé une preuve de réclamation en la forme prescrite pour le solde impayé auprès du syndic ou du séquestre dans les trente jours suivant la date visée aux sous-alinéas a)(i) ou (ii).

Le syndic ou le séquestre qui prend possession ou dispose des stocks grevés par la sûreté est responsable de la réclamation de l'agriculteur, du pêcheur ou de l'aquiculteur jusqu'à concurrence du produit net de la réalisation, déduction faite des frais de réalisation, et est subrogé dans tous leurs droits jusqu'à concurrence des sommes ainsi payées.

claim of the farmer, fisherman or aquaculturist to the extent of the net amount realized on the disposition of that inventory, after deducting the cost of realization, and is subrogated in and to all rights of the farmer, fisherman or aquaculturist to the extent of the amounts paid to them by the trustee or receiver.

Definitions

(2) In this section,

aquaculture means the cultivation of aquatic plants and animals; (*aquiculture*)

aquaculture operation means any premises or site where aquaculture is carried out; (*exploitation aquicole*)

aquaculturist includes the owner, occupier, lessor and lessee of an aquaculture operation; (*aquiculteur*)

aquatic plants and animals means plants and animals that, at most stages of their development or life cycles, live in an aquatic environment; (*organismes animaux et végétaux aquatiques*)

farm means land in Canada used for the purpose of farming, which term includes livestock raising, dairying, bee-keeping, fruit growing, the growing of trees and all tillage of the soil; (*ferme*)

farmer includes the owner, occupier, lessor and lessee of a farm; (*agriculteur*)

fish includes shellfish, crustaceans and marine animals; (*poisson*)

fisherman means a person whose business consists in whole or in part of fishing; (*pêcheur*)

fishing means fishing for or catching fish by any method; (*pêche*)

products of agriculture includes

(a) grain, hay, roots, vegetables, fruits, other crops and all other direct products of the soil, and

(b) honey, livestock (whether alive or dead), dairy products, eggs and all other indirect products of the soil; (*produits agricoles*)

products of aquaculture includes all cultivated aquatic plants and animals; (*produits aquicoles*)

products of the sea, lakes and rivers includes fish of all kinds, marine and freshwater organic and inorganic

Définitions

(2) Les définitions qui suivent s'appliquent au présent article.

agriculteur Est assimilé à l'agriculteur le propriétaire, l'occupant, le locateur ou le locataire d'une ferme. (*farmer*)

aquiculteur Est assimilé à l'aquiculteur le propriétaire, l'occupant, le locateur ou le locataire d'une exploitation aquicole. (*aquaculturist*)

aquiculture Élevage ou culture d'organismes animaux et végétaux aquatiques. (*aquaculture*)

exploitation aquicole Endroit où l'aquiculture est pratiquée. (*aquaculture operation*)

ferme Terre située au Canada utilisée pour l'exercice d'une des activités de l'agriculture, et notamment pour l'élevage du bétail, l'industrie laitière, l'apiculture, la production fruitière, l'arboriculture et toute culture du sol. (*farm*)

organismes animaux et végétaux aquatiques Plantes ou animaux qui, à la plupart des étapes de leur développement, ont comme habitat naturel l'eau. (*aquatic plants and animals*)

pêche L'action de prendre ou de chercher à prendre du poisson, quels que soient les moyens employés. (*fishing*)

pêcheur Personne dont l'activité professionnelle est, uniquement ou partiellement, la pêche. (*fisherman*)

poisson Sont assimilés à des poissons les crustacés et coquillages ainsi que les animaux aquatiques. (*fish*)

produits agricoles Sont compris parmi les produits agricoles :

a) grains, foin, racines, légumes, fruits, autres récoltes et tout autre produit direct du sol;

b) miel, animaux de ferme — sur pied ou abattus —, produits laitiers, œufs et tout autre produit indirect du sol. (*products of agriculture*)

life and any substances extracted or derived from any water, but does not include products of aquaculture. (*produits aquatiques*)

produits aquatiques Poisson de toute espèce, êtres organiques et inorganiques vivant dans la mer et les eaux douces, et toute substance extraite ou tirée des eaux, à l'exception des produits aquicoles. (*products of the sea, lakes and rivers*)

produits aquicoles Tout organisme animal ou végétal aquatique, élevé ou cultivé. (*products of aquaculture*)

Interpretation — products and by-products

(3) For the purposes of this section, each thing included in the following terms as defined in subsection (2), namely,

(a) "products of agriculture",

(b) "products of aquaculture", and

(c) "products of the sea, lakes and rivers",

comprises that thing in any form or state and any part thereof and any product or by-product thereof or derived therefrom.

Interprétation

(3) Pour l'application du présent article, tout élément compris dans les définitions suivantes, prévues au paragraphe (2), s'entend également de cet élément ou de ses parties, quel qu'en soit la forme ou l'état, ainsi que des produits, sous-produits et dérivés qui en sont tirés :

a) « produits agricoles »;

b) « produits aquatiques »;

c) « produits aquicoles ».

Section 81.1 applies

(4) For greater certainty, "goods" in section 81.1 includes products of agriculture, products of the sea, lakes and rivers, and products of aquaculture.

Application de l'article 81.1

(4) Il demeure entendu que le mot « marchandises », à l'article 81.1, s'entend notamment des produits agricoles, aquatiques ou aquicoles.

Other rights saved

(5) Nothing in this section precludes a farmer, fisherman or aquaculturist from exercising

(a) the right that that person may have under section 81.1 to repossess products of agriculture, products of the sea, lakes and rivers, or products of aquaculture; or

(b) any right that that person may have under the law of a province.

1992, c. 27, s. 38; 1997, c. 12, s. 72(F); 2004, c. 25, s. 49.

Non-atteinte aux autres droits

(5) Le présent article n'a pas pour effet d'empêcher un agriculteur, un pêcheur ou un aquiculteur d'exercer :

a) le droit que lui reconnaît l'article 81.1 à la reprise de possession de produits agricoles, aquatiques ou aquicoles;

b) tout autre droit que lui reconnaît le droit provincial applicable.

1992, ch. 27, art. 38; 1997, ch. 12, art. 72(F); 2004, ch. 25, art. 49.

Security for unpaid wages, etc. — bankruptcy

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of $2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

Sûreté relative aux salaires non payés — faillite

81.3 (1) La réclamation de tout commis, préposé, voyageur de commerce, journalier ou ouvrier à qui le failli doit des gages, salaires, commissions ou autre rémunération pour services rendus au cours de la période commençant à la date précédant de six mois la date de l'ouverture de la faillite et se terminant à la date de la faillite est garantie, à compter de cette date et jusqu'à concurrence de deux mille dollars, moins toute somme que le syndic ou un séquestre peut lui avoir versée pour ces services, par une sûreté portant sur les actifs à court terme appartenant au failli à la date de la faillite.

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Interpretation Act

Loi d'interprétation

R.S.C., 1985, c. I-21

L.R.C. (1985), ch. I-21

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which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

Restriction as to public servants

(3) Nothing in paragraph (2)(c) or (d) shall be construed as authorizing the exercise of any authority conferred on a minister to make a regulation as defined in the *Statutory Instruments Act*.

Successors to and deputy of public officer

(4) Words directing or empowering any public officer, other than a minister of the Crown, to do any act or thing, or otherwise applying to the public officer by his name of office, include his successors in the office and his or their deputy.

Powers of holder of public office

(5) Where a power is conferred or a duty imposed on the holder of an office, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

R.S., 1985, c. I-21, s. 24; 1992, c. 1, s. 89.

Restriction relative aux fonctionnaires

(3) Les alinéas (2)c) ou d) n'ont toutefois pas pour effet d'autoriser l'exercice du pouvoir de prendre des règlements au sens de la *Loi sur les textes réglementaires*.

Successeurs et délégué d'un fonctionnaire public

(4) La mention d'un fonctionnaire public par son titre ou dans le cadre de ses attributions vaut mention de ses successeurs à la charge et de son ou leurs délégués ou adjoints.

Pouvoirs du titulaire d'une charge publique

(5) Les attributions attachées à une charge peuvent être exercées par son titulaire effectivement en poste.

L.R. (1985), ch. I-21, art. 24; 1992, ch. 1, art. 89.

Evidence

Documentary evidence

25 (1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.

Queen's Printer

(2) Every copy of an enactment having printed thereon what purports to be the name or title of the Queen's Printer and Controller of Stationery or the Queen's Printer is deemed to be a copy purporting to be printed by the Queen's Printer for Canada.

R.S., c. I-23, s. 24.

Preuve

Preuve documentaire

25 (1) Fait foi de son contenu en justice sauf preuve contraire le document dont un texte prévoit qu'il établit l'existence d'un fait sans toutefois préciser qu'il l'établit de façon concluante.

Imprimeur de la Reine

(2) La mention du nom ou du titre de l'imprimeur de la Reine et contrôleur de la papeterie ou de l'imprimeur de la Reine, portée sur les exemplaires d'un texte, est réputée être la mention de l'imprimeur de la Reine pour le Canada.

S.R., ch. I-23, art. 24.

Computation of Time

Time limits and holidays

26 Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.

R.S., 1985, c. I-21, s. 26; 1999, c. 31, s. 147(F).

Calcul des délais

Jour férié

26 Tout acte ou formalité peut être accompli le premier jour ouvrable suivant lorsque le délai fixé pour son accomplissement expire un jour férié.

L.R. (1985), ch. I-21, art. 26; 1999, ch. 31, art. 147(F).

holiday means any of the following days, namely, Sunday; New Year's Day; Good Friday; Easter Monday; Christmas Day; the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning Sovereign; Victoria Day; Canada Day; the first Monday in September, designated Labour Day; National Day for Truth and Reconciliation, which is observed on September 30; Remembrance Day; any day appointed by proclamation to be observed as a day of general prayer or mourning or day of public rejoicing or thanksgiving; and any of the following additional days, namely,

(a) in any province, any day appointed by proclamation of the lieutenant governor of the province to be observed as a public holiday or as a day of general prayer or mourning or day of public rejoicing or thanksgiving within the province, and any day that is a non-juridical day by virtue of an Act of the legislature of the province, and

(b) in any city, town, municipality or other organized district, any day appointed to be observed as a civic holiday by resolution of the council or other authority charged with the administration of the civic or municipal affairs of the city, town, municipality or district; (*jour férié*)

internal waters,

(a) in relation to Canada, means the internal waters of Canada as determined under the *Oceans Act* and includes the airspace above and the bed and subsoil below those waters, and

(b) in relation to any other state, means the waters on the landward side of the baselines of the territorial sea of the other state; (*eaux intérieures*)

legislative assembly, ***legislative council*** or ***legislature*** [Repealed, 2014, c. 2, s. 14]

legislative assembly or ***legislature*** includes the Lieutenant Governor in Council and the Legislative Assembly of the Northwest Territories, as constituted before September 1, 1905, and the Legislature of Yukon, of the Northwest Territories or for Nunavut; (*législature* ou *assemblée législative*)

lieutenant governor means the lieutenant governor or other chief executive officer or administrator carrying on the government of the province indicated by the enactment, by whatever title that officer is designated, and in Yukon, the Northwest Territories and Nunavut means the Commissioner; (*lieutenant-gouverneur*)

lieutenant governor in council means

centre, en retard de six heures sur l'heure de Greenwich;

e) en Saskatchewan, en Alberta, dans les Territoires du Nord-Ouest et dans les régions du territoire du Nunavut situées à l'ouest du cent deuxième méridien de longitude ouest, de l'heure normale des Rocheuses, en retard de sept heures sur l'heure de Greenwich;

f) en Colombie-Britannique, de l'heure normale du Pacifique, en retard de huit heures sur l'heure de Greenwich;

g) au Yukon, de l'heure normale du Yukon, en retard de neuf heures sur l'heure de Greenwich. (*standard time*)

jour férié Outre les dimanches, le 1er janvier, le vendredi saint, le lundi de Pâques, le jour de Noël, l'anniversaire du souverain régnant ou le jour fixé par proclamation pour sa célébration, la fête de Victoria, la fête du Canada, le premier lundi de septembre, désigné comme fête du Travail, la Journée nationale de la vérité et de la réconciliation, qui a lieu le 30 septembre, le 11 novembre ou jour du Souvenir, tout jour fixé par proclamation comme jour de prière ou de deuil national ou jour de réjouissances ou d'action de grâces publiques :

a) pour chaque province, tout jour fixé par proclamation du lieutenant-gouverneur comme jour férié légal ou comme jour de prière ou de deuil général ou jour de réjouissances ou d'action de grâces publiques, et tout jour qui est un jour non juridique au sens d'une loi provinciale;

b) pour chaque collectivité locale — ville, municipalité ou autre circonscription administrative —, tout jour fixé comme jour férié local par résolution du conseil ou autre autorité chargée de l'administration de la collectivité. (*holiday*)

juridiction supérieure ou ***cour supérieure*** Outre la Cour suprême du Canada, la Cour d'appel fédérale, la Cour fédérale et la Cour canadienne de l'impôt :

a) la Cour suprême de Terre-Neuve-et-Labrador;

a.1) la Cour d'appel de l'Ontario et la Cour supérieure de justice de l'Ontario;

b) la Cour d'appel et la Cour supérieure du Québec;

c) la Cour d'appel et la Cour du Banc de la Reine du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou de l'Alberta;

TAB 3

CANADA

CONSOLIDATION

CODIFICATION

Canada Grain Act

Loi sur les grains du Canada

R.S.C., 1985, c. G-10

L.R.C. (1985), ch. G-10

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R.S.C., 1985, c. G-10

L.R.C., 1985, ch. G-10

An Act respecting grain

Short Title

Short title

1 This Act may be cited as the *Canada Grain Act*.

1970-71-72, c. 7, s. 1.

Interpretation

Definitions

2 In this Act,

actual producer means a person actually engaged in the production of grain; (*producteur-exploitant*)

cash purchase ticket means a document in prescribed form issued in respect of grain delivered to a primary elevator, process elevator or grain dealer as evidence of the purchase of the grain by the operator of the elevator or the grain dealer and entitling the holder of the document to payment, by the operator or grain dealer, of the purchase price stated in the document; (*bon de paiement*)

class, in respect of grain, means any variety or varieties of grain designated by order of the Commission as a class for the purposes of this Act; (*classe*)

Commission means the Canadian Grain Commission established by section 3; (*Commission*)

commissioner means a commissioner appointed pursuant to section 3; (*commissaire*)

contaminated [Repealed, 2020, c. 1, s. 60]

crop year means, subject to any order of the Governor in Council made pursuant to section 115, the period commencing on August 1 in any year and terminating on July 31 in the year next following; (*campagne agricole*)

Division means the Eastern Division or the Western Division; (*région*)

Loi concernant les grains

Titre abrégé

Titre abrégé

1 *Loi sur les grains du Canada*.

1970-71-72, ch. 7, art. 1.

Définitions et interprétation

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

accusé de réception Le document réglementaire accusant réception du grain livré à une installation de transformation ou à un négociant en grains et donnant à son détenteur droit au paiement par l'exploitant ou le négociant. (*grain receipt*)

agréée Qualifie une installation dont l'exploitation est autorisée par licence. (*licensed*)

appellation de grade Nom ou nom et numéro, attribués à un grade de grain établi sous le régime de la présente loi, y compris toute abréviation réglementaire correspondante. (*grade name*)

arrêté Instruction ou ordre donné en matière de commerce de grains par la Commission. (*order*)

bon de paiement Document réglementaire qui constate l'achat, par l'exploitant d'une installation primaire ou de transformation ou par un négociant en grains, du grain livré à l'installation ou au négociant, et qui donne à son titulaire droit au paiement par l'acheteur du prix d'achat fixé. (*cash purchase ticket*)

campagne agricole Sous réserve de tout décret contraire pris par le gouverneur en conseil en application de l'article 115, la période commençant le 1er août d'une

elevator receipt means a document in prescribed form issued in respect of grain delivered to an elevator acknowledging receipt of the grain and, subject to any conditions contained therein or in this Act, entitling the holder of the document

(a) to the delivery of grain of the same kind, grade and quantity as the grain referred to in the document, or

(b) in the case of a document issued for specially binned grain, to delivery of the identical grain; (*récépissé*)

export standard sample means, in respect of a grade of grain, a sample of grain of that grade designated by the Commission pursuant to paragraph 26(b); (*échantillon-type d'exportation*)

foreign grain [Repealed, 2020, c. 1, s. 60]

foreign material means any material intermixed with a parcel of grain, other than kernels of grain of a standard of quality fixed by or under this Act for a grade of that grain, that is of such a character and in such limited quantity that it need not be separated from the parcel of grain before that grade can be assigned to the grain; (*matières étrangères*)

grade name means the name, or name and number, assigned to any grade of grain established by or under this Act and includes any abbreviation prescribed for that grade name; (*appellation de grade*)

grain means any seed designated by regulation as a grain for the purposes of this Act; (*grain*)

grain dealer means a person who, for reward, on his own behalf or on behalf of another person, deals in or handles western grain; (*négociant en grains*)

grain product means any product that is produced by processing or manufacturing any grain alone or with any other grain or substance and that may be presented for storage or handling at an elevator; (*produit céréalier*)

grain receipt means a document in prescribed form issued in respect of grain delivered to a process elevator or grain dealer acknowledging receipt of the grain and entitling the holder of the document to payment by the operator of the elevator or the grain dealer for the grain; (*accusé de réception*)

holder, in relation to any document that entitles the person to whom it is delivered to the payment of money or the delivery of grain, means the person who, from time to time, is so entitled by virtue of

frais de stockage Redevance perçue par le titulaire d'une licence d'exploitation pour le stockage, dans son installation, d'une quantité de grain livrable au détenteur d'un récépissé sur présentation de ce document et selon les modalités y figurant. (*storage charge*)

grain Les semences désignées comme tel par règlement. (*grain*)

grain de l'Est Les grains, autres que ceux importés, livrés dans la région de l'Est. (*eastern grain*)

grain de l'Ouest Les grains, autres que ceux importés, livrés dans la région de l'Ouest. (*western grain*)

grain étranger [Abrogée, 2020, ch. 1, art. 60]

grain importé Les grains cultivés à l'extérieur du Canada ou des États-Unis, y compris les criblures de ces grains et tout produit qu'ils ont servi à préparer. (*imported grain*)

impuretés Matières qui, dans un lot de grains, ne correspondent pas à une norme de qualité fixée sous le régime de la présente loi pour un grade donné de ces grains, qui peuvent être extraites du lot, et qui doivent l'être, pour que celui-ci soit placé dans le grade en question. (*dockage*)

infesté État de grains parasités par des insectes ou autres animaux nuisibles. (*infested*)

inspecteur Personne désignée à ce titre par la Commission en application de l'article 12. (*inspector*)

inspection officielle Échantillonnage et classement par grades d'un lot de grain par un inspecteur. (*official inspection*)

installation ou ***silo*** Les installations suivantes, notamment celles qui appartiennent à Sa Majesté du chef du Canada ou d'une province ou à leur mandataire ou qui sont exploitées par l'un d'eux :

a) les installations situées dans la région de l'Ouest et, selon le cas :

(i) équipées pour la réception des grains ou pour leur chargement sur les navires et les wagons ou leur déchargement,

(ii) construites en vue de la manutention et du stockage des grains directement reçus des producteurs, à l'exclusion de celles destinées à l'exploitation agricole d'un producteur particulier, et

Subclasses of licences

43 The Commission may, with the approval of the Governor in Council, make regulations prescribing

(a) subclasses of the licences established by section 42; and

(b) any terms and conditions of a licence of any class or subclass.

R.S., 1985, c. G-10, s. 43; 1994, c. 45, s. 9.

Sous-catégories de licences

43 La Commission peut, par règlement pris avec l'approbation du gouverneur en conseil :

a) instituer des sous-catégories des licences établies par l'article 42;

b) fixer la durée de validité et les conditions d'exercice des différentes catégories ou sous-catégories de licences.

L.R. (1985), ch. G-10, art. 43; 1994, ch. 45, art. 9.

Prohibition

44 No person shall

(a) operate an elevator of a type referred to in section 42 unless

(i) that person is the holder of a licence issued in respect of the elevator, or

(ii) the elevator has been exempted from the licensing requirements of this Act pursuant to section 117; or

(b) carry on business as a grain dealer unless

(i) that person is the holder of a grain dealer's licence,

(ii) the business of that person as a grain dealer has been exempted from the licensing requirements of this Act pursuant to section 117, or

(iii) that person deals in grain only in the course of operating a licensed elevator or as a broker trading on a recognized grain exchange.

1970-71-72, c. 7, s. 34.

Interdiction

44 Il est interdit :

a) d'exploiter une installation mentionnée à l'article 42 à moins, selon le cas :

(i) d'être titulaire d'une licence délivrée à cette fin,

(ii) que l'installation bénéficie d'une exemption de licence en application de l'article 117;

b) de faire profession de négociant en grains à moins, selon le cas :

(i) d'être titulaire d'une licence à cette fin,

(ii) que le commerce bénéficie d'une exemption de licence en application de l'article 117,

(iii) de n'exercer la profession que dans le cadre de l'exploitation d'une installation agréée ou à titre de courtier auprès d'une bourse de grains reconnue.

1970-71-72, ch. 7, art. 34.

Issue of licences — primary and process elevators and grain dealers

45 (1) Where a person who proposes to operate a primary or process elevator or to carry on business as a grain dealer applies in writing to the Commission for a licence and the Commission is satisfied that the applicant and the elevator, if any, meet the requirements of this Act, the Commission may

(a) issue to the applicant a licence of a class or subclass determined by the Commission to be appropriate to the type of operation of that elevator or the business of that grain dealer; and

(b) subject to the regulations, fix the security to be given by the applicant, by way of bond, suretyship, insurance or otherwise, having regard to the applicant's

Délivrance de licences — silo primaire, silo de transformation et commerce de grains

45 (1) Lorsqu'elle est convaincue que l'intéressé et, le cas échéant, le silo satisfont aux exigences de la présente loi, la Commission peut, sur demande écrite d'une personne qui se propose d'exploiter un silo primaire ou un silo de transformation ou un commerce de grains :

a) lui délivrer la licence appropriée en l'occurrence;

b) fixer, sous réserve des règlements, la garantie à fournir sous forme de cautionnement, d'assurance ou autre par le demandeur en tenant compte des obligations éventuelles de paiement ou de livraison de grain contractées par celui-ci envers les producteurs qui seront détenteurs d'accusés de réception, de bons de

potential obligations for the payment of money or the delivery of grain to producers of grain who are holders of cash purchase tickets, elevator receipts or grain receipts issued pursuant to this Act in relation to grain produced by the holders.

paiement ou de récépissés délivrés en application de la présente loi à l'égard du grain produit par eux.

Issue of licences — terminal and transfer elevators

(2) Where a person who proposes to operate a terminal or transfer elevator applies in writing to the Commission for a licence and the Commission is satisfied that the applicant and the elevator, if any, meet the requirements of this Act, the Commission may

(a) issue to the applicant a licence of a class or subclass determined by the Commission to be appropriate to the type of operation of that elevator; and

(b) subject to the regulations, fix the security to be given by the applicant, by way of bond, suretyship, insurance or otherwise, having regard to the applicant's obligations for the payment of money or the delivery of grain to holders of elevator receipts issued pursuant to this Act.

Délivrance de licences — silo terminal ou de transbordement

(2) Lorsqu'elle est convaincue que l'intéressé et, le cas échéant, le silo satisfont aux exigences de la présente loi, la Commission peut, sur demande écrite d'une personne qui se propose d'exploiter un silo terminal ou de transbordement :

a) lui délivrer la licence appropriée en l'occurrence;

b) fixer, sous réserve des règlements, la garantie à fournir sous forme de cautionnement, d'assurance ou autre par le demandeur en tenant compte des obligations de paiement ou de livraison de grain contractées par celui-ci envers les détenteurs de récépissés délivrés en application de la présente loi.

Terms and conditions of licence

(3) A licence issued pursuant to this section shall be

(a) for a term not exceeding five years; and

(b) subject to such conditions, in addition to any prescribed conditions, as the Commission deems appropriate in the public interest for facilitating trade in grain.

R.S., 1985, c. G-10, s. 45; 1994, c. 45, s. 10; 2001, c. 4, s. 88(E).

Modalités des licences

(3) Toute licence délivrée en vertu du présent article :

a) a une durée de validité maximale de cinq ans;

b) est assortie des conditions réglementaires et des autres conditions que la Commission juge, dans l'intérêt public, de nature à faciliter le commerce des grains.

L.R. (1985), ch. G-10, art. 45; 1994, ch. 45, art. 10; 2001, ch. 4, art. 88(A).

Refusal to issue elevator licence

46 (1) The Commission may refuse to issue an elevator licence if the applicant has not given the security fixed pursuant to section 45 or fails to establish to the satisfaction of the Commission that

(a) the premises that the applicant proposes to use are appropriate for the storage and handling of grain; or

(b) the elevator is or will be of such a type and in such condition and the equipment of the elevator is or will be of such a type and size and in such condition as to enable the applicant to provide, at the location where the applicant proposes to operate the elevator, the services required by or pursuant to this Act to be provided at that location by a licensee holding a licence of the class for which the applicant has applied.

Refus de délivrance de licence — silo

46 (1) La Commission peut refuser de délivrer une licence d'exploitation de silo si l'intéressé n'a pas versé la garantie qu'elle a fixée en vertu de l'article 45 ou n'établit pas, à sa satisfaction :

a) soit que les locaux qu'il se propose d'utiliser conviennent au stockage et à la manutention du grain;

b) soit que le type et l'état de l'installation et de son équipement ainsi que la dimension de celui-ci lui permettront de fournir, au lieu d'exploitation proposé, les services imposés sous le régime de la présente loi au titulaire d'une licence de la catégorie de celle qui est demandée.

Refusal to issue grain dealer's licence

(2) The Commission may refuse to issue a grain dealer's licence if the applicant has not given the security fixed pursuant to section 45.

Refusal of licence re convictions

(3) The Commission may refuse to issue a licence if the applicant has been convicted of an offence under this Act within the twelve months immediately preceding the application for the licence and the Commission is satisfied that it would not be in the public interest to issue a licence to the applicant.

Interpretation

(4) Nothing in this section shall be construed as a limitation on the powers of the Commission to issue or refuse to issue a licence pursuant to any other provision of this Act.

R.S., 1985, c. G-10, s. 46; R.S., 1985, c. 37 (4th Supp.), s. 16; 1994, c. 45, s. 10.

47 [Repealed, 1994, c. 45, s. 10]

Consultation

48 (1) The Commission shall, at the request of an applicant for a licence, consult with the applicant with regard to any conditions that the Commission proposes to attach to the licence pursuant to paragraph 45(3)(b).

Amendment of licence

(2) The Commission may, subject to the regulations and on application by a licensee, amend any condition of a licence issued to the licensee.

R.S., 1985, c. G-10, s. 48; 1994, c. 45, s. 11.

Additional security

49 (1) Where the Commission has reason to believe and is of the opinion that any security given by a licensee pursuant to this Act is not sufficient, the Commission may, by order, require the licensee to give, within such period as the Commission considers reasonable, such additional security as, in the opinion of the Commission, is sufficient.

Enforcement or realization of security

(2) Any security given by a licensee as a condition of a licence may only be realized or enforced by

(a) the Commission; or

(b) any holder referred to in section 45 who has suffered loss or damage by reason of the refusal or failure of the licensee to

Refus de délivrance de licence de négociant en grains

(2) La Commission peut refuser de délivrer une licence de négociant en grains si l'intéressé n'a pas versé la garantie qu'elle a fixée en vertu de l'article 45.

Refus de délivrance — condamnations

(3) La Commission peut refuser de délivrer une licence à toute personne condamnée pour infraction à la présente loi dans les douze mois qui précèdent la demande lorsqu'elle est convaincue que cela serait contraire à l'intérêt public.

Interprétation

(4) Les pouvoirs de refus de délivrance prévus au présent article ne limitent pas les pouvoirs de délivrance ou de refus de délivrance de licences que les autres dispositions de la présente loi confèrent à la Commission.

L.R. (1985), ch. G-10, art. 46; L.R. (1985), ch. 37 (4e suppl.), art. 16; 1994, ch. 45, art. 10.

47 [Abrogé, 1994, ch. 45, art. 10]

Consultation

48 (1) À la demande de l'intéressé, la Commission est tenue de discuter avec lui des conditions qu'elle entend fixer en application de l'alinéa 45(3)b).

Modification d'une licence

(2) La Commission peut, sous réserve des règlements et sur demande du titulaire, modifier les conditions de sa licence.

L.R. (1985), ch. G-10, art. 48; 1994, ch. 45, art. 11.

Garantie supplémentaire

49 (1) Lorsqu'elle a des raisons de croire que la garantie donnée en application de la présente loi par un titulaire de licence est insuffisante, la Commission peut, par arrêté, obliger celui-ci à fournir, dans le délai qu'elle juge raisonnable, la garantie supplémentaire qu'elle estime suffisante.

Recouvrement ou réalisation

(2) La garantie donnée par un titulaire de licence ne peut être réalisée ou recouvrée que, selon le cas :

a) par la Commission;

b) par tout détenteur visé à l'article 45 et qui a subi une perte ou des dommages en raison du manquement du titulaire, délibéré ou non :

(i) comply with this Act or any regulation or order made thereunder, or

(ii) meet any of the licensee's payment or delivery obligations to that holder on the surrender of any cash purchase ticket, elevator receipt or grain receipt issued by the licensee pursuant to this Act.

(i) aux exigences de la présente loi, ainsi que des règlements ou ordonnances pris sous son régime,

(ii) à l'obligation de lui faire un paiement ou de lui livrer du grain sur remise du bon de paiement, de l'accusé de réception ou du récépissé délivré par le titulaire en application de la présente loi.

(2.1) [Repealed, 1994, c. 45, s. 12]

(2.1) [Abrogé, 1994, ch. 45, art. 12]

Limitation — primary or process elevator or grain dealers

(3) Notwithstanding subsection (2), a security given by a licensee as a condition of a licence to operate a primary or process elevator or to carry on business as a grain dealer may be realized or enforced in relation to a cash purchase ticket, an elevator receipt or a grain receipt only if

(a) the licensee fails or refuses to meet any of their payment or delivery obligations to the producer of the grain to which the ticket or receipt relates within such period as may be prescribed after the day on which the grain was delivered to the licensee; and

(b) the producer of the grain has given notice in writing of the failure or refusal to the Commission within thirty days after the failure or refusal.

Limite

(3) Par dérogation au paragraphe (2), la garantie donnée par le titulaire d'une licence d'exploitation d'un silo primaire ou d'un silo de transformation ou d'un commerce de grains ne peut être réalisée ou recouvrée relativement à un accusé de réception, un bon de paiement ou un récépissé que si, à la fois :

a) avant l'expiration de la période réglementaire suivant la livraison au titulaire du grain qui y est visé, celui-ci a manqué à son obligation de paiement ou de livraison envers le producteur ou a refusé de l'exécuter;

b) le producteur en a avisé par écrit la Commission dans les trente jours suivant le manquement ou le refus.

Limitation — terminal and transfer elevator

(4) Notwithstanding subsection (2), a security given by a licensee as a condition of a licence to operate a terminal or transfer elevator may be realized or enforced in relation to an elevator receipt only if the holder of the receipt has given notice in writing to the Commission within thirty days after the failure or refusal of the licensee to meet any of their delivery obligations to the holder.

Idem

(4) Par dérogation au paragraphe (2), la garantie donnée par le titulaire d'une licence d'exploitation d'un silo terminal ou d'un silo de transbordement ne peut être réalisée ou recouvrée relativement à un récépissé que si le détenteur a avisé par écrit la Commission dans les trente jours suivant le manquement ou le refus du titulaire d'exécuter son obligation de livraison envers lui.

Limitation — prescribed percentage

(5) Notwithstanding any other provision of this Act, the Commission may prescribe by regulation the percentage of the value of a cash purchase ticket, an elevator receipt or a grain receipt that may be realized or enforced against security given by a licensee, and the security may be realized or enforced in relation to the cash purchase ticket, elevator receipt or grain receipt only to the extent of the prescribed percentage.

Idem

(5) Par dérogation aux autres dispositions de la présente loi, la Commission peut fixer par règlement le pourcentage de la valeur de l'accusé de réception, du bon de paiement ou du récépissé à l'égard duquel la garantie donnée par le titulaire de licence peut être réalisée ou recouvrée, celle-ci ne pouvant alors l'être que dans la mesure nécessaire au recouvrement du pourcentage réglementaire.

Interpretation — failure to meet payment obligations

(6) If the failure on the part of a licensee to meet the licensee's payment obligations is a result of their giving to the producer a cash purchase ticket or other bill of exchange that the bank or other financial institution on which it is drawn subsequently refuses to honour, that

Disposition interprétative

(6) Le manquement à ses obligations de la part du titulaire de licence lorsque celui-ci remet au producteur un bon de paiement ou toute autre lettre de change que la banque ou autre institution financière sur laquelle ils sont tirés refuse par la suite d'honorer est réputé avoir lieu à la date de la remise.

failure occurs when the cash purchase ticket or other bill of exchange is given to the producer.

(7) [Repealed, 1998, c. 22, s. 6]

Insurance

(8) The Commission may require an applicant for or the holder of a primary elevator licence, a terminal elevator licence or a transfer elevator licence to obtain insurance, in accordance with the regulations, against loss of or damage to the grain stored in the elevator.

R.S., 1985, c. G-10, s. 49; R.S., 1985, c. 37 (4th Supp.), s. 17; 1994, c. 45, s. 12; 1998, c. 22, ss. 6, 25(F).

Restrictions — no liability for improper delivery of grain

49.1 (1) The Commission is not liable to a producer who has delivered grain

(a) to a person who is not a licensee; or

(b) to a licensee, if the producer has not obtained a cash purchase ticket, an elevator receipt or a grain receipt from the licensee.

No liability

(2) The Commission is not liable if a licensee fails to fulfill any payment or delivery obligation owed to a holder of a grain receipt, elevator receipt or cash purchase ticket.

1994, c. 45, s. 13; 1998, c. 22, s. 8.

Charges by Licensees

Charges to be filed

50 (1) Each licensee who operates an elevator shall, before the commencement of each crop year, file with the Commission a schedule of the charges to be made at the licensed elevator in the crop year for each service to be performed under their licence.

Amendment of charges

(2) A licensee who operates an elevator may, during a crop year, file with the Commission an amended schedule of charges for services to be performed under the licence in that crop year.

Condition

(3) An amended schedule of charges is not effective until it has been filed with the Commission.

R.S., 1985, c. G-10, s. 50; R.S., 1985, c. 37 (4th Supp.), s. 18; 1994, c. 45, s. 14.

(7) [Abrogé, 1998, ch. 22, art. 6]

Assurances

(8) La Commission peut exiger du demandeur ou du titulaire de licence de silo primaire, de silo de transbordement ou de silo terminal qu'il souscrive, en conformité avec les règlements, des polices d'assurance pour couvrir la perte du grain stocké dans son silo ou les dommages qui peuvent lui être causés.

L.R. (1985), ch. G-10, art. 49; L.R. (1985), ch. 37 (4e suppl.), art. 17; 1994, ch. 45, art. 12; 1998, ch. 22, art. 6 et 25(F).

Restrictions

49.1 (1) La responsabilité de la Commission n'est pas engagée à l'égard du producteur qui a livré du grain à une personne non titulaire d'une licence ou qui n'a pas obtenu du titulaire auquel il a livré du grain un accusé de réception, un bon de paiement ou un récépissé.

Restriction

(2) La responsabilité de la Commission n'est pas engagée dans le cas où le titulaire de licence ne respecte pas son obligation de paiement ou de livraison envers les détenteurs d'accusés de réception, de récépissés ou de bons de paiement.

1994, ch. 45, art. 13; 1998, ch. 22, art. 8.

Tarif des services

Dépôt du tarif

50 (1) Le titulaire de licence qui exploite un silo dépose auprès de la Commission, avant le début de chaque campagne agricole, le tarif qui sera en vigueur durant la campagne pour les services qu'il fournira au titre de sa licence.

Modification du tarif

(2) Au cours d'une campagne agricole, le titulaire d'une licence d'exploitation peut déposer auprès de la Commission une modification du tarif pour les services qu'il fournira sous licence pendant cette période.

Condition

(3) Une modification du tarif ne peut entrer en vigueur avant son dépôt auprès de la Commission.

L.R. (1985), ch. G-10, art. 50; L.R. (1985), ch. 37 (4e suppl.), art. 18; 1994, ch. 45, art. 14.

(a) any grain, grain product or screenings unless the grain, grain product or screenings is weighed at the elevator immediately before or during receipt;

(b) any material or substance for storage other than grain, grain products or screenings; or

(c) [Repealed, 2005, c. 24, s. 1]

(d) any grain that the operator has reason to believe is infested or contaminated.

R.S., 1985, c. G-10, s. 57; 1998, c. 22, s. 12; 2005, c. 24, s. 1.

a) du grain, des produits céréaliers ou des criblures sans les peser immédiatement avant ou pendant leur réception;

b) pour stockage, d'autres matières que celles visées à l'alinéa a);

c) [Abrogé, 2005, ch. 24, art. 1]

d) du grain qu'il a des raisons de croire infesté ou contaminé.

L.R. (1985), ch. G-10, art. 57; 1998, ch. 22, art. 12; 2005, ch. 24, art. 1.

Grain out of condition

58 Except as required by order of the Commission, no operator of a licensed elevator is required to receive into the elevator any grain that has gone or is likely to go out of condition.

1970-71-72, c. 7, s. 46.

Grain avarié

58 Sous réserve d'une ordonnance de la Commission, l'exploitant d'une installation agréée n'est pas tenu d'y recevoir du grain avarié ou fort susceptible de le devenir.

1970-71-72, ch. 7, art. 46.

Seeds Act and *Pest Control Products Act*

58.1 No operator of a licensed elevator is required to receive into the elevator any grain that

(a) is of a variety produced from seed of a variety that is not registered under the *Seeds Act* for sale in or importation into Canada; or

(b) has in it, on it or has had applied to it a pest control product that is not registered under the *Pest Control Products Act* or any component or derivative of such a product.

2020, c. 1, s. 65.

Loi sur les semences et *Loi sur les produits antiparasitaires*

58.1 L'exploitant d'une installation agréée n'est pas tenu d'y recevoir du grain :

a) soit qui provient d'une variété de semence non enregistrée sous le régime de la *Loi sur les semences* pour vente ou importation au Canada;

b) soit qui contient un produit antiparasitaire non homologué en vertu de la *Loi sur les produits antiparasitaires*, ou l'un de ses composants ou dérivés, ou en est recouvert ou sur lequel un tel produit ou l'un de ses composants ou dérivés a été appliqué.

2020, ch. 1, art. 65.

Operator to exercise care and diligence

59 The operator of a licensed elevator shall exercise reasonable care and diligence to prevent any grain in the elevator from suffering damage or from deteriorating or going out of condition.

1970-71-72, c. 7, s. 47.

Précautions utiles

59 L'exploitant d'une installation agréée doit prendre toutes les précautions et mesures utiles pour empêcher que le grain qui y est stocké ne se dégrade ou s'avarie.

1970-71-72, ch. 7, art. 47.

Primary Elevators

Receipt of grain

60 Subject to section 58 and any order made under section 118, the operator of every licensed primary elevator shall, at all reasonable hours on each day on which the elevator is open, without discrimination and in the order in which grain arrives and is lawfully offered at the elevator, receive into the elevator all grain so lawfully offered for

Installations primaires

Ordre de réception du grain

60 Sous réserve de l'article 58 et d'un arrêté pris en application de l'article 118, l'exploitant d'une installation primaire agréée doit, aux heures normales d'ouverture des jours ouvrables, sans discrimination et selon l'ordre d'arrivée et d'offre légale du grain, recevoir tout le grain pour lequel il est en mesure d'offrir le type et l'espace de stockage demandés.

L.R. (1985), ch. G-10, art. 60; 1998, ch. 22, art. 25(F).

which there is, in the elevator, available storage accommodation of the type required by the person by whom the grain is offered.

R.S., 1985, c. G-10, s. 60; 1998, c. 22, s. 25(F).

Procedure on receipt of grain

61 (1) Subject to subsection (2), if grain is lawfully offered at a licensed primary elevator for sale or storage, other than for special binning, the operator of the elevator shall, at the prescribed time and in the prescribed manner, issue a cash purchase ticket or elevator receipt stating the grade name, grade and dockage of the grain, and immediately provide it to the producer.

Dispute

(2) If the producer and the operator of the elevator do not agree as to the grade of the grain, the dockage or a prescribed grain quality characteristic, the operator shall

(a) take a sample of the grain in the prescribed manner;

(b) deal with the sample in the prescribed manner; and

(c) issue an interim elevator receipt in the prescribed form.

Commission's report

(3) On receipt of a report from the Commission that assigns a grade in respect of the sample and that determines the dockage and each disputed grain quality characteristic, the operator of the elevator shall issue, at the prescribed time and in the prescribed manner, a cash purchase ticket or elevator receipt stating the grade name of the grain, the grade assigned in respect of the sample, the dockage so determined and each grain quality characteristic so determined, and immediately provide it to the producer.

R.S., 1985, c. G-10, s. 61; 1994, c. 45, s. 16; 2020, c. 1, s. 66.

Receipts for specially binned grain

62 (1) Where grain is lawfully offered at a licensed primary elevator for special binning and the operator of the elevator agrees to specially bin the grain, the operator shall specially bin the grain offered and issue an elevator receipt in prescribed form indicating special binning.

Samples of grain to be specially binned

(2) On the receipt at a licensed primary elevator of grain to be specially binned, the operator of the elevator shall, in the manner prescribed, take a sample of the grain and deal with the sample.

Marche à suivre après réception du grain

61 (1) Sous réserve du paragraphe (2), lorsqu'un producteur lui offre légalement du grain pour vente ou stockage, ailleurs qu'en cellule, l'exploitant d'une installation primaire agréée établit, selon les modalités de temps et autres modalités réglementaires, un bon de paiement ou un récépissé faisant état du grade du grain, de son appellation de grade et des impuretés qu'il contient et le délivre sans délai au producteur.

Mésentente

(2) S'il y a mésentente entre le producteur et l'exploitant sur ce grade, ces impuretés ou une caractéristique de qualité du grain prévue par règlement, l'exploitant :

a) prélève un échantillon du grain en la forme réglementaire,

b) suit la procédure réglementaire fixée à l'égard de cet échantillon,

c) délivre, en la forme réglementaire, un récépissé provisoire.

Rapport de la Commission

(3) Sur réception du rapport de la Commission attribuant un grade à l'échantillon, en déterminant les impuretés et déterminant toute caractéristique de qualité faisant l'objet de la mésentente, l'exploitant établit, selon les modalités de temps et autres modalités réglementaires, un bon de paiement ou un récépissé faisant état du grade du grain, de son appellation de grade, des impuretés qu'il contient et des caractéristiques de qualité ainsi déterminées et le délivre sans délai au producteur.

L.R. (1985), ch. G-10, art. 61; 1994, ch. 45, art. 16; 2020, ch. 1, art. 66.

Récépissés pour stockage en cellule

62 (1) L'exploitant d'une installation primaire agréée qui accepte l'offre légale de stockage de grains en cellule constate l'emploi de ce procédé sur le récépissé qu'il délivre.

Échantillons

(2) Sur réception du grain à stocker en cellule, l'exploitant de l'installation primaire agréée prélève un échantillon et applique la procédure réglementaire établie à cet égard.

Disputes

(3) Where a dispute arises between the holder of an elevator receipt indicating special binning and the operator of a licensed primary elevator in relation to the special binning, the Commission may, after affording any interested person a full and ample opportunity to be heard, examine the sample of the grain taken pursuant to subsection (2) and, if it determines that the identity of the grain has not been preserved in the elevator, make such order for payment or for the delivery of grain or both as it deems just.

Restriction

(4) No order shall be made under subsection (3) unless written notice of the dispute has been received by the Commission within 30 days after the delivery of the grain that is the subject of the dispute to a terminal elevator or process elevator.

R.S., 1985, c. G-10, s. 62; 1998, c. 22, s. 25(F); 2012, c. 31, s. 366.

Requested treatment of grain

63 Where

(a) a person lawfully offers grain for storage at a licensed primary elevator equipped to treat the grain in a particular manner and requests that the grain be treated in that manner before the type of storage or the grade of the grain or both are determined, and

(b) the operator of the elevator agrees to receive the grain or is required by this Act or an order of the Commission to receive the grain,

the operator shall, in such manner as may be prescribed, weigh, handle and treat the grain as requested and shall issue an elevator receipt for the grain.

R.S., 1985, c. G-10, s. 63; 1998, c. 22, s. 25(F).

Verification of weight

64 The operator of a primary elevator shall afford to any person who delivers grain to the elevator full facilities to verify the correct weight of the grain while the grain is being weighed.

1970-71-72, c. 7, s. 52.

Compulsory removal of grain

65 (1) Subject to subsection (2), the operator of a licensed primary elevator may, on at least ten days notice in writing, in a form and manner prescribed, to the last known holder of an elevator receipt issued by the operator, require the holder to take delivery from the elevator of the grain referred to in the receipt.

Désaccord

(3) En cas de désaccord entre le détenteur d'un récépissé constatant le stockage en cellule et l'exploitant d'une installation primaire agréée, au sujet du stockage en cellule du grain, la Commission peut, après avoir donné aux intéressés l'occasion de se faire entendre, examiner l'échantillon prélevé en application du paragraphe (2) et, si elle décide que le grain n'a pas été bien séparé dans l'installation, ordonner, selon ce qu'elle estime juste, le paiement ou la livraison du grain ou l'un et l'autre.

Restriction

(4) La prise de l'arrêté visé au paragraphe (3) est subordonnée à la condition que la Commission ait reçu avis écrit du désaccord dans les trente jours suivant la livraison du grain en cause à une installation terminale ou de transformation.

L.R. (1985), ch. G-10, art. 62; 1998, ch. 22, art. 25(F); 2012, ch. 31, art. 366.

Traitement particulier

63 L'exploitant d'une installation primaire agréée effectue le pesage, la manutention et le traitement du grain, qui lui est légalement offert pour stockage, conformément à la demande qui lui est faite et aux modalités réglementaires et délivre ensuite un récépissé dans le cas suivant :

a) la personne qui lui offre le grain lui demande de procéder à un traitement particulier pour lequel l'installation est équipée préalablement à la détermination du type de stockage ou au classement par grades du grain ou à l'une et l'autre;

b) il accepte de recevoir le grain ou y est contraint par la présente loi ou un arrêté de la Commission.

L.R. (1985), ch. G-10, art. 63; 1998, ch. 22, art. 25(F).

Vérification du poids

64 L'exploitant d'une installation primaire offre toutes possibilités à la personne qui y livre du grain d'en vérifier le poids exact pendant la pesée.

1970-71-72, ch. 7, art. 52.

Enlèvement obligatoire du grain

65 (1) Sous réserve du paragraphe (2), l'exploitant d'une installation primaire agréée peut, par avis écrit d'au moins dix jours donné, en la forme réglementaire, au dernier détenteur connu d'un récépissé délivré par lui, obliger celui-ci à prendre livraison du grain visé par le récépissé.

Restriction applicable to specially binned grain

(2) Except with the written permission of the Commission, no operator of a licensed primary elevator shall, pursuant to subsection (1), require the holder of an elevator receipt for specially binned grain to take delivery of the grain.

Failure to take delivery

(3) Where the holder of an elevator receipt issued by the operator of a licensed primary elevator fails to take delivery of the grain referred to in a notice given pursuant to subsection (1) within a period for taking delivery set out in the notice, whether or not the notice has been brought to the attention of the holder, and the holder or a subsequent holder later requests delivery of the grain referred to in the receipt, the operator of the elevator may, at the option of the operator, on surrender of the elevator receipt and payment of all charges accruing under this Act to the day on which the receipt is surrendered,

(a) deliver grain pursuant to the surrendered receipt;

(b) pay to the holder of the surrendered receipt the market price, on the day that the receipt is surrendered, for grain of the same kind, grade and quantity as the grain referred to in the receipt; or

(c) deliver to the holder of the surrendered receipt an elevator receipt issued by the operator of a licensed terminal elevator for grain of the same kind, grade and quantity as the grain referred to in the surrendered receipt.

Warning

(4) Each elevator receipt issued by the operator of a licensed primary elevator shall bear the following warning:

"WARNING: The right of the holder of this receipt to obtain delivery of the grain described in the receipt may be altered by the issuer by notice to the last holder known to the issuer. Every holder of a receipt should immediately notify the issuer of their name and address.

AVERTISSEMENT : L'exploitant qui a délivré le récépissé peut, par avis au dernier détenteur connu, modifier le droit de celui-ci d'obtenir livraison du grain faisant l'objet du récépissé. Les nouveaux détenteurs doivent lui communiquer sans délai leurs nom et adresse."

R.S., 1985, c. G-10, s. 65; 1994, c. 45, s. 17; 2012, c. 31, s. 367.

Waiver

66 (1) The holder of an elevator receipt issued by the operator of a licensed primary elevator may, in writing in prescribed form on the receipt, waive the right to

Restriction en cas de stockage en cellule

(2) Sauf autorisation contraire par écrit de la Commission, le paragraphe (1) ne permet pas à l'exploitant d'une installation primaire agréée d'obliger le détenteur d'un récépissé pour du grain stocké en cellule à en prendre livraison.

Défaut de prendre livraison

(3) Faute par le détenteur de se conformer à l'avis visé au paragraphe (1), dans le délai imparti, qu'il en ait ou non pris connaissance, l'exploitant de l'installation peut, sur remise du récépissé par le détenteur en question ou par un détenteur subséquent, et sur paiement des droits exigibles aux termes de la présente loi :

a) soit livrer le grain conformément au récépissé;

b) soit payer au détenteur du récépissé le prix du marché, au jour de la remise du récépissé, pour du grain en même quantité et des mêmes type et grade que ceux visés au récépissé;

c) soit remettre au détenteur du récépissé un récépissé délivré par l'exploitant d'une installation terminale agréée pour du grain en même quantité et des mêmes type et grade que ceux visés au récépissé qui a été remis par le détenteur.

Avertissement

(4) Chaque récépissé délivré par l'exploitant d'une installation primaire agréée doit porter la mention suivante :

« AVERTISSEMENT : L'exploitant qui a délivré le récépissé peut, par avis au dernier détenteur connu, modifier le droit de celui-ci d'obtenir livraison du grain faisant l'objet du récépissé. Les nouveaux détenteurs doivent lui communiquer sans délai leurs nom et adresse.

WARNING : The right of the holder of this receipt to obtain delivery of the grain described in the receipt may be altered by the issuer by notice to the last holder known to the issuer. Every holder of a receipt should immediately notify the issuer of their name and address. »

L.R. (1985), ch. G-10, art. 65; 1994, ch. 45, art. 17; 2012, ch. 31, art. 367.

Renonciation au droit de livraison

66 (1) Le détenteur d'un récépissé délivré par l'exploitant d'une installation primaire agréée peut, en s'y engageant par écrit sur le récépissé, en la forme

demand the delivery from the elevator of the grain referred to in the receipt.

Subsequent holders

(2) The rights of subsequent holders of an elevator receipt referred to in subsection (1) are subject to a waiver given pursuant to that subsection.

1970-71-72, c. 7, s. 54.

Discharge of grain from primary elevator

67 (1) Subject to section 86, the operator of a licensed primary elevator shall without delay discharge into a conveyance referred to in paragraph (b), to the extent of the conveyance's capacity, the identical grain or grain of the same kind, grade and quantity that any elevator receipt issued by the operator requires if the holder of the receipt who is entitled to the delivery of grain referred to in that receipt

(a) may lawfully deliver the grain to a terminal elevator or process elevator or to a consignee at a destination other than an elevator; and

(b) has caused to be placed at the elevator, to transport the grain, a railway car or other conveyance that is capable of receiving grain discharged out of the elevator and to which the grain may lawfully be delivered.

Movement of grain forward

(2) Forthwith on the loading of a conveyance at a licensed primary elevator pursuant to subsection (1), the operator of the elevator shall, if so requested by the holder of the elevator receipt for the grain so loaded,

(a) cause the conveyance to be billed to such elevator or consignee as the holder may have lawfully directed; and

(b) on surrender of the elevator receipt and payment of the charges accrued under this Act in respect of the grain, deliver the receipt of the consignee or such other receipt as may be prescribed to the person who surrendered the elevator receipt.

R.S., 1985, c. G-10, s. 67; 2012, c. 31, s. 368.

Purchase of elevator receipt by operator

68 Where an operator of a licensed primary elevator who has issued an elevator receipt for grain purchases the receipt, the operator shall issue to the holder of the receipt, on the surrender of the receipt, a cash purchase ticket for the purchase price.

1970-71-72, c. 7, s. 56.

68.1 [Repealed, 2012, c. 31, s. 369]

réglementaire, renoncer à son droit d'exiger la livraison du grain en faisant l'objet.

Détenteurs subséquents

(2) La renonciation prévue au paragraphe (1) est opposable aux détenteurs subséquents.

1970-71-72, ch. 7, art. 54.

Déchargement d'une installation primaire

67 (1) Sous réserve de l'article 86, l'exploitant d'une installation primaire agréée remplit sans délai le véhicule de transport visé à l'alinéa b) avec le grain mentionné sur le récépissé qu'il a délivré ou du grain en même quantité et des mêmes type et grade que ceux qui y sont précisés, si le détenteur du récépissé qui a droit à la livraison du grain visé par celui-ci :

a) peut légalement livrer le grain à une installation terminale ou de transformation, ou à un consignataire en un lieu autre qu'une installation;

b) a pris les arrangements voulus pour que se trouve sur place, à l'installation, un wagon ou autre véhicule de transport pouvant légalement recevoir un chargement de grain.

Acheminement du grain

(2) Dès que le chargement visé au paragraphe (1) est terminé, et si le détenteur du récépissé lui en fait la demande, l'exploitant :

a) fait acheminer le véhicule de transport à l'installation ou au consignataire légalement désigné par le détenteur;

b) délivre à la personne qui lui remet le récépissé et acquitte les droits exigibles aux termes de la présente loi, le récépissé du consignataire ou tout autre récépissé prévu par règlement.

L.R. (1985), ch. G-10, art. 67; 2012, ch. 31, art. 368.

Achat d'un récépissé par l'exploitant

68 L'exploitant d'une installation primaire agréée qui achète un récépissé qu'il a lui-même établi délivre au détenteur qui le lui remet un bon de paiement équivalent au prix d'achat.

1970-71-72, ch. 7, art. 56.

68.1 [Abrogé, 2012, ch. 31, art. 369]

grain is not lawfully receivable by the operator of the elevator or other consignee.

R.S., 1985, c. G-10, s. 81; R.S., 1985, c. 37 (4th Supp.), s. 24; 1994, c. 45, s. 22; 2004, c. 25, s. 108.

Records and reports

82 Every licensed grain dealer shall maintain such records of his business as a grain dealer and make such reports to the Commission in respect of that business as may be prescribed.

1970-71-72, c. 7, s. 68.

82.1 [Repealed, 2012, c. 31, s. 377]

Grain Handling Generally

Contracts to be made only by licensees

83 (1) No person in the Western Division shall, for reward, by way of a profit, commission or otherwise,

(a) act on behalf of any other person in buying, selling or arranging for the weighing, inspection or grading of western grain, or

(b) make any contract for the purchase of western grain,

unless that person is a licensee or is employed by a licensee and acts only on behalf of his employer.

Exception

(2) Subject to this Act, a transaction referred to in subsection (1) may be entered into by a person who is not a licensee where the transaction is

(a) a contract for the purchase of grain without reference to any grade name on terms whereby the consideration payable under the contract for the purchase of the grain is to be paid in full at the time of the making of the contract or the delivery of the grain;

(b) a contract for the purchase of grain whereby the grain is purchased by a producer of grain for use as seed in the producer's farming operation;

(c) a contract for the purchase of grain whereby a person who raises livestock or poultry purchases the grain for feeding the livestock or poultry; or

(d) a contract made on the premises of a recognized grain exchange by or through a broker who is a member of the exchange and duly recorded pursuant to the rules of the exchange.

R.S., 1985, c. G-10, s. 83; 1994, c. 45, s. 24.

Registres et rapports

82 Chaque négociant en grains titulaire d'une licence tient les registres de son commerce et fait à la Commission les rapports réglementaires y afférents.

1970-71-72, ch. 7, art. 68.

82.1 [Abrogé, 2012, ch. 31, art. 377]

Manutention du grain en général

Opérations réservées aux titulaires de licences

83 (1) Il est interdit, dans la région de l'Ouest, à toute personne qui n'est pas titulaire d'une licence ou mandatée par son employeur titulaire de licence de se faire rémunérer, d'une manière ou d'une autre, notamment au titre d'un profit ou d'une commission, pour les opérations suivantes :

a) achat, vente ou négociations en vue de la pesée, de l'inspection ou du classement par grades, au nom d'une autre personne, de grain de l'Ouest;

b) signature d'un contrat pour l'achat de grain de l'Ouest.

Exceptions

(2) Par dérogation au paragraphe (1) et sous réserve des autres dispositions de la présente loi, peuvent être signés par une personne qui n'est pas un titulaire de licence les contrats suivants :

a) un contrat d'achat de grain dont l'appellation de grade n'est pas spécifiée, prévoyant le plein paiement du prix fixé à la signature du contrat ou à la livraison du grain;

b) un contrat d'achat de grain, par un producteur de grain, à titre de semences pour son exploitation agricole;

c) un contrat d'achat de grain, par un éleveur, pour l'alimentation de son bétail ou de ses volailles;

d) un contrat signé dans l'enceinte d'une bourse des grains reconnue, par un courtier membre de cette bourse et dûment enregistré en conformité avec les règlements de cette bourse.

L.R. (1985), ch. G-10, art. 83; 1994, ch. 45, art. 24.

TAB 4

CHAPTER 86.

An Act respecting Grain.

SHORT TITLE.

1. This Act may be cited as the Canada Grain Act. Short title.
1925, c. 33, s. 1.

INTERPRETATION.

2. In this Act, unless the context otherwise requires, Definitions.

(a) "agent" or "railway agent" includes any railway station agent; "Agent." "Railway agent."

(b) "appeal inspector" means an inspector of grain designated under the provisions of this Act, to hear appeals in the first instance from the grading of grain by an inspecting officer; "Appeal inspector."

(c) "applicant" referring to an applicant for cars, means any person who owns grain for shipment in car lots, or who is an operator of any elevator; "Applicant."

(d) "assistant chief inspector" means an assistant chief inspector of grain appointed or continued in office under this Act; "Assistant chief inspector."

(e) "Board" means the Board of Grain Commissioners for Canada; "Board."

(f) "chief deputy inspector" means a chief deputy inspector of grain appointed or continued in office under this Act; "Chief deputy inspector."

(g) "chief inspector" means the chief inspector of grain appointed or continued in office under this Act; "Chief inspector."

(h) "commission merchant" means any person who sells grain on commission; "Commission merchant."

(i) "country elevator" means such as are described in section one hundred and forty-three of this Act; "Country elevator."

(j) "Department" means the Department of Trade and Commerce; "Department."

(k) "deputy inspector" means a deputy inspector of grain appointed or continued in office under this Act; "Deputy inspector."

(l) "district" means an inspection district or subdivision established under this Act; "District."

Grain not required to be received if no room or elevator closed.

212. Nothing in this Act shall be construed to require the receipt of any kind of grain into any elevator in which there is not sufficient room to accommodate or store it properly, or in cases where the elevator is necessarily closed. 1925, c. 33, s. 212.

Delivery of grain deemed a bailment, not a sale.

213. 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. 1925, c. 33, s. 213.

Officers to examine condition of grain cars.

214. Every officer, before opening the doors of any car containing grain upon its arrival at any place designated by law as an inspection point for the purpose of inspecting or weighing such grain shall

(a) ascertain the condition of such car and determine whether any leakages have occurred while the car was in transit; and

(b) make a record of any leakages found, stating the facts connected therewith.

Report.

2. Such officer shall forthwith report the defective condition of such car to the proper railway official, and to the Board. 1925, c. 33, s. 214.

Identity of grain.

215. For the purpose of preserving the identity of grain in transit to points of consumption in Canada or to points of export shipment on the seaboard, the Board may grant to any shipper permission to lease for such term as is approved by him special bins in such public terminal elevators as are necessarily used in the transportation of grain for the special binning of grain in transit.

Special bins.

2. The bin capacity which may be so leased in any public terminal elevator shall be as the Board shall approve, but shall not be less than sixteen thousand bushels in any such elevator.

Term.

3. The term of the several leases shall be as approved by the Board.

Lease of.

4. The shipper receiving such permission may, subject to its terms, enter into an agreement for the lease of special bins in public terminal elevators necessary to the transportation of grain to the point of destination.

Rates for.

5. The rates to be paid for the lease of such special bins shall be such as are agreed upon: Provided that on payment of the regular rate for the full capacity leased for the full term of the lease the shipper acting under the permission of the Board as in this section provided, shall be given a lease of the bin capacity to which he thereby becomes entitled.

TAB 5

1932 CarswellAlta 1
Alberta Supreme Court [Appellate Division]

Busse v. Edmonton Grain & Hay Co.,

1932 CarswellAlta 1, [1932] 1 W.W.R. 296, [1932] 1 D.L.R. 744, 26 Alta. L.R. 83

Busse (Plaintiff) Appellant v. Edmonton Grain & Hay Company Limited (Defendant) Respondent

Harvey, C.J.A., Clarke, Mitchell, Lunney and McGillivray, JJ.A.

Judgment: January 20, 1932

Counsel: *E. S. M. Wyman*, for plaintiff, appellant.
C. H. Grant, K.C., for defendant, respondent.

Subject: Public; Contracts
Headnote
Grain Laws --- Contracts for sale of grain — Passing of title
Grain — Storage of in Elevator — Subsequent Agreement for Sale — Grain Destroyed by Fire — Right to Insurance Moneys — Whether Title Had Passed Under Agreement — Storage Receipt Under S. 148 Canada Grain Act, 1925.
Appeal — Raising New Point on — Governing Principle.
The plaintiff stored grain with the defendant elevator company and was given a graded storage receipt therefor in pursuance of sec. 148 of *The Canada Grain Act, 1925*. Afterwards the plaintiff and defendant agreed that the plaintiff would sell the grain to the defendant at a price three cents per bushel above the Fort William price, less freight and charges, at any time that the plaintiff elected so to sell and the defendant agreed to purchase the grain on such election. The grain was put in a particular bin by itself and most of it remained there until it was destroyed by fire before the plaintiff had made such election. The grain had been insured by the defendant and it collected the insurance moneys. The plaintiff sued for the insurance moneys on the grain actually burned and for the value of grain which had been taken and used by the defendant. Ewing, J. dismissed the action ([1931] 3 W.W.R. 262), holding that under said agreement the title to the grain had passed to the defendant, and the plaintiff had merely reserved the right to fix the price in the manner provided therein. On appeal
Held that the ownership of the grain had not passed to the defendant under the contract and that, therefore, the plaintiff was entitled to the judgment prayed for (*South Australian Insur. Co. v. Randell*, L.R. 3 P.C. 101, 6 Moo. P.C. [N.S.] 341, 16 E.R. 755, distinguished).

Appeal from the judgment of Ewing, J. ([1931] 3 W.W.R. 262). Appeal allowed with costs, and judgment directed for the plaintiff with costs.

The appeal was heard by HARVEY, C.J.A., CLARKE, MITCHELL, LUNNEY and MCGILLIVRAY, JJ.A.

The judgment of the Court was delivered by *Harvey, C.J.A.*:

1 This is an appeal by the plaintiff from a judgment of Ewing, J. reported in [1931] 3 W.W.R. 262, in which the facts are stated. I do not, therefore, restate them.

2 The learned trial Judge bases his judgment on an agreement which he finds to have been put in writing to sell the grain at a price three cents a bushel more than the Fort William price at the time the plaintiff elected to fix the price, under which in his opinion the title passed to the defendant at the time of the agreement, which was before the fire.

3 It seems to me that this view is not the proper one having regard to the pleadings and the evidence.

4 The portion of the pleadings dealing with this defence is contained in pars. 7 and 8 which are as follows:

> At the time of the delivery of the said grain, it was agreed between the plaintiff and defendant that the plaintiff would sell the same to the defendant at a premium of three cents per bushel over Fort William prices, then fixed, less freight, at any time that the plaintiff elected to sell the said grain and the defendant agreed to purchase the same on such election.
>
> The plaintiff has not elected to sell the said grain, or if he has so elected, has not notified the defendant thereof and the defendant is still ready and willing to purchase said grain at the premium agreed upon, namely 3c. per bushel over Fort William prices, less freight.

5 That clearly alleges, not a sale, but an option to sell with the distinct allegation that the option had not been exercised, and the evidence is not in any way in conflict with that aspect but on the contrary is in entire harmony with it. Of the two witnesses for the defendant who give evidence of the agreement, one says:

> The purport of it was we were to purchase the grain put into storage by Busse at 3c. over spot; any day that he elected, less of course our charges.

6 The other witness, who says he drew the agreement, says it was:

> That we would buy the barley at any day he may set at 3c. over spot, Fort William freight.

7 There is no suggestion in that that the defendant had bought the grain, but it is that it would buy it when the plaintiff elected to sell, which the pleadings allege he had not done. Moreover the defendant has maintained and still maintains its right to charge for storage which would seem to be more consistent with the view that the grain remained the property of the plaintiff.

8 In my view, therefore, the judgment cannot be sustained on this ground.

9 Mr. Grant, however, contends now that the original storage contract was in fact a contract of sale, and not one of bailment, and that sec. 213 of the *Canada Grain Act* then in force, R.S.C., 1927, ch. 86 [now 1930, ch. 5] which declares that it is a bailment and not a sale, is *ultra vires*. Mr. Wyman objects that this ground is now raised for the first time, and should not be considered. In view of the fact that, by reason of sec. 34 of *The Judicature Act*, R.S.A., 1922, ch. 72, judgment cannot be, and could not have been, for the defendant on this ground in the absence of notice to the Attorney-General for Canada and perhaps other reasons, it is doubtful whether this point should now be considered. The principle applicable is discussed in the judgment of the House of Lords in *North Staffordshire Ry. v. Edge*, [1920] A.C. 254, 89 L.J. K.B. 78, in which permission to raise a new point was refused, and it was held that such permission should only be given where it is clear that all the material facts are before the Court, "and that full justice can be done between the parties only by permitting the new point of controversy to be discussed." In that case, it was an appellant who desired to raise the point, but in *Thomson v. Van Hummell and International Casualty Co.* (1913) 48 S.C.R. 167, 4 W.W.R. 385, the new point was being raised by the respondent, and Davies, J. (as he then was) with whom Anglin, J. (as he then was) concurred, expressed himself to the same effect.

10 Certainly the ground is not definitely raised in the pleadings and that it was not intended to be covered by any indefinite provision of the defence seems clear from the fact that we now hear of it for the first time. It is contended that it is covered by par. 5 of the defence which is as follows:

> The defendant admits that it received 1446 bushels and 10 pounds of barley from the plaintiff and issued in respect thereof to the plaintiff a certain storage receipt, under the provisions of the *Canada Grain Act*, and the defendant's agreement thereunder was to return to the plaintiff, upon payment of the defendant's charges, the said quantity, grade and kind of grain to the plaintiff.

11 It is argued that it is implied by the last words of the paragraph that the transaction was not a bailment and was therefore a sale, but on the other hand the earlier words of the paragraph distinctly allege that the storage receipt is given under the provision

of the *Canada Grain Act* and under those provisions it constitutes a bailment and not a sale. The contract moreover is in the terms prescribed by the Act.

12 It may be argued with force that the defendant has by this allegation declared the provisions of the Act a part of the contract and it would in such a case be of no importance whether those provisions were *ultra vires* the Parliament of Canada.

13 In view, however, of the conclusion I have reached on other grounds I find it unnecessary to form any decided opinion on either of these points.

14 Mr. Grant places great reliance on a decision of the Privy Council in 1869, *South Australian Insur. Co. v. Randell*, L.R. 3 P.C. 101, 6 Moo. P.C. (N.S.) 341, 16 E.R. 755. In that case a farmer had delivered grain to a miller. The receipt stated that the grain was "received to store." In the statement of the facts it is stated that the farmer was entitled to demand at any time an equal quantity of like quality but in the judgment it is stated that there is no direct evidence that such was the case and the judgment appears to assume that it was not but merely that he was entitled to demand the market price at the time of demand. In the meantime, he was charged, after a certain length of time, at the rate of a farthing per bushel per month. The miller insured all the grain in the mill and a fire occurred. The policy had a condition that "goods held in trust or on commission must be insured as such, otherwise the policy will not extend to cover them." The grain in storage was not described in the policy as in trust. The miller sued the insurance company. Its defence was only as to the grain in storage as respects which it pleaded "that the plaintiffs were not interested in the stock, and also that in their proposals for the insurance they represented that the stock was to be insured for themselves, whereas it was held by the plaintiffs in trust for other persons."

15 The report states (p. 102) that:

> The question was whether such portion, consisting of wheat, was held by the plaintiffs in trust, within the meaning of the above condition, and was therefore not covered by the policy.

16 It was held by the judgment that it was not, and that the insurance company was liable.

17 By the terms of the contract in the present case it is provided that the defendant's obligation may be satisfied by a delivery of other grain of equal quantity and like grade instead of by payment of the market price, in this respect differing from the Australian case. In that case though it was only necessary to determine whether the grain was held in trust within the meaning of the condition of the insurance policy the statements in the judgment are general and not limited in that way, it being said (p. 113):

> The result is, in the opinion of their Lordships, that the farmers who delivered their wheat to the Respondents upon the terms disclosed in the evidence should not be considered afterwards to be beneficial owners and the Respondents' bailees in trust for the farmers.

18 But it is to be noted that this is immediately preceded by a statement of the evidence showing, in the words of one of the plaintiffs, that:

> The wheat was ours, to do what we thought proper. We might grind or sell; and when anyone came who brought us wheat, we had to pay market price of equal quality.

19 This offers no alternative of a demand of a like quantity. Now the situation here is quite different from that. The defendant had no right to deal with it other than in accordance with the contract. It was there for storage and storage only. It was not put into a consumable stock as in the miller's case. The defendant was bound at all times to deliver it or its equivalent in quantity and quality whenever required by the plaintiff. It had no right to treat it as it saw fit as the miller had. Then there is the still more important fact that by the terms of the contract as well as by the statute the defendant was required to insure the grain and the cost of that insurance was to be borne by the plaintiff showing that it was intended for his benefit. The rate of payment for this service is left blank in the contract but sec. 147 of the statute provides that the Board of Grain Commissioners may make regulations for "the receipt, storage, insurance, handling and shipping of grain *** and the maximum rates of charges therefor" and that a copy of the regulations shall be posted in the elevator. It is common ground that the prescribed rates were to be paid by the plaintiff.

Under the present *Grain Act* it is expressly provided that the insurance shall be for the benefit of the person delivering the stored grain but, even in the absence of special provision, the fact that the cost of insurance is paid by the person who delivers the grain seems quite inconsistent with the view that he has lost his beneficial interest in it. There is no hint in the report of the Australian case that any part of the cost of the insurance was borne by the farmer. It was apparently by and for the miller alone.

20 In these very material respects the present case differs so entirely from the decided one that the latter cannot be deemed applicable. There are also many provisions of the statute to which exception probably could not be taken, limiting the elevator manager's control and authority over the grain and recognizing that of the depositor of the grain, which point to the same conclusion.

21 I am of the opinion therefore that ownership of the grain did not pass to the defendant under the contract. Fortunately, we are not required to consider what would be the situation had the grain actually been mixed with other grain so as to lose its identity for this grain was put in a particular bin by itself and the major portion of it so remained until it was destroyed by the fire. What had been taken had been used by the defendant for its own use. As already pointed out it had no authority to so use it and in doing that had rendered itself liable for conversion. The plaintiff is therefore entitled to the insurance money on the grain actually burned and for the value of the grain converted. As the price before the fire was not less than at that time he would be entitled to at least as much per bushel for the grain converted as for that burned. The evidence indicates that the sum received by way of insurance amounted to 57 cents per bushel and the plaintiff claims at that rate for the whole quantity which as stated would seem to be justified. He also admits that a deduction should be made of two and three-quarter cents per bushel for storage, insurance, etc. He would then be entitled to be paid 54 $^{1}/_{4}$ cents per bushel for the 1,446 bushels, or $784.45, and he should have judgment for that amount with interest at five per cent from February 1, 1930, with costs including costs of examination for discovery. He should also have his costs of appeal.

Appeal allowed with costs, and judgment directed for plaintiff with costs.

Solicitors of record:
Miller & Wyman, solicitors for plaintiff, appellant.
Grant & Stewart, solicitors for defendant, respondent.

TAB 6

2018 SKQB 304
Saskatchewan Court of Queen's Bench

Chaplin Grain Corp. v. Antelope Creek Enterprises Ltd.

2018 CarswellSask 529, 2018 SKQB 304, 299 A.C.W.S. (3d) 211

CHAPLIN GRAIN CORPORATION (PLAINTIFF / DEFENDANT BY COUNTERCLAIM) and ANTELOPE CREEK ENTERPRISES LTD. (DEFENDANT / PLAINTIFF BY COUNTERCLAIM)

Leurer J.A. (ex officio)

Judgment: November 9, 2018
Docket: Regina QBG 2882/15

Counsel: Phillip Gallet, for Plaintiff
Kenneth Brodt, for Defendant

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial

Headnote

Commercial law --- Agricultural products — Contracts for sale of grain — Delivery

Pursuant to written contract, defendant seller agreed to sell and plaintiff buyer agreed to purchase 475 metric tonnes of eston lentils, and contract contemplated that buyer would pay for lentils in 14 business days — Price of lentils rose dramatically between date of contract and date of delivery, and seller refused to deliver lentils to buyer — Seller justified refusal to deliver on basis that buyer was not licensed as grain dealer pursuant to Canada Grain Act — Seller sold lentils to different buyer M Ltd. at much higher price than it would have received if it sold lentils to buyer — Buyer was forced to re-enter market to purchase grain to substitute for lentils it had resold to its buyer, there was critical market shortage but it was able to purchase lentils from M Ltd. at same price it had purchased them from buyer — Result was that buyer suffered loss largely mirroring additional profit that seller was able to earn by walking away from its contract with buyer — Buyer brought action against seller seeking damages for breach of contract; and seller counterclaimed based on misrepresentation — Action dismissed; counterclaim dismissed — It was common ground that buyer was not licensed, and buyer conceded that contract was unenforceable unless it fell within scope of one of exceptions to licensing requirement — Section 83(2)(a) of Act set out two preconditions to operation of exception to licensing requirement, that contract must be for purchase of grain without reference to any grade name, and that consideration payable under contract for purchase of grain was to be paid in full at time of making of contract or delivery of grain, and failure to meet either precondition meant that buyer should have been licensed — Contract did not provide for purchase of grain to be paid in full at time of delivery of grain — In context of surrounding circumstances, it was concluded that it was implicit that 14 business days was statement of period of time within which payment would be made, and mentioned time period was measured beginning with date of physical delivery of grain — That understanding of contract also accorded with subjective view of parties — Specified payment term would allow time for buyer to grade grain and it would give seller assurance of specific date by which it would receive payment — Exception provided for in s. 83(2)(a) of Act was inapplicable because contract did not provide for payment in full at time of delivery, buyer was in breach of s. 83(1) of Act, and contract was unenforceable Canada Grain Act, R.S.C. 1985, c. G-10, s 83(2)(a).

Commercial law --- Sale of goods — Seller's remedies — Action for damages — Miscellaneous

Pursuant to written contract, defendant seller agreed to sell and plaintiff buyer agreed to purchase 475 metric tonnes of eston lentils, and contract contemplated that buyer would pay for lentils in 14 business days — Price of lentils rose dramatically between date of contract and date of delivery, and seller refused to deliver lentils to buyer — Seller justified refusal to deliver on basis that buyer was not licensed as grain dealer pursuant to Canada Grain Act — Seller sold lentils to different buyer M Ltd. at much higher price than it would have received if it sold lentils to buyer — Buyer was forced to re-enter market to purchase grain to substitute for lentils it had resold to its buyer, there was critical market shortage but it was able to purchase lentils from M Ltd.

at same price it had purchased them from buyer — Result was that buyer suffered loss largely mirroring additional profit that seller was able to earn by walking away from its contract with buyer — Buyer brought action against seller seeking damages for breach of contract; and seller counterclaimed based on misrepresentation — Action dismissed; counterclaim dismissed — While seller claimed that it relied on representation that buyer was licensed grain dealer to its detriment and suffered additional damages, nothing in evidence suggested that seller was told buyer was licensed — There was no evidence whatsoever that there was reliance on, or any loss flowing from, purported representation — Counterclaim was wholly without merit.

ACTION by buyer seeking damages for breach of contract; COUNTERCLAIM by seller based for misrepresentation.

***Leurer J.A. (ex officio)*:**

INTRODUCTION

1 The principal issue in this action is whether a buyer of grain was required to be licensed pursuant to the Canada Grain Act, RSC 1985, c G-10 [CGA] when it entered into a contract with a seller. The buyer concedes that the contract is unenforceable if a license was required in the circumstances of this case. Other questions remain to be answered, depending on the outcome of this issue.

2 Pursuant to written contract dated October 2, 2015 [contract], Antelope Creek Enterprises Ltd. [Antelope Creek] agreed to sell, and Chaplin Grain Corporation [Chaplin Grain] agreed to purchase, 475 metric tonnes of eston lentils [lentils], a form of small green lentils. The contract contemplated Antelope Creek would ship the lentils in November 2015 and be paid within 14 business days thereafter.

3 Between the date of the contract, and November 2015, the price of lentils rose dramatically. Antelope Creek refused to deliver the lentils when requested by Chaplin Grain, asserting it had been promised that delivery would occur in early November and it would be paid by November 10, 2015. Later, Antelope Creek also justified the refusal to deliver on the basis that Chaplin Grain was not licensed as a grain dealer pursuant to the *CGA*. In the end, Antelope Creek sold the lentils to a different buyer, at a much higher price than it would have received had it sold the lentils to Chaplin Grain. Chaplin Grain suffered a corresponding loss.

4 Chaplin Grain sues for the amount of its loss, and punitive damages. Antelope Creek advances a counterclaim, alleging it relied on a representation that Chaplin Grain was a licensed grain dealer.

5 For the reasons that follow, I dismiss both the claim and counterclaim.

BACKGROUND

6 Chaplin Grain is a closely-held corporation, controlled by Ronald Gleim and another family member. In 2015, Chaplin Grain operated grain cleaning and processing plants in Chaplin and Gull Lake. Part of Chaplin Grain's business involved the resale of grain purchased from producers. It is common ground that, at the time, Chaplin Grain was not licensed as a grain dealer pursuant to the *CGA*.

7 Antelope Creek is also a closely-held corporation, controlled by Ronald Mattus and other members of his family. In 2015, Antelope Creek farmed approximately 8,000 acres of land, and was one of the largest farms in the Chaplin area. Mr. Mattus was experienced in the marketing of lentils, having grown the crop for many years prior to 2015.

8 In early September 2015, Mr. Mattus contacted Tia Fahlman of Chaplin Grain, to determine Chaplin Grain's interest in purchasing the lentils. In a short conversation, Ms. Fahlman advised Mr. Mattus that the market was pricing lentils between $0.32 and $0.33 per pound. Mr. Mattus said he was looking to receive a minimum of $0.34 per pound, and therefore would not sell at that time. Ms. Fahlman told Mr. Mattus that she would be back in touch if she could find a buyer that would allow Chaplin Grain to meet Mr. Mattus' price.

9 Mr. Mattus contends he asked Ms. Fahlman if Chaplin Grain was licensed under the *CGA*, in response to which Ms. Fahlman said that licensure was in progress. Ms. Fahlman does not recall this detail of the conversation, but agreed on cross-

examination that she might have mentioned the licensing status of Chaplin Grain. Mr. Mattus does not suggest that he was told when the licensing process would be complete, and it is clear that, even on his telling of events, Mr. Mattus would have been aware that Chaplin Grain was not then a licensed grain dealer.

10 By early October 2015, Ms. Fahlman had identified a buyer for the lentils who was prepared to pay $0.35 per pound, which in turn would allow Chaplin Grain to meet Mr. Mattus' price. She called Mr. Mattus on Friday, October 2, 2015, and offered to purchase the lentils for $0.345 per pound. An agreement on price was reached between Ms. Fahlman and Mr. Mattus.

11 Mr. Mattus' evidence is that he told Ms. Fahlman he needed to have the lentils delivered and paid for by November 10, 2015. Ms. Fahlman conceded that Mr. Mattus wanted to make delivery in early November, and that Chaplin Grain would "try" to achieve this. However, Ms. Fahlman denied that she would have promised that this could be accomplished, given the possibility that matters, outside of the Chaplin Grain's control, could affect its ability to receive grain on a particular date or small range of dates.

12 After her short conversation with Mr. Mattus, Ms. Fahlman passed on the details of the arrangement reached with Mr. Mattus to her subcontractor, Tempest Besse, with instructions to Ms. Besse to prepare a written contract, in standard form, to send to Mr. Mattus. Ms. Besse promptly prepared the draft contract and sent it to Mr. Mattus. However, it contained mistakes. The draft contract indicated that shipment would be made to Chaplin Grain's Gull Lake facility, whereas Mr. Mattus and Ms. Fahlman agreed he could deliver to the Chaplin facility. Mr. Mattus signed the draft contract, but corrected this mistake, and sent it back to Ms. Besse on October 2, 2015.

13 On Monday, October 5, 2015, Ms. Besse prepared a revised form of contract, with the correct place of delivery, which she again sent to Mr. Mattus. Mr. Mattus noticed that while the place of delivery was now accurate, his name was misspelled. He corrected this mistake, and once again signed the contract, and returned it to Ms. Fahlman. Chaplin Grain sues on this contract.

14 In its central terms, the contract provides as follows:

COMMODITY:	ESTON LENTILS
QUALITY:	NUMBER 2 OR BETTER
QUANTITY:	APPX 475 METRIC TONS (APPX 17,500BU)
PRICE:	CAD 760.59 PER METRIC TON (3450CENTS)
DELIVERY TERMS:	DELIVERED CHAPLIN
PAYMENT TERMS:	15 BUSINESS DAYS
SHIPMENT PERIOD:	NOVEMBER 2015

[Exhibit JT1, Tab 3]

15 Other terms of the contract exist, including a term allowing Antelope Creek to meet its contractual obligation to deliver 475 tonnes within a five percent tolerance.

16 Relying on the contract, the next day, October 6, 2015, Chaplin Grain sold 460 metric tonnes of the lentils to a third party for $0.35 per pound. The evidence is, and I accept, that the quantity resold by Chaplin Grain was 15 tonnes less than purchased from Antelope Creek to allow for the possibility that Antelope Creek would deliver less than 475 tonnes.

17 The price of eston lentils increased dramatically in the weeks that followed. By November 3, 2015, one published price was for $0.44 per pound.

18 No contact occurred between Antelope Creek and Chaplin Grain between October 5, 2015, and November 2015. On November 3, 2015, Mr. Mattus sent a text message to Ms. Fahlman asking "When do u [*sic*] plan to take lentils need money by 10 of November Ron Mattus" (Exhibit JT1, Tab 16, p. 1).

19 A series of text messages passed between Mr. Mattus and Ms. Fahlman in the days that followed. Ms. Fahlman acknowledged that the "plan" had been to bring the lentils in the first week of November, but a "hiccup" had developed. Ms. Fahlman attempted to arrange a mutually agreeable delivery date later in November, but Mr. Mattus continued to insist on an earlier delivery. In a text message sent on November 6, 2015, Mr. Mattus advised that he was leaving on a holiday the next day and would be away until November 18, 2015. He asked "how much to buy out of lentil contract" (Exhibit JT1, Tab 16, p. 5). Later that day, Chaplin Grain sent a letter to Mr. Mattus calling for delivery of the lentils beginning November 16, 2015.

20 On November 18, 2015, the day Mr. Mattus had indicated he would return from his holiday, Chaplin Grain asked Mr. Mattus if he would be hauling in the lentils that week or the next. A further series of messages were exchanged, in which Mr. Mattus introduced, for the first time, that he had been in contact with the Canadian Grain Commission [Commission]. Mr. Mattus claimed "they asked me not to deliver as u [*sic*] are not licensed or bonded" (Exhibit JT1, Tab 18, p. 2).

21 Ultimately, messages exchanged between the parties evince Mr. Mattus' refusal to deliver the lentils to Chaplin Grain. On November 26, 2015, Mr. Mattus messaged advising:

> Our lentils are resold as you are not licenced have asked CGC to shut u [*sic*] down
>
> No costs to us as you are not licenced
>
> [Exhibit JT1, Tab 16, p. 8]

22 On November 27, 2015, Antelope Creek agreed to sell the lentils to a third party, Mid-West Grain Ltd. [Mid-West], at a price of $0.46 per pound. In the result, Antelope Creek received sales proceeds of approximately $120,000 above what it would have received had it sold the lentils to Chaplin Grain under the contract.

23 Like Chaplin Grain, Mid-West was not licensed or bonded under the *CGA*, although, as pointed out on behalf of Antelope Creek, Mid-West paid half of the purchase price for the lentils at the time its contract was entered into, and the second half 10 days later.

24 Chaplin Grain was forced to re-enter the market to purchase grain to substitute for the lentils it had resold to its buyer. There was a critical market shortage. Because of an existing relationship, Mid-West agreed to resell the lentils to Chaplin Grain for the same price it had purchased the lentils from Antelope Creek. The result of this was that Chaplin Grain suffered a loss largely mirroring the additional profit that Antelope Creek was able to earn by walking away from its contract with Chaplin Grain.

ISSUES

25 The following issues require resolution:

> (a) Is the contract contrary to s. 83 of the *CGA*?
>
> (b) Did the contact require Chaplin Grain to take delivery of the lentils in early November and to pay for the lentils prior to November 10, 2015?
>
> (c) Did Antelope Creek rely on a representation by Chaplin Grain that it was a licensed grain dealer?

(a) Is the contract contrary to s. 83 of the CGA?

26 Section 83 of the CGA prohibits the buying of grain in western Canada without a license, 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.

27 It is common ground that Chaplin Grain was not licensed in 2015, and Chaplin Grain conceded to Antelope Creek's position that, if the contract did not fall within the scope of one of the exceptions to the licensing requirement, the contract was unenforceable. I proceed on this basis.

28 Of particular import to the issues in this case are ss. 44 and 83 of the CGA, which, so far as is material to the issues in this claim, provide as follows:

> **44** No person shall
>
> . . .
>
> (b) carry on business as a grain dealer unless
>
> (i) that person is the holder of a grain dealer's licence,
>
> (ii) the business of that person as a grain dealer has been exempted from the licensing requirements of this Act pursuant to section 117, or
>
> (iii) that person deals in grain only in the course of operating a licensed elevator or as a broker trading on a recognized grain exchange.
>
> **83** (1) No person in the Western Division shall, for reward, by way of a profit, commission or otherwise,
>
> (a) act on behalf of any other person in buying, selling or arranging for the weighing, inspection or grading of western grain, or
>
> (b) make any contract for the purchase of western grain,
>
> unless that person is a licensee or is employed by a licensee and acts only on behalf of his employer.
>
> (2) Subject to this Act, a transaction referred to in subsection (1) may be entered into by a person who is not a licensee where the transaction is
>
> (a) a contract for the purchase of grain without reference to any grade name on terms whereby the consideration payable under the contract for the purchase of the grain is to be paid in full at the time of the making of the contract or the delivery of the grain;
>
> (b) a contract for the purchase of grain whereby the grain is purchased by a producer of grain for use as seed in the producer's farming operation;
>
> (c) a contract for the purchase of grain whereby a person who raises livestock or poultry purchases the grain for feeding the livestock or poultry; or
>
> (d) a contract made on the premises of a recognized grain exchange by or through a broker who is a member of the exchange and duly recorded pursuant to the rules of the exchange.

29 Chaplin Grain says that ss. 83(2)(a) is applicable. That provision sets out two preconditions to the operation of the exception to the licensure requirement: (1) the contract must be for the purchase of grain "without reference to any grade name"; and, (2) the "consideration payable under the contract for the purchase of grain is to be paid in full at the time of the making of the contract or the delivery of the grain". A failure to meet either precondition means that, in this case, Chaplin Grain should have been licensed.

(i) Does the contract reference a grade name?

30 The contract refers to the commodity as "eston lentils". It is common ground that eston lentils are a type of green lentils, designated as grain pursuant to s. 5(1) of the Canada Grain Regulations, CRC, c 889 [Regulations].

31 Section 2 of the CGA defines "grade name" as follows:

> **2** . . .
>
> ***grade name*** means the name, or name and number, assigned to any grade of grain established by or under this Act and includes any abbreviation prescribed for that grade name.

32 Pursuant to s. 5(2) of the Regulations, grade names and specifications for grades of grain are those set out in Schedule 3 of the Regulations. Schedule 3 is comprised of 61 tables, each of which is applicable to a different grain. In each table there are various specific grade names, some of which are accompanied by grade numbers. For example, Table 1, applicable to "Wheat, Canada Western Red Spring (CWRS)" specifies four grade names: No. 1 CWRS, No. 2 CWRS, No. 3 CWRS and CW Feed. Looking to the definition of "grade name" as prescribed in s. 2 of the CGA, I would interpret "CW Feed" to be an example of grade name, "CWRS" to be an abbreviation used as part of a grade name, and "No. 1" to be the example of a number assigned as part of the name of a grade of grain.

33 Table 35 of Schedule 3 is applicable to "Lentils, Canada, Other than Red (Can)" and therefore the lentils in this case. Four different grade names are specified in the table: "No. 1 Canada", "No. 2 Canada", "Extra No. 3 Canada" and "No. 3 Canada". The grades are differentiated by objective characteristics, which include features such as "Degree of Soundness" (uniformity of size and colour), damage and the measured presence of foreign material.

34 Chaplin Grain argues that, in this case, the contract does not refer to a "grade name" because the commodity sold and purchased was "ESTON LENTILS", which is not a name found in Table 35. Also, it points out that, although the contract refers to the commodity being sold as "NUMBER 2 OR BETTER", the definition of "grade name" means either the "name" or "name *and* number" [emphasis added]. Antelope Creek argues, in effect, that Chaplin Grain is placing form over substance, and the contract clearly was one where grain of a specific grade was being sold.

35 The requirement for licensure of grain buyers, unless certain exceptions exist, is directly related to the overall regulation of the western Canadian grain trade. The *CGA* establishes the Commission (formerly the Board of Grain Commissioners for Canada), the general objects of which are set out in s. 13 of the CGA, as follows:

> **13** Subject to this Act and any directions to the Commission issued from time to time under this Act by the Governor in Council or the Minister, the Commission shall, in the interests of the grain producers, establish and maintain standards of quality for Canadian grain and regulate grain handling in Canada, to ensure a dependable commodity for domestic and export markets.

36 The particular functions of the Commission are set out in s. 14 of the CGA, and include:

> **14**(1) Subject to this Act, the Commission shall, in furtherance of its objects,
>
> (a) recommend and establish grain grades and standards for those grades and implement a system of grading and inspection for Canadian grain to reflect adequately the quality of that grain and meet the need for efficient marketing in and outside Canada;
>
> (b) establish and apply standards and procedures regulating the handling, transportation and storage of grain and the facilities used therefor;
>
> . . .

37 In *Montana Mustard Seed Co. v. Continental Grain Co. (Canada) Ltd.*, [1974] 4 W.W.R. 695 (Sask. C.A.) at 699-670 [*Montana Mustard*], Maguire J.A. spoke of the overall regulatory purpose for the Commission and the system of grading grains, in the following terms:

> The objects of the Commission appointed under the provisions of the Act and thus it may be said of the legislation, in the interest of grain producers, are to establish and maintain standards of quality for Canadian grain and regulate grain handling in Canada to ensure a dependable commodity for domestic and export markets. In the words of the learned trial Judge [p. 56] the "sanctity and integrity of the grain grading system in Canada, and to protect grade names from de-basement."
>
> . . .
>
> Grade names and specifications are established. The integrity of these grade names is essential in both the domestic and export markets. To maintain this integrity it is, I think, essential that those dealing in grain be controlled through a licensing system. Section 34(b) [now s. 44(b)] provides the initial control always subject to the exemptions set forth in cl. (ii) thereof. This section read in conjunction with s. 69(1) [now s. 83(1)] subject to the exception found in subs. (2) thereof, provides the further necessary control when read with ss. 84 and 87 [now s. 102 and 105]. Reference should be made to s. 99 [now s. 117], which provides for further exemptions, which with the other sections I have mentioned go to establish that only those controls essential to the maintenance and attainment of the objects of the legislation are required to be met.

38 The exceptions to the requirement that transactions for the sale of grain be by licensed grain dealers are situations where grain is not being sold for its particular trading quality (*i.e.* the exceptions set out in ss. 83(2)(a), (b) or (c)), or where another form of regulation over the transaction exists (*i.e.* a contract through a "recognized grain exchange", under ss. 83(2)(d)).

39 In this case, I conclude the contract required Antelope Creek to deliver the grain that met, at minimum, the attributes of No. 2 Canada "Lentils, Canada, Other Than Red (Can)", as prescribed in Table 35 of Schedule 3 of the Regulations. The evidence is that lentils must be either "No. 1 Canada", or "No. 2 Canada" to be eligible for export, which was the intended market for the lentils to be purchased by Chaplin Grain. If Antelope Creek had delivered grain that did not at least meet the standard for "No. 2 Canada" I have no doubt Chaplin Grain would contend the contract was breached.

40 All of this would tend to bring this contract within the object of the licensure requirement, as identified by the Court of Appeal in *Montana Mustard* . However, Chaplin Grain argues that the requirement a buyer be licensed to buy grain has been narrowly construed, and the exceptions given broad interpretation. It points to *Montana Mustard* and *Humboldt Flour Mills Co. v. Nordick* (1978), 71 Sask. R. 205 (Sask. Q.B.) [*Humboldt Flour Mills*] as examples of contracts which are analogous and which have been upheld by the courts.

41 For its part, Antelope Creek argues that the contracts in *Montana Mustard* and *Humboldt Flour Mills* are distinguishable from the contract in this case, as they involved contracts where there was an obligation by the buyer to purchase grain regardless of quality, whereas in this case the obligation under the contract was to deliver grain that met the prescribed qualities, failing which Chaplin Grain would not be obligated to purchase the grain. Antelope Creek therefore argues that the contract here directly implicates the purpose for the statutory rule and limited exceptions to it.

42 Ultimately, because of my conclusion respecting the second precondition that must exist for an exception under ss. 83(2)(a) to be made out, I do not need to determine the outcome of this debate.

(ii) Does the contract provide for payment of the purchase price at the time of delivery?

43 While I have doubt about the first precondition to the operation of the exception, I am not able to agree with Chaplin Grain that the contract provided for the purchase of the grain is "to be paid in full at the time of ... the delivery of the grain" (per ss. 83(2)(a) of the CGA). Since Chaplin Grain must establish both preconditions, I therefore conclude the exception provided for in s. 83(2)(a) of the CGA is inapplicable.

44 The apparent policy basis for this aspect of the exception is that licensing (and therefore bonding) is not required when payment is made before or at the time of delivery. Here, the contract states, beside "PAYMENT TERMS", "14 BUSINESS DAYS". The evidence is that the grain would be immediately weighed at the point of delivery, but a sample would need to be sent away to be graded to ensure it met the contractual quality. Chaplin Grain's evidence is that grading is typically completed within two or three days after physical delivery. A buyer, such as Antelope Creek, would have a strong commercial interest in ensuring that there is a defined date by which payment would be made after physical delivery of the grain. In the context of these surrounding circumstances, it my conclusion that it is implicit that the 14 business days is a statement of the period of time within which payment will be made, and the mentioned time period is measured beginning with the date of physical delivery of the grain.

45 Although the analysis of contractual interpretation ends with a determination of the objective intention of parties as determined by the written contract, in light of the surrounding circumstances, I observe that this understanding of the contract was also the subjective view of the parties who, prior to the repudiation of the contract by Antelope Creek, shared the mutual understanding that under the terms of the contract, as written, Chaplin Grain would only be in breach of the contract if it failed to pay by the 14th day following the physical delivery of the lentils, even if the grading process was completed many days earlier.

46 Chaplin Grain relies on *Montana Mustard* and *Humboldt Flour Mills* to argue for a different conclusion. However, it is clear that, in both cases, the court grounded its conclusion that the *CGA* was not breached on the interpretation of the specific terms of each contract. The contracts in both cases are distinguishable from the contract in this case, as, in each, payment became due immediately after grading (and hence "delivery") was complete.

47 In *Montana Mustard*, the obligation of the seller to deliver, and buyer to accept, the grain was not affected by the grade, although the price to be paid by the purchaser was directly affected by the grade assigned to it by the Commission, and no payment would be made until that grade was determined. Buyers seeking to avoid the contracts argued that, because the grain would be received by the buyer some time before payment, under the contract the purchase of the grain was not to be paid in full at the delivery of the grain. Justice Maguire, for the Court of Appeal, disagreed. The substance of his reasoning was that, pursuant to the terms of the contract, delivery did not occur until the grading had been completed (at p. 701-702):

> [24] The learned trial Judge held the contract was not one under which the grower was to be paid in full at the time of the delivery of the grain. In so holding he said [at p. 55]:
>
> > Under the Montana grower contracts, the relevant portions of which are quoted above, Montana buys a crop of mustard seed from the grower whatever grade it may turn out to be. The grading of that crop is done by the Canada Grain Commission after delivery of the crop and the price is determined and paid according to the grade certified by that body. It is clear in the instant case that the consideration payable for the grain is not paid in full at the time of making the contract or upon delivery of the grain. The purchase money is paid after the happening of both events. Accordingly Montana is buying mustard seed by transactions which do not exempt it from the licensing requirements of the Act.
>
> [25] With every deference I cannot agree with this view. The weighing and grading of the grain were simply two things which were required to be done to determine the amount to be paid on delivery of the grain.
>
> [26] Such requirements did not detract from the contractual obligation to pay in full for the grain at the time of delivery: they were simply necessary steps in completion of the delivery and to determine the amount to be paid at that time.
>
> [27] To suggest that simply weighing the grain to determine the amount thereof delivered would be a derogation of the obligation to pay on delivery is simply not tenable: nor is the grading which determines the basis upon which the payment is to be made. In my opinion the contract clearly provides for payment in full upon delivery determined by weight and grade.

48 Chaplin Grain argues that this reasoning governs in the present circumstance. It says that "certain items must be confirmed during the delivery before payment is made, such as: weighing, grading, sampling, and delivering all of the required grain" [Chaplin Grain Trial Brief, para. 59]. However, this reasoning only provides assistance to Chaplin Grain if somehow the

contract in this case could be interpreted to require payment *immediately* after all of these steps are taken. Even if "delivery" means the completion of all of these steps, the most obvious interpretation of the contract in this case would be simply to push out to a later date. Chaplin Grain's payment obligation still only exists 14 days after the "delivery". Chaplin Grain is still left with the problem that, on this interpretation of "delivery", the contract still does not fall within the scope of the exception provided for under ss. 83(2)(a) of the CGA, because it does not provide payment in full at the time of delivery.

49 To find *Montana Mustard* helpful to Chaplin Grain, I would have to interpret the 14 day period for payment prescribed in the contract as meaning, "Payment terms: as soon as grade was verified, and in any event no later than 14 business days from the date of physical delivery". Not only does this involve a significant reconstruction of the words of contract, nothing in the surrounding circumstances points in this direction.

50 In the context of the business relationship between Chaplin Grain and Antelope Creek, it makes far more sense to interpret the provision respecting payment terms as it was apparently understood by the parties, that is to say a statement of the obligation resting on Chaplin Grain to pay within 14 business days of the date of physical delivery. In this case, although the 14-day-payment term would allow time for Chaplin Grain to grade the grain, to ensure that Antelope Creek had fulfilled its obligation to deliver Canada No. 2 grade or better eston lentils, it would also give Antelope Creek the assurance of a specific date by which it would receive payment. Importantly, for the purposes of the issues in this case, there would be no breach of the contract if Chaplin Grain delayed payment even after the grading was complete, as long as payment was made in this time period. All of this is in contrast to the contract that was before the court in *Montana Mustard*, which did not prescribe a time for payment, allowing the court to interpret it to *require* payment as soon as grading was completed (p. 702).

51 A similar distinction exists between the contract in this case and that at issue in *Humboldt Flour Mills*, in which case payment was to be made "immediately ... when grade and dockage is established" (at para. 15).

52 I harken back to the purpose for the requirement of licencing and the exceptions to it. Where, as I find here, the purchaser of grain is not required to make payment until a date well after delivery is effected, the purpose for the bonding remains, namely the protection of the unpaid producer who has relinquished the grain to the buyer. Although the courts in both *Montana Mustard* and *Humboldt Flour Mills* were able to conclude that, pursuant to the contracts in those cases, the "delivery" of the grain occurred only after the grading of the grain took place, the breach of the *CGA* in those cases was avoided only because the payment obligation arose immediately after this "delivery" occurring. Here, I am not able to interpret the contract between Chaplin Grain and Antelope Creek as imposing the same obligation on the part of Chaplin Grain to make payment as soon as this had been accomplished.

53 As a result, my conclusion is that, in this case, the contract is not one where the "consideration payable under the contract for the purchase of grain is to be paid in full at the time of ... the delivery of the grain". The exception set out in ss. 83(2)(a) is therefore inapplicable. Chaplin Grain was in breach of s. 83(1) of the CGA. In view of Chaplin Grain's concession referenced in para. 27 of this judgment, I am left with no alternative but to conclude that the contract is unenforceable.

(b) Did the contract require Chaplin Grain to take delivery of the lentils in early November and to pay for the lentils prior to November 10, 2015?

54 My decision on the first issue makes it unnecessary to decide whether Chaplin Grain breached the contract by failing to take delivery of the lentils in early November and pay for them prior to November 10, 2015. However, in case it is later determined that I am wrong about the first point, I will proceed to decide this second issue.

55 By its written terms, the contract provided for a shipment period of "November 2015", without setting out a specific day in that month for delivery. Both parties proceeded on the basis that, absent the alleged oral representations, this would be understood as allowing Chaplin Grain to call for delivery of the lentils by Antelope Creek any time in November 2015. The payment terms are indicated to be "14 business days", reinforcing that the date of delivery was open and not specific.

56 This understanding of the contract makes commercial sense, in the context of the businesses of both producer and grain buyer. The producer is best positioned to assess the window within which he or she will be able to make delivery of the grain.

For its part, there may be many exigencies that affect the ability of a grain company to receive delivery on a particular date. Therefore, keeping in mind the principles of contractual interpretation, including those set out in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), I interpret the written contract as allowing Chaplin Grain to call for the product at any point in time in November, and to pay Antelope Creek within 14 business days after the physical delivery of the grain to its processing facility.

57 Antelope Creek argues, notwithstanding how the contract is written, the representations it says were made to Mr. Mattus, that the lentils would be taken in and paid for by Chaplin Grain by early November, give rise to a collateral obligation or in some fashion affect the interpretation of the written terms of the contract. For the reasons that follow, I reject Antelope Creek's position, on the facts as I find them, that anything more than a non-contractual commitment by Chaplin Grain to try to take in the grain in early November was made.

58 The position of Antelope Grain is dependent on the evidence of Mr. Mattus. I have extreme doubts as to the veracity of Mr. Mattus' evidence in several respects, which in turn diminish my acceptance of his evidence that a promise respecting time of delivery and payment was made, as he claims.

59 Mr. Mattus acknowledged in cross-examination he was not aware of any grain dealer that offers a producer a specific date for delivery, yet he claims he was made a promise of close to this effect by Ms. Fahlman. More significantly, if Mr. Mattus was intending that time of delivery and payment were to be otherwise than as he would understand from the written terms of the contract, I find it remarkable that he did not seek a change to the written language of the contract, particularly given other changes he sought and obtained to the contract form.

60 I do not believe Mr. Mattus when he claims to have had no knowledge of the prevailing market price for lentils when he first contacted Chaplin Grain in September 2015, or when he re-initiated contact with Chaplin Grain in early November to arrange delivery of the grain. The evidence before the court is that pricing information for grain is readily available. Common sense suggests that any farmer, but particularly one operating a farm the size of Antelope Creek, would watch general market conditions carefully to be aware of the value of his inventory. The fact Mr. Mattus had a specific price in mind when he first spoke with Ms. Fahlman strongly reinforces this conclusion.

61 Mr. Mattus' professed concern about the timing of delivery and payment also sits uncomfortably with events following his first conversation with Ms. Fahlman and his next conversation with her in early October. Between these two dates, Mr. Mattus took no steps to market the lentils. If, as Mr. Mattus maintains, time of delivery (and therefore a particular date for payment) was paramount, it is remarkable that he did nothing for the rest of September to ensure he could move his product, and be paid, as time ticked toward his purported deadline of early November.

62 Mr. Mattus' actions after the contract was entered into in early October are cause for further comment. The evidence suggests it would take at least some time to organize the delivery once the grain was called for. Mr. Mattus provides no explanation, other than he was "waiting" to hear from Chaplin Grain, as to why, if the promise was for an early November delivery, he only contacted Chaplin Grain on November 3, 2015.

63 Mr. Mattus committed several misrepresentations to Chaplin Grain in the several weeks that followed this contact on November 3, 2015, suggesting that, at least when it comes to matters dealing with this contract, he is liberal with the truth when it suits his objectives. On November 18, 2015, Mr. Mattus represented to Chaplin Grain he had sold the lentils the previous week. However, the evidence is that the lentils were only sold on November 26, 2015. Mr. Mattus also misrepresented to Chaplin Grain the information that he was receiving from the Commission respecting the implications of Chaplin Grain's non-licensure.

64 I accept that Mr. Mattus had inquired of Ms. Fahlman about the likelihood of Chaplin Grain taking delivery of the lentils in early November, and Ms. Fahlman had indicated that Chaplin Grain would try to take in the grain in early November. I can also accept that this was desirable to Mr. Mattus, from the perspective of managing Antelope Creek's cash flow. However, based on the totality of the circumstances, I simply do not believe Mr. Mattus when he says he thought Ms. Fahlman's statement that

Chaplin Grain would try to take delivery in early November was a promise of contractual force, or would, on either a subject or objective understanding, have been seen as a binding commitment of any type.

65 Ultimately, I am convinced Mr. Mattus was aware that, under the terms of the contract, Chaplin Grain could call for delivery of the lentils in its discretion in November. I am further convinced that Mr. Mattus was well aware by early November the price of lentils was on the rise and the product that he had agreed to sell to Chaplin Grain for $0.345 per pound was now worth considerably more. It was this, and not a concern that he would not receive payment prior to November 10, 2015 (or for that matter any particular date in November) as he now alleges, which lead Mr. Mattus to refuse to fulfill the contract.

66 My overarching conclusions are that, in the face of the rising market, Mr. Mattus first attempted to convert what even he understood was a non-contractual statement by Ms. Fahlman, respecting when Chaplin Grain would try to take delivery, into a contractual promise. Mr. Mattus then looked to reinforce his position by turning to the fact that Chaplin Grain was unlicensed, a fact he was well aware of when he entered into the contract, as an excuse to avoid Antelope Creek's obligation under the contract.

67 I add, for completeness, that even if Chaplin Grain had been obligated to take delivery of the lentils in early November, and pay Antelope Grain by November 10, 2015, I would not have found this to be a sufficient basis for Antelope Creek to treat the contract as repudiated, nor am I convinced that Antelope Creek suffered damages as a result of not receiving payment by November 10, 2015.

68 Based on these findings of fact, and my interpretation of the contract, but for my conclusion that Chaplin Grain was in non-compliance with the *CGA*, and the concession given by Chaplin Grain that if this conclusion was reached the contract is unenforceable, I would have found Antelope Creek in breach of contract and assessed damages against it in favour of Chaplin Grain.

69 I will say something about damages. Damages are properly assessed in accordance with s. 50 of The Sale of Goods Act, RSS 1978, c S-1:

> **50**(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may maintain an action against the seller for damages for non-delivery.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.
>
> (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or if no time was fixed then at the time of the refusal to deliver.

70 The contract was for the delivery of 475 tonnes, but the total quantity delivered by Antelope Creek to Mid-West was 455.544, which was within a tolerance of five percent allowed for under the contract. I conclude that this is the amount Antelope Creek would have delivered to Chaplin Grain if it had fulfilled the contract. Damages should be assessed on this basis. The difference in the contract price and the market or current price in this case is determinable from the difference between the price paid by Mid-West ($1,014.12 per tonne) to Antelope Creek and the contract price ($760.59 per tonne), that is $253.53 per tonne. The measure of damages is therefore product of 455.544 and $253.53, *i.e.*, $115,494.07.

71 In addition, Chaplin Grain was entitled to a processing fee of one percent of the contract price. This should be calculated on the basis of the total quantity delivered (455.544 tonnes), at the contract rate ($760.59 per tonne), resulting in an additional $3,464.82, for a total damages amount of $118,958.89.

72 There were some questions asked in the cross-examination of Mr. Gleim suggesting that Chaplin Grain should have mitigated its losses, by going into the market and buying grain to replace the lentils not delivered to it by Antelope Creek. I reject this suggestion, as the evidence is that lentils were in short supply and, if anything, Chaplin Grain was fortunate to be able to purchase the lentils from Mid-West.

73 But for my conclusion that the contract was unenforceable, I would have invited further submissions from the parties, in light of my findings of fact, as to the appropriateness, and if appropriate the quantum, of an award of punitive damages against Antelope Creek.

(c) Did Antelope Creek rely on a representation by Chaplin Grain that it was a licensed grain dealer?

74 Antelope Creek asserts by way of counterclaim that it relied, to its detriment, on a representation that Chaplin Grain was a licensed grain dealer, and suffered additional damages. While the point was not pressed in argument, for completeness I will briefly deal with the issue.

75 Nothing in the evidence suggests Mr. Mattus was told that Chaplin Grain was licensed. The evidence is to the contrary, as Mr. Mattus asserted to a Commission employee that he had been advised that Chaplin Grain was in the "process" of being registered. There is also no evidence whatsoever that there was reliance on, or any loss flowing from, the purported representation. The counterclaim is therefore wholly without merit.

CONCLUSION

76 The normal rule is that costs are ordered in favour of a successful litigant. I have dismissed both the claim and counterclaim, and therefore success is divided. Additionally, Antelope Creek has taken opportunistic advantage of the fact that Chaplin Grain was not licensed, a fact it was well aware of when it entered into the contract in question, to avoid its responsibilities to Chaplin Grain and to profit enormously at Chaplin Grain's expense. Even apart from the fact that success has been divided, I would, on that basis, have been disinclined to order costs against Chaplin Grain.

77 The claim and counterclaim are therefore both dismissed, with no order of costs for or against either party.

Action dismissed; counterclaim dismissed.

TAB 7

1989 CarswellSask 367
Saskatchewan Court of Queen's Bench

Northern Sales Co. v. Degelman Farms Ltd.

1989 CarswellSask 367, [1989] C.L.D. 836, 76 Sask. R. 187

Northern Sales Co. Ltd., Plaintiff v. Degelman Farms Ltd., Defendant

Dielschneider J.

Judgment: May 10, 1989
Docket: Doc. Q.B. No. 4090

Counsel: *D.C. Hodson* , for the plaintiff
G.P. Wanhella , for the defendant

Subject: Corporate and Commercial

Headnote

Trade and Commerce --- Marketing controls — Interpretation

Sale of Goods Act, R.S.S. 1978, c. S-1, s. 6.

Plaintiff grain dealer licensed by grain commission -- Plaintiff entering into verbal agreement with defendant for purchase and sale of canola -- Agreement never carried out -- Plaintiff's action for enforcement of contract dismissed -- Relevant legislation outlining two categories of valid contracts -- Contracts in question not meeting criteria for either category -- Contracts illegal and unenforceable.

***Dielschneider J.* :**

1 This matter, comprising two questions, came on before me for disposition under Rule 188.

2 Both questions are summarized in the order setting the matter down for this hearing. The questions read:

> i. Are the two verbal agreements referred to in paragraph 3 of the Plaintiff's Statement of Claim unenforceable by virtue of section 85 of *The Canada Grain Act* , S.C. 1970-72, c. 7?
>
> ii. Are the two verbal agreements referred to in paragraph 3 of the Plaintiff's Statement of Claim unenforceable under section 6 of *The Sale of Goods Act* , R.S.S. 1978, c. S-1?

3 In paragraph 3 of its claim the plaintiff alleges:

> 3. ... that it entered into two verbal agreements with the Defendant for the purchase of Canola grain the particulars of which are as follows:
>
> a) The Defendant agreed on May 19, 1988 to sell to the Plaintiff 113.4 metric tonnes of canola at an agreed price of $318.00 per metric tonne with the grain to be delivered to Saskatoon between October 1, 1988 and November 15, 1988.
>
> b) The Defendant agreed on May 24, 1988 to sell to the Plaintiff 100 metric tonnes of canola at an agreed price of $329.80 per metric tonne with the grain to be delivered to Saskatoon between October 1, 1988 and November 15, 1988.

4 For the purpose of this hearing it is admitted that the plaintiff was a grain dealer duly licensed by the Canadian Grain Commission; that the subject matter of the purchase agreements was a graded commodity namely, No. 1 Canada Canola; that neither agreement was reduced to writing; that no part of the purchase price was paid; and that the grain was never delivered.

5 Section 85 of the *Canada Grain Act* , 1970-71-72, c. 7 (now s. 103 R.S.C. 1985 c. G-10) reads as follows:

> 103.(1) Except with the written permission of the Commission, no person other than a licensee shall use any form prescribed under this Act in any transaction.
>
> (2) No licensee shall enter into a contract of a kind that can lawfully be made only by a licensee under this Act, in any form except in a prescribed form or a form authorized by the Commission.

6 I have concluded that s. 85 prohibits a licensed grain dealer from purchasing a graded commodity, e.g. No. 1 Canada Canola, unless a contract for the purchase is in a form prescribed by the Canadian Grain Commission or in a form authorized by it. Because the contracts here are verbal and therefore do not meet either category, they are illegal and unenforceable.

7 The first question is therefore answered in the negative. Similarly, the second question. A contract illegal under the *Canada Grains Act* is unenforceable as well under the *Sale of Goods Act* .

8 The defendant will therefore have judgment dismissing the plaintiff's claim with costs to be taxed.

9 The meaning of s. 85 of the *Canada Grains Act* was addressed in depth by Cavanagh J. of the Alberta Supreme Court, Trial Division, in *Diversified Crops Ltd. v. Patton Farms Ltd.* , (1976) 61 D.L.R. (3d) 749 , affirmed on appeal 1976, 76 D.L.R. (3d) 190 . Cavanagh J. concluded, and the Appellate Division of the court concurred that a licensee under the Act is prohibited from entering into contracts for the purchase of grain in any form other than a form prescribed or authorized by the Canadian Grain Commission.

10 Before me the argument is made on behalf of the plaintiff that the section does not prohibit an oral contract for the the purchase of grain. Rather, so the argument continues, the section means that if a dealer in grain elects to use a form, then he must use one that is prescribed or authorized. Until and unless he so elects, he is free to negotiate an agreement verbally.

11 With respect, s. 85 sets out certain criteria for compliance by a grain dealer in carrying out all the transactions he is lawfully entitled to do. Under the Act a grain dealer must be licensed by the Canadian Grain Commission; the plaintiff here is a licensee. A licensee may only enter into a kind of contract lawfully available to a grain dealer under his license; there is nothing arising out of the facts before me suggesting that the plaintiff was not licensed to purchase No. 1 Canada Canola. A contract entered into by a licensee must be in a form prescribed by the Canadian Grains Commission or authorized by it; the contract pleaded by the plaintiff in his claim is a verbal one, the form of which is neither prescribed nor authorized by the Commission.

12 It is difficult to envisage how the Canadian Grains Commission in the exercise of its mandate as the watchdog of all grain sales in western Canada could effectively discharge its duties if s. 85 could be construed in the manner suggested by the plaintiff. To me it is clear that Parliament intended by the section to mandate a written contract in either of two forms; one prescribed or mandated by the Commission and another formulated by the grain dealer and approved and authorized by the Commission. That is the way I believe the section must be construed.

13 Because the contracts in issue here are in neither one of the modes mandated by s. 85, both are unenforceable. Mr. Justice Cavanagh, after quoting Lord Devlin in *St. John Shipping Corp. v. Joseph Rank, Ltd.*, [1956] 3 All E.R. 683 at p.687 went on to quote Baron Parke, in *Cope v. Rowlands* (1836), 2 M & W 149, 150 E.R. 707 :

> It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition ... And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract.

14 This principle is well established in Saskatchewan law; it was approved and adopted in *Haug Bros. and Nellermoe v. Murdock* , (1916) 4 W.W.R. 1064 . See also *Prince Albert Properties and Land Sales Ltd. v. Kushneryk* , (1955) 16 W.W.R. 567 at 574 ; and see *North-Sask. Seeds Ltd. v. Couch*, [1960] 31 W.W.R. 253 at 258 .

15 Section 85 clearly states that no licensee, and the plaintiff is a licensee, shall, not may, enter into a contract in any form except in a prescribed form or one which is authorized.

16 Nor are the contracts in issue saved by s. 69 (now s. 83) of the Act. The section reads:

> 69.(1) No person in the Western Division shall, for reward, by way of a commission or otherwise,
>
> (a) act on behalf of any other person in buying, selling or arranging for the weighing, inspection or grading of western grain, or
>
> (b) make any contract for the purchase of western grain, unless that person is a licensee or is employed by a licensee and acts only behalf of his employer.
>
> (2) Subject to this Act, a transaction referred to in subsection (1) may be entered into by a person who is not a licensee where the transaction is
>
> (a) a contract for the purchase of grain without reference to any grade name on terms whereby the consideration payable under the contract for the purchase of the grain is to be paid in full at the time of the making of the contract or the delivery of the grain;
>
> (b) a contract for the purchase of grain whereby the grain is purchased by a producer of grain for use as seed in the producer's farming operation;
>
> (c) a contract for the purchase of grain whereby a person who raises livestock or poultry purchases the grain for feeding the livestock or poultry; or
>
> (d) a contract made on the premises of a recognized grain exchange by or through a broker who is a member of the exchange and duly recorded pursuant to the rules of the exchange.

17 It is established that the plaintiff is a licensee as required by ss. 2. It is also established that the grain purchased by the plaintiff had reference to a grade name, i.e. No. 1 Canada Canola. Nor was the grain purchased for seed or for livestock feed. Finally, it was admitted that the sale was not made on the premises of a grain exchange or through a broker-member of an exchange.

18 Because illegal, the contracts cannot be enforced. For the foregoing reasons therefore, judgment will be entered as I said in opening.

TAB 8

CANADA

CONSOLIDATION

CODIFICATION

Canada Grain Regulations

Règlement sur les grains du Canada

C.R.C., c. 889

C.R.C., ch. 889

Current to December 13, 2021

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À jour au 13 décembre 2021

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elevator, within 15 days after plans for the alteration or addition become available;

(c) without delay notify the Commission in writing of any damage to, or destruction of, any elevator building described in the application, or damage to, or destruction or removal of, any equipment required by the Commission to be installed in the elevator building;

(d) without delay notify the Commission in writing of any damage to, or the destruction of, any grain stored in any elevator building described in the application;

(e) keep each elevator building and all associated equipment in good repair and in good working order;

(e.1) keep sampling and weighing equipment and areas surrounding the equipment clean and accessible; and

(f) keep the licence posted in a conspicuous place in the elevator.

SOR/89-376, s. 14(F), 16(F); SOR/2000-213, s. 2; SOR/2001-273, s. 10; SOR/2002-255, s. 5; SOR/2003-284, s. 9(E); SOR/2004-198, s. 9; SOR/2005-361, s. 4.

dans les quinze jours suivant la date à laquelle les plans de la modification ou de l'ajout sont établis;

c) signaler sans délai à la Commission, par écrit, tout dommage causé à ces bâtiments ou à l'équipement exigé par la Commission, leur destruction ainsi que l'enlèvement de tout ou partie de l'équipement;

d) signaler sans délai à la Commission, par écrit, tout dommage subi par le grain stocké dans ces bâtiments et toute destruction de ce grain;

e) maintenir en bon état tous ces bâtiments ainsi que l'équipement connexe;

e.1) maintenir propres et accessibles le matériel d'échantillonnage et de pesée ainsi que les aires autour de celui-ci;

f) afficher en permanence la licence dans un endroit bien en vue de l'installation.

DORS/89-376, art. 14(F) et 16(F); DORS/2000-213, art. 2; DORS/2001-273, art. 10; DORS/2002-255, art. 5; DORS/2003-284, art. 9(A); DORS/2004-198, art. 9; DORS/2005-361, art. 4.

Security

17 The period prescribed for the purpose of paragraph 49(3)(a) of the Act is

(a) if an elevator receipt or grain receipt is issued on delivery of the grain, 90 days; and

(b) if a cash purchase ticket or other bill of exchange is issued on delivery of the grain or is later issued on surrender of an elevator receipt or grain receipt in respect of the grain, the lesser of

(i) 90 days, and

(ii) the period that ends 30 days after the day on which the cash purchase ticket or other bill of exchange is issued.

SOR/2000-213, s. 2; SOR/2005-361, s. 5.

Garantie

17 Pour l'application de l'alinéa 49(3)a) de la Loi, la période réglementaire est la suivante :

a) si un récépissé ou un accusé de réception est délivré sur réception du grain, quatre-vingt-dix jours;

b) si un bon de paiement ou une autre lettre de change est émis sur réception du grain ou est plus tard émis sur remise d'un récépissé ou d'un accusé de réception du grain, la plus courte des périodes suivantes :

(i) quatre-vingt-dix jours,

(ii) la période se terminant trente jours après la date de la délivrance du bon de paiement ou de la lettre de change.

DORS/2000-213, art. 2; DORS/2005-361, art. 5.

18 Security is not required from an applicant for a licence or from a licensee if the applicant or licensee is an agent of Her Majesty in right of Canada.

SOR/89-376, ss. 2, 14(F), 16(F); SOR/96-508, s. 12; SOR/2000-213, s. 2.

18 Aucune garantie n'est exigée du demandeur d'une licence ou du titulaire de licence qui est un mandataire de Sa Majesté du chef du Canada.

DORS/89-376, art. 2, 14(F) et 16(F); DORS/96-508, art. 12; DORS/2000-213, art. 2.

19 For the purposes of subsection 49(5) of the Act, the prescribed percentage of security realized or enforced is 100%.

SOR/89-376, ss. 10(F), 14(F), 16(F); SOR/89-393, s. 3; SOR/93-24, s. 1; SOR/2000-213, s. 2.

19 Pour l'application du paragraphe 49(5) de la Loi, le pourcentage à l'égard duquel la garantie peut être réalisée ou recouvrée est de 100 %.

DORS/89-376, art. 10(F), 14(F) et 16(F); DORS/89-393, art. 3; DORS/93-24, art. 1; DORS/2000-213, art. 2.

TAB 9

Caught in the Rye: The *Canada Grain Act*, Security, Title and Insolvency Proceedings

H Lance Williams and Forrest Finn[*]

I. INTRODUCTION

Security over grain is regulated very differently than other security in Canada. Indeed, as a consequence of the unique history of western grain production and the endemic power imbalances that existed in that industry, Parliament developed a distinct, producer-friendly statutory regime for the taking of security over grain. Therefore, whenever dealing with grain, insolvency professionals must consider the application and effects of this regime.

1. Diversified Crops Ltd v Patton Farms Ltd; Diversified Crops Ltd v Rosgen

In the spring of 1973, Diversified Crops Ltd ("Diversified") was a grain dealer and elevator operator licensed by the Canadian Grain Commission (the "CGC"). That March, the price of flax was "substantially below" $4 a bushel.[1] This was a good price for Diversified. Moreover, Diversified recognized the potential volatility of flax seed pricing and was concerned that prices could increase dramatically over the summer and fall. As a result, Diversified entered into a futures contract with Rosgen, according to which Diversified agreed to purchase flax from Rosgen at fixed prices (the "futures").[2] Throughout the summer of 1973, Diversified's concerns materialized and the price of flax soared. By September 1973, the price was "substantially above $4" a bushel.[3] The price continued to rise, and between October and November it hovered between $8.49 and $11.10 a bushel.[4] The futures therefore constituted a significant asset of Diversified.

---

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[1] *Diversified Crops Ltd v Patton Farms Ltd; Diversified Crops Ltd v Rosgen* (1975), 61 DLR (3d) 749 at 750, 1975 CanLII 960 (ABQB) [*Diversified Crops*].

[2] *Ibid*.

[3] *Ibid* at 751.

[4] *Ibid*.

Diversified's primary shareholder was Canlin Ltd ("Canlin"). Canlin was also a creditor of Diversified. As part of this arrangement, Diversified had issued a debenture to Canlin, granting the company a floating charge over all of Diversified's assets, including the futures (the "Canlin debenture"). To secure its own financing, Canlin issued its own debenture to the Bank of Montreal ("BMO") which granted the bank a floating charge over all of Canlin's assets (the "BMO debenture").[5] Subsequently, Canlin experienced significant financial issues. By April of 1973, Canlin was unable to meet its obligations under the BMO debenture and defaulted. In response, BMO appointed a trustee pursuant to the terms of the BMO debenture to seize Canlin's assets.

In an attempt to realize the full recoverable value from Canlin (including under the Canlin debenture), the trustee sought to enforce the futures. Unfortunately for the trustee, Rosgen refused to honour the futures and refused to deliver the flax. Instead, seeing the staggering increase in the price of flax, Rosgen sold its grain on the market, significantly increasing its profit.[6] The trustee, on behalf of Diversified, sued Rosgen for breach of the futures.

At first glance, the facts outlined above provide a relatively clear case of a breach of contract. However, Rosgen advanced an unusual argument: that the futures were illegal, as they did not comply with what was then section 85 of the *Canada Grain Act* (*CGA*).[7] This argument was accepted by the then Alberta Supreme Court, Trial Division, with Justice Cavanagh finding that:

> …s. 85(2), of the *Canada Grain Act*, adds another prerequisite to the formation of a legal contract, namely, that it shall be in a prescribed or authorized form; it was not.…In light of the above cases then, the plaintiff is seeking to enforce illegal contracts. This it cannot do.[8]

Interestingly, Diversified's non-compliance with section 85 was rather minute, and Justice Cavanagh noted that it could have been resolved quite simply. [9] Yet the

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[5] *Ibid* at 750–51.
[6] *Ibid* at 751.
[7] *Ibid* at 751–53; *Canada Grain Act*, 1970-71-72 (Can), c 7, s 85.
[8] *Ibid* at 754.
[9] *Ibid.* (Justice Cavanagh notes that "[a] witness from the Canadian Grain Commission indicated that the form was not objectionable. But that does not get around the fact that there was no prescription or authorization before the form was used to enter into a contract and that is expressly forbidden by s.

consequences of the non-compliance were significant: the contracts as a whole were unenforceable, and neither Diversified nor BMO could realize on the value of the futures.

2. Scope

In this paper, we explore the *CGA* and introduce insolvency professionals to the regulatory regime it creates in an effort to help avoid the pitfalls experienced by BMO, Canlin and Diversified, and which continue to this day. First, we discuss the unique history and policy objectives of the legislation. We also outline the significant consequences that the history and objectives of the *CGA* have for the interpretation and application of the statute. Second, we highlight the key characteristics of the *CGA* regime and explain how these characteristics will likely affect insolvency professionals working with companies in the grain industry. Finally, we conclude with key takeaways for these professionals.

II. HISTORY OF THE CANADA GRAIN ACT

1. Manitoba Grain Act

The *CGA* was first introduced as the *Manitoba Grain Act* (*MGA*) in 1900 in response to complaints by western farmers about the predatory practices of grain elevator operators and grain dealers.[10] It was, for example, common practice for elevator operators to artificially lower the grade and weight of a producer's grain to pay that producer less than what their grain was worth on the market. The concern about such practices is reflected in the Hansard evidence for the introduction of the *MGA*. The Honourable Senator Scott stated at the second reading of the *MGA* in the Senate that:

> The farmers had a number of grievances that from time to time had been pressed on the attention of the government, but up to the present time no actual legislation has been enacted.…A third was that, as the trade was carried on under the elevator system, it practically gave to the owners of the elevators a monopoly of the purchase of grain…and as the farmers maintain,

85(2)." Thus, it is likely that, had Diversified simply sought authorization before using the contracts, they would have been enforceable.)

[10] *The Manitoba Grain Act*, SC 1900, c 39.

> whether rightly or wrongly, they were, under those conditions, forced often to sell their grain at less value than the market price justified.[11]

The *MGA* was intended to curb such practices in order to protect grain producers and contained the posting of security by licence holders as further protection. The benefits of security were noted in Parliament as an express protection for grain producers:

> Hon. Mr. McMILLAN – What guarantee does the license give?
> Hon. Mr. SCOTT – He has to give security.
> Hon. Sir MACKENZIE BOWELL – It is a further protection to the farmer.[12]

The overarching purpose of the *MGA* was, therefore, to protect grain producers from the monopolistic practices and asymmetric power of elevator operators and grain dealers. Unfortunately, however, the *MGA* was ineffective in meeting this lofty goal for several reasons. First, the statute lacked legislative teeth. As a result, both grain dealers and railway companies refused to comply with the statute unless they faced serious consequences.[13] Second, the limited coercive power of the legislation was amplified by the fact that the *MGA* created a piecemeal approach to the multi-faceted grievances of grain producers. For example, the *MGA* empowered several authorities with varying responsibilities over the same issues. This created a jumbled and complicated regime that was ineffective in addressing the concerns of grain producers.[14] Third, the *MGA* was enacted before Saskatchewan and Alberta joined Confederation. As a result, the *MGA* was limited in scope, applying only to the "Inspection District of Manitoba". By the time Saskatchewan and Alberta joined Confederation in 1905, grain producers in these provinces produced more wheat than all of Manitoba. However, because of the limited application of the statute, these producers were left unprotected.[15] As a result of these issues, Parliament passed a series of amendments to the *MGA* before finally re-enacting the legislation in 1912 as the *CGA*.

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[11] *Debates of the Senate*, 8-5, vol 1 (11 June 1900) at 607 (Hon Mr Scott) [*Debates of the Senate*] [emphasis added].
[12] *Ibid* (21 June 1900) at 733 [emphasis added].
[13] Murray Knuttila, "Grain Growers Associations" (2011), online: *Encyclopedia of the Great Plains* <plainshumanities.unl.edu/encyclopedia/doc/egp.pd.024>.
[14] Ron Friesen, "Fair treatment for Western farmers began 100 years ago" (3 April 2012), online: *Grainews* <grainews.ca/news/fair-treatment-for-western-farmers-began-100-years-ago>.
[15] *Ibid*.

2. Canada Grain Act

The *CGA* was introduced with the same policy objectives as the *MGA*: the protection of grain producers. Indeed, in introducing the *CGA* for a second reading in the Senate, the Honourable Senator Cartwright explained the reason for the bill, stating that:

> Without committing myself to any definite statement as to the amount of loss which may have been sustained by our western farmers in the manner charged, I think there is no doubt whatever that they have suffered considerably by reason of the manipulation to which their grain has been subjected in the terminal elevators, and perhaps elsewhere; and it appears tolerably clear that the devices that I have mentioned have had the effect of more or less reducing the price which they would otherwise have obtained for the superior qualities of their grain. Nobody will dispute the desirability not merely of preserving the standard of our grain, but of assuring the farmers that they will obtain the highest possible price for what they produce.[16]

While the *CGA* has also undergone several amendments, it continues to govern Canadian grain with the same fundamental purpose of protecting grain producers. Indeed, despite these various amendments, the jurisprudence has continued to recognize the producer-protection purpose of the legislation. For example, in *Chaplin Grain Corporation v Antelope Creek Enterprise Ltd*, Justice Leurer held that the *CGA* created a "regulatory regime, designed, at least in part, to protect grain producers".[17]

3. Interpretation of the *CGA*

This central purpose has important implications for how the *CGA* is interpreted by the courts. Legislation enacted to protect a certain class of persons is given a liberal interpretation that falls generously in favour of that class of persons. For example, in *Seidel v TELUS Communications Inc* the Supreme Court of Canada held that:

> [37] As to statutory purpose, the *BPCPA* is all about consumer protection. As such, its terms should be interpreted generously in favour of consumers: *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R.

[16] *Debates of the Senate*, 11-3, vol 1 (16 February 1911) at 228 (Hon Richard Cartwright) [emphasis added].
[17] *Chaplin Grain Corporation v Antelope Creek Enterprise Ltd*, 2018 SKQB 304 at para 26 [*Chaplin Grain*].

> 129, and *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, 2005 BCCA 605, 48 B.C.L.R. (4th) 328.…[18]

Therefore, in considering the application of the *CGA,* insolvency professionals should note that ambiguities in the legislation are likely to be resolved in favour of the grain producers.

III. THE *CGA* REGIME

1. Introduction

The *CGA* creates a complex regime governing everything from the composition of the CGC, to the grading of grain, to the relationship between grain producers and the elevator operators and grain dealers. For the purposes of this article, we highlight only those aspects of the *CGA* likely to be of the most concern to insolvency professionals: the mandatory nature of the *CGA*, the security requirement imposed on elevator operators and grain dealers, how title to the grain passes and when lenders' security may attach to the grain.

2. Mandatory Regime

First, compliance with the *CGA* is mandatory for elevator operators and grain dealers.[19] Section 83 of the *CGA* provides that only those licensed under the *CGA* regime may purchase grain in western Canada:[20]

> 83(1) No person in the Western Division shall, for reward, by way of a profit, commission or otherwise,
>
> (a) act on behalf of any other person in buying, selling or arranging for the weighing, inspection or grading of western grain, or

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[18] *Seidel v TELUS Communications Inc*, 2011 SCC 15 at para 37 [emphasis added]. See also *Pinto v Revelstoke Mountain Resort Limited Partnership*, 2011 BCCA 210 at para 17; *Choi v Brook at the Village on False Creek Developments Corp*, 2013 BCSC 1535 at para 29.

[19] There are certain scenarios in which the CGC may allow certain deviations from the *CGA* regime. However, these circumstances are limited and must have prior CGC approval: *Canada Grain Act*, RSC, 1985, c G-10, ss 116(2), 117 [*CGA*].

[20] *Chaplin Grain, supra* note 17 at para 26. Note that many of the relevant sections of the *CGA* apply in the "Western Division". This division is defined as "all that part of Canada lying west of the meridian passing through the eastern boundary of the City of Thunder Bay, including the whole of the Province of Manitoba": *CGA*, *supra* note 19, s 2, "Western Division". While fewer sections relate to the "Eastern Division", it is important to note that several provisions of the statute still apply to grain in these regions.

> (b) make any contract for the purchase of western grain,
> unless that person is a licensee or is employed by a licensee and acts only on behalf of his employer.[21]

The mandatory nature of the regime is intended to satisfy the policy objectives described above. Indeed, the courts have held that it was imposed by Parliament to ensure "the protection of the unpaid producer who has relinquished the grain to the buyer."[22] For this reason, non-compliance with the *CGA* has serious consequences. As demonstrated in the introduction of this paper, non-compliance with the *CGA* will render a contract for the purchase of grain illegal and unenforceable.[23] For example, in *Northern Sales Co Ltd v Degelman Farms Ltd*, in evaluating an oral contract, the Saskatchewan Court of Queen's Bench held that:

> [6] …s. 85 prohibits a licensed grain dealer from purchasing a graded commodity; e.g.; No. 1 Canada Canola, unless a contract for the purchase is in a form prescribed by the Canadian Grain Commission or in a form authorized by it. Because the contracts here are verbal and therefore do not meet either category, they are illegal and unenforceable.[24]

The consequences of this non-compliance are imposed even if the grain producer has acted in bad faith. For example, in *Chaplin Grain*, Antelope Creek Enterprises Ltd ("Antelope Creek") contracted to sell lentils to Chaplin Grain Corporation ("Chaplin") at a price of $0.345 per pound.[25] Subsequently, the price of lentils rose significantly. Antelope Creek then repudiated the contract and entered into a contract with another party to sell the lentils for $0.46 per pound. As a result of this repudiation, Antelope Creek received additional sales proceeds of approximately $120,000.[26] Chaplin sued to enforce the contract. Justice Leurer noted in *obiter dicta* that, absent the *CGA*, the Court would have found in favour of Chaplin. Justice Leurer even found that Antelope Creek

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[21] *CGA*, *supra* note 19, s 83(1). There are, however, several exceptions listed at section 83(2) of the *CGA*. These exceptions also are intended to protect Canadian farmers and further their interests. These recognized exceptions cover the following situations: (1) a contract for the purchase of grain contains no grade information and is paid for in full at the time of delivery; (2) the purchase of grain as seed in a producer's operation; (3) a contract for the purchase of grain for the feeding of livestock; or (4) a contract through a recognized grain exchange.
[22] *Chaplin Grain*, *supra* note 17 at para 52.
[23] *Diversified Crops*, *supra* note 1 at 754.
[24] *Northern Sales Co Ltd v Degelman Farms Ltd* (1989), 76 Sask R 187, 1989 CanLII 4543 at para 6 (QB). See also *Gutka v Cargill Ltd* (1994), 127 Sask R 126, 1994 CanLII 4879 (QB).
[25] *Chaplin Grain*, *supra* note 17 at paras 10–13.
[26] *Ibid* at para 22.

had “taken opportunistic advantage” of Chaplin, leading the Court to note that, absent the non-compliance with the *CGA*, it would have invited submissions for punitive damages against Antelope Creek.[27] However, due to the mandatory nature of the *CGA*, the contract’s non-compliance with section 85 overwhelmed Antelope Creek’s bad faith and the repudiation was upheld.[28]

Compliance with the regime is therefore a requirement for a valid and enforceable contract for the purchase of grain. Where the *CGA* is not complied with, creditors and trustees will likely lose potentially lucrative assets, as they will be unable to enforce contracts for the purchase of grain, as occurred in *Diversified Crops*.

Non-compliance may also have additional serious consequences that may hamper an elevator operator or grain dealer’s ability to successfully restructure. The *CGA* grants the CGC broad supervisory powers over the licensing of elevator operators and grain dealers. In the event of non-compliance with the *CGA*, the CGC may investigate a non-complying company and, if it deems it is appropriate, suspend or even revoke the non-compliant party’s licence.[29] Since such licences are necessary for a company to carry on businesses as an elevator operator or grain dealer, non-compliance with the *CGA* may result in the termination of that company’s ability to carry on its business at all. This may seriously complicate, if not prevent, the company’s restructuring.

3. Security Requirement

The second area of concern for insolvency professionals is the security requirement imposed by the *CGA* on elevator operators and grain dealers. Section 45 of the *CGA* provides:

> **Issue of Licences — primary and process elevators and grain dealers**
>
> **45(1)** Where a person who proposes to operate a primary or process elevator or to carry on business as a grain dealer applies in writing to the Commission for a licence and the Commission is satisfied that the applicant and the elevator, if any, meet the requirements of this Act, the Commission may
>
> …

[27] *Ibid* at paras 73, 76.
[28] *Ibid* at para 68.
[29] *CGA*, *supr*a note 19, ss 14, 91, 93.

> **(b)** subject to the regulations, fix the security to be given by the applicant, by way of bond, suretyship, insurance or otherwise, having regard to the applicant's potential obligations for the payment of money or the delivery of grain to producers of grain who are holders of cash purchase tickets, elevator receipts or grain receipts issued pursuant to this Act in relation to grain produced by the holders.[30]

As discussed above, this security requirement was first introduced under the *MGA* as a protection for grain producers.[31] The jurisprudence has held that this purpose has extended to the *CGA*. For example, in *CB Constantini Ltd v Neuls*, the Federal Court of Canada found that the requirement "is in place to protect producers".[32] By requiring elevator operators and grain dealers to post security in advance, the *CGA* ensures that, should the operator or dealer become insolvent, the grain producers may still realize on the security to ensure payment for their grain.[33]

The enforcement of the security is largely dealt with under the Safeguards for Grain Farmers Program (the "SGFP") administered by the CGC. In the event that an operator or dealer fails to pay a producer for their grain, that producer may request compensation through the SGFP.[34] If the CGC determines that the producer is eligible under the SGFP, the CGC will make a claim on the security on behalf of the producer and, upon receiving payment from the security, will administer the payment to the producer.[35]

To be eligible under the SGFP, a producer is required to meet four criteria.[36] They must have:

- delivered the grain to a licensed grain company;
- delivered grain regulated under the *CGA*;[37]

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[30] *Ibid*, s 45(1)(b) [emphasis added]. This security is often in the form of an insurance policy. Note that the same security requirement is also imposed on operators of terminal and transfer elevators: *ibid*, s 45(2)(b).
[31] *Debates of the Senate*, *supra* note 11 (21 June 1900) at 733.
[32] *CB Constantini Ltd v Neuls*, 2009 FC 365 at para 16 [*CB Constantini*]. The Saskatchewan Court of Queen's Bench has additionally recognized that section 45(1) is a part of "a larger regulatory regime, designed, at least in part, to protect grain producers": *Chaplin Grain*, *supra* note 17 at para 26.
[33] *CB Constantini*, *supra* note 32 at para 15.
[34] CGC, "Producer Protection – Payment Protection: Safeguards for Grain Farmers Program" (28 February 2019), online: *Canadian Grain Commission* <grainscanada.gc.ca/en/protection/payment/> ["Producer Protection"].
[35] *Ibid*.
[36] *Ibid*.

- received the proper documents;[38] and
- demanded payment during the period of eligibility (the “eligibility period”).

The exact duration of the eligibility period is fact-dependent and is based on two triggers. First, a producer is eligible for compensation from the SGFP for a maximum of 90 days from the date the producer delivered the grain. Second, in order to demand payment, the producer must exchange the receipt for a cash purchase ticket (“CPT”) or a cheque and deposit that ticket or cheque. Once in receipt of this CPT or cheque, the producer must contact the CGC within 30 days to remain eligible under the SGFP.[39] These time periods often overlap. In the case of such an overlap, the lesser of the two time periods applies.[40]

Insolvency professionals acting as trustees or receivers for grain dealers or elevator operators will, therefore, want to inquire as to the form of the security and, if the security is an insurance policy, review this policy deeply to understand all the implications of an insolvency proceeding and potential subrogation rights. In addition, where an insolvency professional represents a grain producer dealing with an insolvent grain dealer or elevator operator, that insolvency professional should be aware of the required documentation and time frames to access the security through the SGFP. In addition, due to the fact-dependent nature of the relevant time frames, an insolvency professional must inquire with the producer to determine what strict timelines apply in order to submit their claim under the SGFP in a timely manner.

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[37] The following grains are regulated under the *CGA*: barley, beans, buckwheat, canola, chick peas, corn, fababeans, flaxseed, lentils, mixed grain, mustard seed, oats, peas, rapeseed, rye, safflower seed, soybeans, sunflower seed, triticale and wheat: “Canada Grain Regulations”, CRC, c 889, s 5(1) [“Canada Grain Regulations”].

[38] “Producer Protection”, *supra* note 34. The producer must be able to produce one of the following documents: (1) a primary elevator receipt; (2) a grain receipt; (3) a cash purchase ticket; or (4) a cheque from the party that purchased the grain.

[39] *Ibid*. This 30-day period starts to run on the day the cash purchase ticket or cheque was *issued*. Therefore, if a dealer or operator issues a post-dated cheque to a producer, the period starts running from the date it was issued, not the date on the cheque. This can have serious consequences. For example, if a producer receives a post-dated cheque on 1 October dated 15 November, the producer has until 31 October (15 days before the date on the cheque) to seek compensation from the operator or dealer’s security.

[40] *Ibid*; “Canada Grain Regulations”, *supra* note 37, s 17.

4. Title

i. Introduction

One of the most important issues likely to emerge for insolvency professionals dealing with grain is that of title to the grain—both how title passes and how it may be encumbered. In order to better understand this issue, it is necessary to review the interaction between the *CGA* and the provincial personal property security regimes.

ii. Jurisdiction

First, the regulation of secured transactions is an area of joint jurisdiction between the federal and provincial governments. While the provinces have passed various statutes regulating this area, including each province's respective *Personal Property Security Act* (*PPSA*), the federal government can, and has, regulated secured transactions.[41] The federal government's ability to legislate in this area has been upheld by the Supreme Court of Canada.[42]

Typically, the *PPSA* will expressly exclude areas subject to federal regulation. For example, the *PPSA* expressly excludes transactions governed by the *Bank Act*.[43] However, even where the federal regulation is not contemplated, if the two regimes come into conflict, the federal legislation will prevail under the doctrine of paramountcy.[44] Indeed, the Supreme Court of Canada held in *Bank of Montreal v Innovation Credit Union* that:

> [28] As the Court held in *Hall*, the *Bank Act* security provisions are valid federal legislation which cannot be subject to the operation of provincially enacted priority provisions (*Hall*, at pp. 154-55). Because provinces cannot enact provisions that would affect the priority of a validly created federal security interest, the conceptual framework for resolving disputes between *PPSA* security interests and *Bank Act* security interests is necessarily that supplied by the *Bank Act*.[45]

[41] Bruce MacDougall, *Canadian Personal Property Security Law*, 2nd ed (Toronto: LexisNexis Canada, 2019) at 13 [MacDougall]: the most general federal regulation relating to security interests available to federally chartered banks, for example, is the *Bank Act*, SC 1991, c 46.
[42] *Bank of Montreal v Hall*, [1990] 1 SCR 121, 1990 CanLII 157; MacDougall, *supra* note 41.
[43] MacDougall, *supra* note 41 at 13.
[44] *Bank of Montreal v Innovation Credit Union*, 2010 SCC 47 [*Innovation Credit*]; *Royal Bank of Canada v Radius Credit Union Ltd*, 2010 SCC 48.
[45] *Innovation Credit, supra* note 44 at para 28.

Second, the *CGA* adds an additional layer of jurisdiction by declaring that many of the central infrastructure elements necessary for carrying on business as an elevator operator or a grain dealer are works for the general advantage of Canada:

> **Works for the general advantage of Canada**
> **55(1)** All elevators in Canada heretofore or hereafter constructed, except elevators referred to in subsection (2) or (3), are and each of them is hereby declared to be a work or works for the general advantage of Canada.
>
> **Other works**
>
> **(1.1)** Every flour mill, feed mill, feed warehouse and seed cleaning mill is a work for the general advantage of Canada.
>
> **(2) and (3)** [Repealed before coming into force, 2008, c. 20, s.3][46]

This declaration ensures that such infrastructure and their regulation are outside of provincial jurisdiction and within the jurisdiction of Parliament.[47] In considering both the transfer of title over grain and the ability to encumber such title, it is necessary to understand the regime created under the *CGA*. Knowledge of the *PPSA* alone is insufficient.

iii. Transfer of title

Once a producer delivers grain to either an elevator operator or a grain dealer, the operator or dealer may fully pay for the grain. Where payment in full is received, title to the grain has transferred.

In the absence of full payment, however, the operator or dealer must immediately provide the producer with either a valid CPT or a receipt (an elevator receipt in the case of a primary elevator operator or a grain receipt in the case of a process elevator operator or a grain dealer).[48] The CPT is a unique document under the *CGA* and is defined as:

> …a document in prescribed form issued in respect of grain delivered to a primary elevator, process elevator or grain dealer as evidence of the purchase of the grain by the operator of the elevator or the grain dealer and

[46] *CGA*, *supra* note 19, s 55.
[47] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(10)(c), reprinted in RSC 1985, Appendix II, No 5.
[48] *CGA*, *supra* note 19, ss 61(1), 81(1).

> entitling the holder of the document to payment, by the operator or grain dealer, of the purchase price stated in the document[.][49]

In the case of a primary elevator operator, the issuance of a valid CPT is where title has transferred. If the operator issues an elevator receipt, title to the grain remains with the producer. Indeed, the elevator receipt expressly entitles the producer to either delivery of grain of the same kind, grade and quantity referred to in the receipt or, in the case of a document issued for specially binned grain, to delivery of the identical grain.[50] This creates a bailment relationship that continues until a valid CPT is issued.[51]

The situation is more complex with regard to grain dealers and process elevator operators, both of whom may issue a grain receipt. Unlike an elevator receipt, a grain receipt does not expressly entitle the producer to delivery of identical grain.[52] Moreover, while an elevator operator is under a duty of care with regard to the grain in their possession, the *CGA* does not provide a similar duty of care with regard to grain dealers.[53] As a result, the nature of the commercial relationship between grain dealers and producers is more opaque. This is further complicated by the fact that the definition of a grain receipt contains similar language to that of a CPT. Indeed, both the definition of the CPT and the grain receipt note that the document "entitl[es] the holder of the document to payment".[54] As a result, it appears likely that the issuance of a grain receipt may be a transfer of title to the grain.

This distinction may appear pedantic, but it is not without its logic. A primary elevator is defined in the *CGA* as "an elevator the principal use of which is the receiving of grain directly from producers for storage or forwarding or both".[55] These actions fit with the

[49] *Ibid*, s 2, "cash purchase ticket".
[50] *Ibid*, s 2, "elevator receipt". The only way for the holder of a receipt to waive its right to require the elevator operator to return like-grain is in writing and in the prescribed form on the receipt: *ibid*, s 66.
[51] *NM Patterson & Co v Carnduff*, [1931] 2 WWR 221, 1931 CarswellSask 32 at paras 3, 18–19 (CA) [*NM Patterson*]. While *NM Patterson* was decided under section 213 of the *CGA* (a section that has subsequently been repealed), other provisions of the *CGA* clearly contemplate the creation of a bailment relationship. For example, elevator operators are subject to a duty of care toward the grain producers: *CGA*, *supra* note 19, s 59.
[52] *Ibid*, s 2, "grain receipt".
[53] *Ibid*, s 59. Interestingly, however, the duty of care applies to any "operator of a licensed elevator". As a result, it very likely applies to process elevator operators as well, hinting that such operators may also be in a bailment relationship with regard to the grain in their possession.
[54] *Ibid*, s 2, "cash purchase ticket" and "grain receipt".
[55] *Ibid*, s 2, "primary elevator".

bailment relationship, since the grain is not being materially altered.[56] In contrast, a process elevator is defined as “an elevator the principal use of which is the receiving and storing of grain for direct manufacture or processing into other products”.[57] This anticipates the transformation of the grain into other products, altering the fundamental nature of the grain. In addition, a grain dealer is “a person who, for reward, on his own behalf or on behalf of another person, deals in or handles western grain”.[58] This definition clearly anticipates that the grain dealer will deal with the grain they hold, which may result in the grain being unrecoverable. As a result, the delivery of grain to a process elevator or grain dealer is likely inconsistent with a bailment relationship. Title likely transfers.

As detailed above, the distinctions between primary elevator operators, process elevator operators and grain dealers are likely consequential with regard to the transfer of title. It is therefore necessary for insolvency professionals working in the grain industry to fully understand the character and business of the purchaser of the grain in each transaction. Unfortunately, however, the nature of a purchaser’s licence is not always evident from that purchaser’s operations. Thus, an insolvency professional should also make the appropriate inquiries to determine the particular licence held by each purchaser.

iv. Validity of a CPT

The *CGA* also contains strict regulation for what is considered a valid CPT. The validity of a CPT is of vital importance, because any invalidity of a CPT “occurs when the [CPT] or other bill of exchange is given to the producer” and not when the invalidity is discovered.[59] Therefore, if a CPT is deemed invalid, it is invalid *ab initio*, and arguably title to the grain did not transfer. There are several ways in which a CPT is rendered invalid. The most relevant for insolvency professionals is that the purchaser cannot pay the amount of the CPT. Section 49(6) of the *CGA* provides that:

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[56] It may be altered to a degree by cleaning and other processes accounted for in the dockage of the grain. However, a primary elevator does not alter the fundamental character of the grain.
[57] *CGA*, *supra* note 19, s 2, “process elevator”.
[58] *Ibid*, s 2, “grain dealer”.
[59] *Ibid*, s 49(6).

> If the failure on the part of a licensee to meet the licensee's payment obligations is a result of their giving to the producer a cash purchase ticket or other bill of exchange that the bank or other financial institution on which it is drawn subsequently refuses to honour, that failure occurs when the cash purchase ticket or other bill of exchange is given to the producer.[60]

This has serious consequences in an insolvency context. Indeed, if an elevator operator or grain dealer becomes insolvent and is, therefore, unable to fulfill its payment obligations under a CPT, then that CPT is invalid *ab initio*. The arguable result of this is that the operator or dealer did not obtain title to the grain. Rather, title is deemed to have always been with the producer and an initially valid CPT (in which title has passed) may be rendered invalid through insolvency and the title will not have passed retroactively. The result allows the producer to claim either for the return of its property or (more likely) against the security held. Insolvency professionals need to be aware of the potential for producer claims or claims of subrogation in relation to inventory held at the commencement of an insolvency.

v. Taking security in grain

As discussed above, absent the issuance of a valid CPT, a primary elevator operator very likely holds the producer's grain as a bailee. While such a bailment relationship may not necessarily prevent the attachment of a security interest under the *PPSA*, it does under the *CGA*. Indeed, the *CGA* expressly prohibits the granting and taking of security in grain subject to an elevator receipt without first obtaining the endorsement or delivery of the elevator receipt:

> **Restriction on creation of charge, interest or right**
> **112** Despite anything in the *Bank Act*, no charge on or interest or right in grain referred to in an elevator receipt that affects the interest or right of the holder of the receipt may be created by the holder, or by the operator of a licensed elevator who issued the receipt, other than by the endorsement or delivery of the receipt to the person in whose favour the charge, interest or right is created.[61]

[60] *Ibid* [emphasis added].
[61] *Ibid*, s 112.

As a result, lenders should be aware that, while their security may have met all the requirements for attachment and perfection to be enforceable under the *PPSA*, the interest may still be prevented from attaching under the *CGA*.

IV. CONCLUSION

Due to the unique and nuanced regime created by the *CGA*, insolvency professionals cannot simply rely on their general understanding of security, insolvency and contract law when dealing with matters relating to the grain industry. As outlined in this article, the *CGA* has imposed special requirements for enforceable contracts, for security to protect grain producers, for the transfer of title and for the attachment of a security interest to grain. As a result, insolvency professionals working on such matters must develop a thorough understanding of the *CGA* and must engage experts in this area where necessary.

TAB 10

2013 ABCA 440
Alberta Court of Appeal

Jackson v. Canadian National Railway

2013 CarswellAlta 2549, 2013 ABCA 440, [2014] 4 W.W.R. 427, [2014] A.W.L.D. 169, [2014] A.W.L.D. 303, 236 A.C.W.S. (3d) 246, 566 A.R. 247, 597 W.A.C. 247, 91 Alta. L.R. (5th) 401

Thomas Richard Jackson Appellant (Plaintiff) and Canadian National Railway and Canadian Pacific Railway Respondents (Defendants)

Clifton O'Brien, Peter Martin, Brian O'Ferrall JJ.A.

Heard: September 10, 2013
Judgment: December 20, 2013
Docket: Calgary Appeal 1201-0323-AC

Proceedings: affirming *Jackson v. Canadian National Railway* (2012), 2012 CarswellAlta 2304, 2012 ABQB 652, 73 Alta. L.R. (5th) 219, [2013] 4 W.W.R. 311 (Alta. Q.B.)

Counsel: E.F. Anthony Merchant, Q.C., P. Bates, C.R. Churko for Appellant
R. Leurer, Q.C., D. Hodson, Q.C., V. Monar-Enweani for Respondents

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Refusal to certify

Plaintiff was grain farmer — Plaintiff alleged that rate charged by defendant railways to move grain included cost for hopper car maintenance that railways had not actually incurred — Plaintiff sought restitutionary award for amount of overstated maintenance costs — Plaintiff brought unsuccessful application to certify class action to benefit other grain farmers in his position — Defendants brought successful application for summary judgment — Plaintiff appealed — Appeal dismissed — It was implicit in legislated formulas set out in Canada Transportation Act that railways were entitled to set maximum rate scales, and later to recover maximum revenue entitlement, in accordance with formulas monitored and enforced by Canadian Transportation Agency — Railways were not subject to common law duty to charge fair and reasonable rates — It was plain and obvious that statement of claim did not disclose cause of action within meaning of s. 5 of Class Proceedings Act.

Transportation --- Carriers — Fares and freight rates — Regulation of rates — Miscellaneous

Plaintiff was grain farmer — Plaintiff alleged that rate charged by defendant railways to move grain included cost for hopper car maintenance that railways had not actually incurred — Plaintiff sought restitutionary award for amount of overstated maintenance costs — Plaintiff brought unsuccessful application to certify class action to benefit other grain farmers in his position — Defendants brought successful application for summary judgment — Plaintiff appealed — Appeal dismissed — It was implicit in legislated formulas set out in Canada Transportation Act that railways were entitled to set maximum rate scales, and later to recover maximum revenue entitlement, in accordance with formulas monitored and enforced by Canadian Transportation Agency — Railways were not subject to common law duty to charge fair and reasonable rates — It was plain and obvious that statement of claim did not disclose cause of action within meaning of s. 5 of Class Proceedings Act.

APPEAL by plaintiff from judgment reported at *Jackson v. Canadian National Railway* (2012), 2012 CarswellAlta 2304, 2012 ABQB 652, 73 Alta. L.R. (5th) 219, [2013] 4 W.W.R. 311 (Alta. Q.B.), dismissing plaintiff's application to certify class action and granting defendants' application for summary judgment.

***Per curiam*:**

I. Introduction

1 The appellant, Thomas Richard Jackson, is an Alberta grain farmer. In 2010, he sued the respondent railways seeking restitution for what he claimed were excessive freight rates. Specifically, he claimed that the rate the railways charged to move grain, from 1995 to 2007, included a cost for hopper car maintenance that the railways had not actually incurred. He sought a restitutionary award for the amount of the overstated maintenance costs, and sought to certify the action as a class action to benefit other grain farmers in his position.

2 When the appellant filed his certification application, the respondents applied for summary judgment dismissing the claim. The case management judge heard both applications at the same time. She denied certification and granted the summary dismissal application.

3 Jackson now appeals both findings. For the reasons that follow, we dismiss his appeal.

II. Background

4 The background facts, including a brief history of regulated grain freight rates, are set out in the chambers judge's thorough and careful reasons, and we will not repeat them all here (see: 2012 ABQB 652 (Alta. Q.B.)). The following précis is sufficient for purposes of this appeal.

A. The rate-making structure

5 Freight rates for the movement of western Canadian grain have been a contentious matter for more than a century. They have been subject to an evolving system of freight rate regulation since 1897.

6 Throughout this time, Parliament has provided various statutory formulas for developing rates, and has delegated rate making, and other ancillary matters, to a specified administrative body, known by a variety of names but now called the Canadian Transportation Agency (Agency). Historically, the courts have not played a role in adjudicating the reasonableness of freight rates in western Canada.

7 Prior to 1983, ratemaking was dealt with through the "Crow Rate" and related subsidies. On November 23, 1983, however, Parliament passed the *Western Grain Transportation Act*, RSC 1985, c W-8. Under this legislation the determination of the annual rate scale became subject to a complex formula pursuant to section 36 of that Act. This determination involved a consideration of eligible costs and included quadrennial costing reviews which required the Agency to "take into account all costs actually incurred" relating to the movement of regulated grain.

8 The ratemaking process changed in 1995 when Parliament introduced a system of "Maximum Rate Scales" (MRS). The calculation of the MRS involved a freight rate multiplier which adjusted rates for inflation. The freight rate multiplier incorporated a volume-related composite price index (VRCPI) which was used to forecast changes in the railroads' expenses associated with the transportation of regulated grain, including, among other components, leased hopper cars. Under this new regime, the quadrennial costing reviews were eliminated, with the consequence that operating efficiencies accrued to the benefit of the railway companies. Subsequently, the Agency set the MRS over the period from 1997 to 2001.

9 Parliament changed the system, yet again, on August 1, 2000, introducing a regime that allowed the railways to set their own rates, subject to a Maximum Revenue Entitlement (MRE). Under this system the railways were entitled to negotiate and set rates for transporting regulated grain. They were subject to penalty if their revenues from the shipment of that grain exceeded the MRE established by the Agency for that year. The formula for determining a railway's MRE was, and is, set out in section 151(1) of the *Canadian Transportation Act* (*CTA*) which provides:

> 151. (1) A prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year is the amount determined by the Agency in accordance with the formula

> [A/B + ((C - D) × $0.022)] × E × F
>
> where
>
> A is the company's revenues for the movement of grain in the base year;
>
> B is the number of tonnes of grain involved in the company's movement of grain in the base year;
>
> C is the number of miles of the company's average length of haul for the movement of grain in that crop year as determined by the Agency;
>
> D is the number of miles of the company's average length of haul for the movement of grain in the base year;
>
> E is the number of tonnes of grain involved in the company's movement of grain in the crop year as determined by the Agency; and
>
> F is the volume-related composite price index as determined by the Agency.

10 The VRCPI ("F" in the above formula) is essentially an inflation index set by the Agency. It is important to observe that the formula does not contemplate the Agency embarking upon an examination of actual costs for any component of service. Rather, an inflation allowance is applied to certain historical costs, which essentially yields the benefit of operating efficiencies to the railway companies. It follows that the railways bore the risk if costs exceeded the projected inflation.

11 The current MRE regime was described by Rothstein J.A. (as he then was) in *Canadian Pacific Railway v. Canadian Transportation Agency*, 2003 FCA 271 (Fed. C.A.), at para 2:

> Under this new form of regulation, the Canadian Transportation Agency (Agency) determines the maximum revenue entitlement (revenue cap) for each railway company for each year ending July 31 (crop year) according to a formula set out in the *Canada Transportation Act*, S.C. 1996, c. 10 (as amended by S.C. 2000, c. 16). If a railway company's revenues for the movement of western grain for the crop year exceed the company's revenue cap for that year, the company is required to pay out the excess together with applicable penalties pursuant to the *Railway Company Pay Out of Excess Revenue for the Movement of Grain Regulations*, SOR/2001-207 of June 7, 2001.

12 Rothstein J.A. observed further, at para 27:

> Determining whether demurrage revenues are reasonable is an entirely different function. That function would require the Agency to engage in a broad assessment of whether demurrage charges or increases in demurrage charges can be justified by market and/or railway cost considerations and the effect on shippers and consignees. That type of intensive freight rate regulation is no longer applicable under current railway legislation. Even in the case of the movement of western grain by rail, where regulation is more pervasive than for other commodities or regions, *the regulation of a railway company's revenues is not based on reasonableness but rather on application of a formula taking into account changes from base year figures in volume, length of haul and relevant inflation*.
>
> [emphasis added]

B. The hopper cars

13 As mentioned above, one of the costs that became embedded in the determinations applicable under both the MRS and the MRE regimes was the cost of hopper car maintenance. As early as 1972 the Canadian Government had been acquiring hopper cars and supplying them to the railways under a variety of agreements for use in transporting grain. Under these agreements, the railways had assumed responsibility for maintaining the hopper cars. When the Canadian Government developed the MRS and MRE regimes, these maintenance costs became a fixed cost that was subject to adjustment for inflation under the VRCPI.

14 These fixed costs for hopper car maintenance became a subject of some debate and speculation in the late 1990's, but it was not until the Canadian Government proposed disposing of its hopper car fleet to the Farmer Rail Car Coalition in 2004 that steps were taken to ascertain the actual cost of maintaining the hopper cars. Studies by the Agency in 2004 and 2005 indicated that the embedded cost, as annually adjusted, substantially exceeded the actual cost.

15 In 2006, the Canadian Government decided not to sell the hopper car fleet. However, in recognition the disparity between the embedded and actual maintenance costs, the Government determined that an adjustment was required. In 2007 Parliament passed Bill C-11, entitled *An Act to Amend the Canada Transportation Act and the Railways Safety Act and to Make Consequential Amendments to Other Acts*, 1 st Sess, 29 th Parl, assented to 22 June, 2007. Clause 57 of the Bill provided:

> Despite subsection 151(5) of the *Canada Transportation Act*, the Canadian Transportation Agency shall, once only, on request of the Minister of Transport and on the date set by the Agency, adjust the volume-related composite price index to reflect the costs incurred by the prescribed railway companies, as defined in section 147 of the Act, for the maintenance of hopper cars used for the movement of grain, as defined in section 147 of that Act.

16 The Agency subsequently carried out an investigation, which involved consulting with many organizations, and on February 19, 2009 released *Decision No. 67-R-2008* [2008 CarswellNat 4923 (Can. Transport. Agency)] (the "Hopper Car Decision"). The Agency estimated that during the first seven years under the MRE regime, starting with the 2000-2001 crop year, the legislative formula set out in section 151(1) permitted the railway companies to recover at least $300 million more than they had actually spent on hopper car maintenance. The Agency confirmed that this difference arose because the statutory formula for calculating the MRE embedded historical maintenance costs at a time when the railways were experiencing substantial cost reductions in hopper car maintenance due to operating efficiencies.

17 As the Agency was empowered to make a one-time only adjustment to the VRCPI, it did so, providing a reduction, on average, of $2.59 per tonne of grain shipped in the 2007-2008 class year. The Hopper Car Decision was upheld by the Federal Court of Appeal: *Canadian National Railway v. Canadian Transportation Agency*, 2008 FCA 363 (F.C.A.). Ryer J.A., on behalf of the Court, summarized the purpose and effect of clause 57, as follows, at para 3:

> Clause 57 provides for an adjustment to the volume-related composite price index (the "VRCPI"), an important component of the formula that provides a "revenue cap" *on the revenues that Canadian National Railway Company ("CN") and Canadian Pacific Railway Company ("CP") are permitted to earn from the transportation of western grain*. The mandated adjustment is narrowly focused on a single component of the VRCPI, costs incurred by CN and CP for the maintenance of hopper cars used in the transportation of western grain.
>
> [emphasis added]

18 This adjustment did not claw back any amounts which the statutory formula had allowed the railway companies to recover, based upon the historic embedded costs which were derived in the quadrennial costing review that occurred in 1992 when the *Western Grain Transportation Act* had been in effect.

19 The Agency's conclusions about the fixed and actual costs of hopper car maintenance, found in the Hopper Car Decision, are the basis of the appellant's proposed class action. But the appellant is seeking, through the remedy of unjust enrichment, to do what the legislation did not do, which is to recover on behalf of western grain producers the differential, arising in the years before the adjustment, between the actual costs of hopper car maintenance and the rates charged for that purpose, based upon the application of the statutory formula embedding historic costs.

III. Chambers Judge's Decision

A. Certification

20 The chambers judge started her analysis by dealing with the appellant's certification application. The first issue was whether the pleadings disclosed a cause of action within the meaning of section 5 of the *Class Proceedings Act*, SA 2003, c C-16.5. It was the appellant's submission that section 5 of the *CTA* created a duty to transport grain at the lowest possible cost so that the railways were obliged to charge rates based upon the actual cost of service.

21 The judge did not accept this argument. She pointed out that section 5 was a "purpose statement" setting out the objectives of Canada's National Transportation Policy. As such, the section did "not establish a specific duty on the part of the Railways to charge rates below those mandated by the Agency to reflect decreasing HCMC" (hopper car maintenance costs) (para 63). Rather, in her view, the freight rates were wholly governed by the legislative provisions. She stated, at para 66:

> The *CTA* is a comprehensive legislative regime under which the Agency is empowered to make certain determinations in regard to freight rates in accordance with the broad objectives set out in the National Transportation Policy. The regulatory regime effectively supplants any common law obligation on the part of Railways with regard to freight rates, and replaces it with an arrangement whereby the determination of appropriate maximum rates and railway revenues has been made by Parliament and the Agency.

22 She concluded that "the rates charged and revenues earned by the Railways were specifically allowed by Parliament and the Agency" (para 67), which provided a juristic reason barring any claim for restitution for unjust enrichment. Thus, it was plain and obvious the appellant had not pleaded a viable cause of action. The chambers judge found, as well, that if the appellant's action became a class action, individual considerations would overwhelm common ones, and that certification should also be denied on this basis.

B. Summary judgment dismissing the claim

23 The chambers judge turned to the respondents' claim for summary dismissal. She found there were no material facts in dispute requiring a trial. She also found that the legal issue raised by the claim involved the interpretation of the legislative scheme set out in the *CTA*, and that no additional evidence was needed to evaluate the merits of the claim: *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.) at para 11. When she turned to the statute, she found that the "legislated arithmetic" underlying the maximum rate scales, and subsequently the maximum revenue requirements, as well as the legislation allowing a one-time adjustment to the VRCPI, would largely be rendered "meaningless" if the interpretation put forward by the appellant were adopted (paras 123-4). Thus, she found there was no merit to the claim within the meaning of *Rule* 7.3(1)(b) of the *Alberta Rules of Court*.

24 Additionally, the chambers judge held that the appellant's individual claim was statute barred pursuant to section 3 of the Alberta *Limitations Act*, RSA 2000, c L-12.

IV. Analysis

25 The appellant advances three grounds of appeal which challenge the chambers judge's conclusions on certification and summary dismissal. In our view, however, while the tests for determining whether there is a cause of action for purposes of certification and summary judgment dismissing a claim are somewhat different, both tests require the court in this case to interpret the same sections of the *CTA*. As the reasons which the chambers judge gave for denying certification, and granting summary dismissal, are based upon this statutory interpretation, the result is the same applying either test.

26 The test of whether the pleadings disclose a cause of action to meet the certification requirement is not stringent. This requirement will be met, unless it is plain and obvious, assuming the truth of the facts as pleaded, that the plaintiff's claim cannot succeed: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para 63. This was the test applied by the chambers judge (para 56).

27 The test for summary judgment was stated by the Supreme Court of Canada in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at para 27, (1999), 178 D.L.R. (4th) 1 (S.C.C.):

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court.

28 In *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.), it was observed that the summary judgment rule serves an important purpose in the civil litigation system by preventing claims which have no chance of success from proceeding to trial.

29 The appellant submits that "evidentiary controversy" precludes summary dismissal at this stage of the proceedings because there are material facts in dispute. We agree with the chambers judge, however, that the central controversy is with respect to the interpretation of the *CTA*, and not with respect to any contested material facts. The process of discovery is not of assistance in determining the meaning and intent of the statutory provisions. Thus, there are no genuine issues of material fact which require trial. In such a case, the question becomes whether the issue can fairly be decided on the record before the court. In *Tottrup*, this Court stated, at para 11:

> There are, however, other types of summary judgment applications. In some cases the facts are clear and undisputed. The ultimate outcome of the case may depend on the interpretation of some statute or document, or on some other issue of law that arises from undisputed facts. In such cases the test for summary judgment is not whether the issue is "beyond doubt", but whether the issue of law can fairly be decided on the record before the court. If the legal issue is unsettled or complex or intertwined with the facts, it is sometimes necessary to have a full trial to provide a proper foundation for the decision. In other case it is possible to decide the question of law summarily...

30 We agree with the chambers judge that the *CTA* can be interpreted, to the extent necessary, on the record before the Court, so that summary dismissal is available and appropriate to grant if it is determined that the plaintiff has no chance of success. We turn, therefore, to whether she correctly interpreted the *CTA*.

31 The appellant argued in the court below that the railways had an obligation to charge reasonable rates, based upon actual costs, and that this duty could be found in section 5 of the *CTA*. The appellant's proposed amended claim states that "Parliament intended" that the railway companies "would pass on or share" the reductions in hopper car maintenance costs "to or with the class members", and that the respondents had a statutory duty to do so. The chambers judge rejected this argument, however, finding that the *CTA* constitutes a complete code with respect to the transportation of regulated grain. As a consequence, she held that "the regulatory regime effectively supplants any common law obligation on the part of Railways with regard to freight rates" (para 66).

32 Having encountered this roadblock in the court below, the appellant took a different approach before us, arguing that the duty to charge reasonable rates is a common law duty that coexists with the legislation. He cited the judgment of the Supreme Court in *Ottawa Electric Railway v. Nepean (Town)* (1920), 60 S.C.R. 216 (S.C.C.), for the proposition that the common law imposes a duty to charge fair and reasonable rates, and further, that such a duty can exist alongside a regulatory regime which prescribes either maximum rates or maximum revenues. The appellant also cited *Canadian National Railway v. Neptune Bulk Terminals (Canada) Ltd.*, 2006 BCSC 1073, [2007] 2 W.W.R. 623 (B.C. S.C.), which recognizes that the legislation governing railways is not a complete codification of the law, as many common law rules remain applicable. Specifically, Wedge J. stated in that case that "the CTA continues to impose on railway companies such as CN certain duties often referred to as 'common carrier obligations'" (para 92).

33 The railways replied to this argument by pointing out that it was not made before the chambers judge, with the result that the appellant is precluded from advancing this new argument on appeal. We note that the Statement of Claim has already been amended a number of times and that the further Amended Proposed Statement of Claim before the chambers judge (ARD, 74-78) does not refer to a common law duty. It appears, therefore, that a further amendment may be required if the action is permitted to continue. Nevertheless, we have chosen to deal with the appellant's most recent submission on its merits.

34 *Ottawa Electric* dealt with statutory powers to control and disallow any proposed tariff of rates under section 323 of the then *Railway Act* (para 19). However, it appears that at least some of the judges accepted that there was also power in the common law courts over rates charged by a common carrier (para 20 per Sir Louis Davies, C.J., and para 69 per Idington J.). It was held by a majority in that case that the statutory power could be exercised to control rates, notwithstanding that a tariff maximum existed in that instance.

35 The appellant contends, therefore, that Parliament, in enacting legislation which imposed maximum rate scales, and subsequently maximum revenue entitlements, did not intend to thwart the common law requirement that the rates set by a common carrier be fair and reasonable. He acknowledges that maximum rate scales and maximum revenue requirements provide customers with a measure of protection, but argues that such protection is not exhaustive. He submits, in other words, that even if the rates charged by the railroads did not exceed the maximum rate scales, nor yield the maximum revenue requirement, the rates still remained subject to the requirement that they be fair and reasonable. He submits, further, that the hopper car decision established that the railways collected hundreds of millions of dollars for hopper car maintenance beyond their actual expenditures, which demonstrates that the rates throughout the period were unjust and unreasonable.

36 There are two difficulties with this argument. The first is that it appears to be founded on the proposition that a single component of costs, namely the cost of hopper car maintenance, will define whether freight rates were fair and reasonable. Any number of factors, however, could go into such a determination, and much more would be required to demonstrate that the rates were unfair or unreasonable. Furthermore, there is no direct correlation between the claim for the "overstated" maintenance costs and any amount of excessive earnings due to rates being determined to be unfair and unreasonable. It would seem that something in the nature of a rate hearing, which would examine the costs, as well as other determinations of fair and reasonable rates, would be required. It also seems unlikely that Parliament intended that such a task would be left to the courts where freight rate regulation has for many decades been delegated to a specialized body.

37 The second difficulty with the appellant's argument is more profound and relates to the far-reaching nature of the statutory scheme set out in the *CTA*. We note, in starting our analysis of this issue, that the class period described in the appellant's claim is August 1, 1995 to July 31, 2007. However, it appears to be accepted by the appellant that limitations legislation precludes asserting a claim for any period beyond 10 years from the date of issuance of the Statement of Claim. Thus, for all practical purposes, the relevant time frame for examining whether the legislation constitutes a complete code is during the regime when the maximum revenue requirement was in force, which commenced as of August 1, 2000.

38 As the issue of whether the *CTA* has ousted any common law in relation to freight rates is one of statutory interpretation, it is useful to begin by referring to the governing principles in this area. The first is 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. The following passages from Ruth Sullivan's *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) are apposite:

> **Adequacy of the legislation.** Arguably the most important factor in determining the relationship between legislation and the common law is the court's sense of what is needed to ensure a coherent and effective operation of the law. (at 433)
>
> In interpreting a code, concern for the internal coherence of the statute takes precedence over the presumption against changing the common law. (at 439)
>
> **Legislation offers comprehensive scheme.** Resort to the common law is considered inappropriate when the legislation to be applied is broad and detailed enough to offer a comprehensive regulation of the mater in question. This is not to say that the Act as a whole necessarily amounts to a comprehensive code, but rather that the matter in question is dealt with by the legislature in a comprehensive fashion. It could be dealt with in part of a statute, in more than one statute, or in statute law supplemented by regulation. In so far as the legislation is comprehensive, it displaces the common law. (at 442)

39 The chambers judge considered the relevant provisions of the *CTA* in the context of the history of regulated grain freight rates at paras 7 — 30 of her Reasons. We note that no issue is taken on this appeal with her historical analysis. Interpreting the *CTA* in the context of this history, she found that the legislation underlying the maximum rate scales, the maximum

revenue "entitlements," as well as the legislation allowing a one-time adjustment to the VRCPI, would largely be rendered "meaningless" (para 123) if the construction put forward by the appellant were adopted.

40 We agree. In our view, there would be no reason to set maximum rate scales, and later maximum revenue entitlements, if the railway companies were not entitled to charge the maximum rates, or recover the maximum revenue entitlement, as calculated and administered by the Agency in accordance with the provisions of the *CTA*. Furthermore, calculating both the MRS and the MRE involved, and continues to involve, the application of complex statutory formulas which depart from the cost based measurements under the *Western Grain Transportation Act*. Finally, there would have been no need to make a one-time adjustment to the VRCPI in which the hopper car maintenance costs were imbedded, if the railways were already obliged to "pass on the share" of the reduction in maintenance costs, achieved by operating efficiencies, to shippers by reason of common law obligations.

41 In our view, therefore, it is implicit in the legislated formulas set out in the *CTA* that the railways were entitled to set maximum rate scales, and later to recover maximum revenue entitlement, in accordance with the formulas monitored and enforced by the Agency, without having to determine whether the rates were fair and reasonable at common law, assuming, but without deciding, that such common law obligation existed and generally applied to freight rates in Canada. The internal coherence of the governing statute requires no less. 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.

42 Nor is this an instance where the common law can comfortably exist to supplement and support the statutory regime. Here, where the regulation is with respect to freight rates, it is comprehensive and exhaustive. In *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325 (S.C.C.), the Supreme Court dealt with an analogous situation. The *Fisheries Act*, under the heading "Disposition of Things Seized" set out provisions with respect to the disposition and return of seized goods. The sections did no provide for the payment of interest on proceeds held by the court. The respondent sought to rely on the doctrine of unjust enrichment to supplement the statute. Major J. on behalf of the court stated in disposing of the appeal, at para 12:

> ... I agree with the trial judge's conclusion that the *Fisheries Act* creates a complete code dealing with the disposition and return of seized property. This code imposes no obligation on the Crown to pay interest or any other amount in addition to what is set out in s. 73.1. The plain meaning of this statutory provision is clear. This may seem unfair given that the proceeds in the case at bar were held for a number of years. If so, it is for Parliament to correct it. The circumstances outlined above occurred simply through the operation of the Act. The comprehensive nature of this statutory regime is not diminished by the fact that the proceeds are to be paid to the Receiver General. This simply directs where the funds are to be paid. It does not add to nor detract from s. 73.1 which governs what is to be returned if not properly forfeited.

43 In this case we are dealing with hopper car maintenance costs. For better or for worse, Parliament dealt with these costs by imbedding them in a legislative formula. When it became apparent that the embedded costs in the statutory formula did not reflect the railways' actual costs, because of increased operational efficiencies, Parliament addressed the issue by legislating a one-time adjustment to the VRCPI. It did not legislate a claw-back. To suggest that a claim for unjust enrichment exists on these facts, due to an un-extinguished common law right, would run contrary to the obvious intention of Parliament.

44 It must be remembered that the appellant does not allege that the railroad companies broke the law, or that the rates they set did not comply with the legislation. Indeed, section 119(2) of the *Act* states specifically that if a railway company issues and publishes a tariff of rates in compliance with Division VI (Transportation of Western Grain) "the rates are the lawful rates of the railway company." Thus, when read in the context of the whole of the legislation, a lawful rate fixed in accordance with the legislation precludes a finding of unjust enrichment. The lawful rates are a juristic reason to allow the alleged enrichment.

45 In reaching our conclusion, we have not overlooked the appellant's submission that the tariffs set by the railway companies pursuant to Division VI (Transportation of Western Grain) are subject to Division IV (Rates, Tariffs and Services). In this regard, section 148 of the *Act* states: "The provisions of Division IV apply, with such modifications as the circumstances require, to tariffs and rates under this Division to the extent that those provisions are not inconsistent with this Division."

46 The appellant points to section 112, which provides that a rate "established by the Agency under this Division must be commercially fair and reasonable to all parties." Here, the rates are neither established by the Agency, nor under Division VI. The railroad companies have freedom to set their own rates, subject to the maximum revenue requirements, including the right to negotiate rates with shippers. If a shipper and a railroad cannot agree on rates, they may ask the Agency to mediate their disagreement or submit the matter to the Agency for final offer arbitration.

47 In summary, we agree with the chambers judge's conclusion that the governing regulatory regimes, during the proposed class period, constitute a comprehensive code of regulation which displaces any common law obligations that might have existed previously. This means that the railways were not subject to a common law duty to charge fair and reasonable rates, and that a juristic reason exists to justify the retention of the disputed maintenance costs which form the basis of the appellant's claim in unjust enrichment. It follows that the plaintiff's claim cannot succeed and that the chambers judge's decision granting summary judgment dismissing the claim must be upheld. Although perhaps redundant, we also agree with her decision to deny certification on the basis that it was plain and obvious that the Statement of Claim did not disclose a cause of action within the meaning of section 5 of the *Class Proceedings Act*.

48 These conclusions are dispositive of the appeal. We therefore do not need to deal with any remaining collateral issues.

V. Conclusion

49 The appeal is dismissed.

Appeal dismissed.

End of Document

TAB 11

2016 SKCA 31
Saskatchewan Court of Appeal

Roberts Properties Inc. v. Saskatchewan Power Corp.

2016 CarswellSask 127, 2016 SKCA 31, 264 A.C.W.S. (3d) 317, 476 Sask. R. 143, 48 M.P.L.R. (5th) 76, 666 W.A.C. 143, 84 C.P.C. (7th) 1

Roberts Properties Inc., Appellant (Plaintiff) and Saskatchewan Power Corporation, City of Regina, City of Swift Current, and City of Saskatoon, Respondent (Defendants)

Caldwell, Herauf, Whitmore JJ.A.

Heard: January 13, 2016
Judgment: March 9, 2016
Docket: CACV2603

Proceedings: affirming *Roberts Properties Inc. v. Saskatchewan Power Corp.* (2014), 28 M.P.L.R. (5th) 64, [2014] S.J. No. 474, 58 C.P.C. (7th) 296, 2014 CarswellSask 524, 2014 SKQB 245, 453 Sask. R. 115, C.L. Dawson J. (Sask. Q.B.)

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Barry Rossman, Q.C, for Respondent, City of Saskatoon
Murry Walter, Q.C, for Respondent, City of Swift Current
Christine Clifford, for City of Regina

Subject: Civil Practice and Procedure; Property; Public; Torts; Municipal

Headnote

Municipal law --- Municipal liability — Practice and procedure — Actions — Miscellaneous

Plaintiff owned and operated residential apartment building — Plaintiff sought to certify class action — Plaintiff alleged that defendant power company unlawfully overcharged potential class for certain electrical services, and that portion of this overcharge had been remitted to defendant cities — Plaintiff's claim concerned "basic monthly service charge" levied by defendant power company on their bulk-metred customers — Plaintiff's claim was struck for disclosing no reasonable cause of action — Plaintiff appealed — Appeal dismissed — Plaintiff's allegation that chambers judge made overriding and palpable error in her review of affidavit evidence was unfounded — There was uncontroverted evidence that rate schedule was available for public inspection in manner provided by s. 8(4) of Power Corporation Act — No error was found in chambers judge's conclusion that if common law duty of fairness existed in this case, it was supplanted by s. 8(3) of Act, which provided statutory authorization for basic monthly charge levied against bulk-metred service corporations — Chambers judge had held that claims against defendant cities were derivative of claim against power company, and since claim against power company had been struck, it was plain and obvious that claim against cities could not succeed — This finding was confirmed.

Public law --- Public utilities — Actions by and against public utilities — Practice and procedure — Miscellaneous

Plaintiff owned and operated residential apartment building — Plaintiff sought to certify class action — Plaintiff alleged that defendant power company unlawfully overcharged potential class for certain electrical services, and that portion of this overcharge had been remitted to defendant cities — Plaintiff's claim concerned "basic monthly service charge" levied by defendant power company on their bulk-metred customers — Plaintiff's claim was struck for disclosing no reasonable cause of action — Plaintiff appealed — Appeal dismissed — Plaintiff's allegation that chambers judge made overriding and palpable error in her review of affidavit evidence was unfounded — There was uncontroverted evidence that rate schedule was available for public inspection in manner provided by s. 8(4) of Power Corporation Act — No error was found in chambers judge's conclusion that if common law duty of fairness existed in this case, it was supplanted by s. 8(3) of Act, which provided statutory

authorization for basic monthly charge levied against bulk-metred service corporations — Chambers judge had held that claims against defendant cities were derivative of claim against power company, and since claim against power company had been struck, it was plain and obvious that claim against cities could not succeed — This finding was confirmed.

APPEAL by plaintiff from judgment reported at *Roberts Properties Inc. v. Saskatchewan Power Corp.* (2014), 2014 SKQB 245, 2014 CarswellSask 524, [2014] S.J. No. 474, 58 C.P.C. (7th) 296, 28 M.P.L.R. (5th) 64, 453 Sask. R. 115 (Sask. Q.B.), striking plaintiff's claim for disclosing no reasonable cause of action.

***Herauf J.A.*:**

I. Introduction

1 Roberts Properties Inc., the appellant, sought to set aside the order of Dawson J. that struck its claim against all of the defendants for disclosing no reasonable cause of action. The appeal was dismissed from the Bench with reasons to follow. These are those reasons.

II. Background

2 The facts are succinctly set out in the reasons of the Chambers judge (see 2014 SKQB 245 (Sask. Q.B.)) and are repeated here for ease of reference:

> [2] The plaintiff, Roberts Properties Inc., is a Saskatchewan corporation with a registered address in Regina, Saskatchewan. The plaintiff owns and operates a residential apartment building in Regina. The building contains 83 residential units. All 83 units share one electrical meter.
>
> [3] The primary defendant, Saskatchewan Power Corporation ("SaskPower"), was established pursuant to *The Power Corporation Act*, R.S.S. 1978, c. P-19 (*The Power Corporation Act*). The defendant cities, the City of Regina ("Regina"), the City of Swift Current ("Swift Current") and the City of Saskatoon ("Saskatoon"), are municipal corporations established pursuant to *The Municipalities Act*, S.S. 2005, c. M-36.1.
>
> [4] The plaintiff seeks to certify a class action in these proceedings. As the proposed representative, the plaintiff alleges that SaskPower unlawfully overcharged the potential class for certain electrical services. The plaintiff further alleges that a portion of this overcharge has been remitted to the defendant cities.
>
> [5] The members of the proposed class are the owners of properties designated by SaskPower as "bulk-metered service locations". Bulk-metered service locations are residential properties which contain multiple residential units, but share one electrical meter for the entire location.
>
> [6] The plaintiff's claim concerns the "basic monthly service charge" levied by SaskPower on their bulk-metered customers. SaskPower defines its "basic monthly service charge" as "the fixed monthly amount that is charged for each service ... cover(ing) the cost of billing, meter reading, and account administration".
>
> [7] The crux of the plaintiff's claim is that the proposed class is being overcharged by an unlawfully high basic monthly service charge.
>
> [8] It should be noted that not every residential complex is a bulk-metered service location. Residential apartment complexes and trailer courts built after 1984, excepting senior citizen apartments, are required to have individual meters for each suite or trailer stall. Prior to 1984, the owners of residential apartment complexes had the choice to receive electrical services as a bulk-metered service location or to install individual meters for each residential unit. Owners who chose the bulk-metered service option prior to 1984 now have the option to install individual meters for each residential complex or to continue to receive electricity through a single meter for the entire complex.

[9] SaskPower can read or estimate only one electrical meter at a bulk-metered service location. However, the basic monthly service charge levied by SaskPower against bulk-metered service locations is calculated according to the total number of residential units at that location. In the plaintiff's case, the plaintiff's basic monthly service charge is calculated by taking into account all 83 residential units at the building, even though SaskPower reads or estimates only one meter at that location. In effect, the plaintiff is required to pay a basic monthly service charge or each of the 83 units, even though there is only one meter for the entire complex.

[10] The plaintiff claims that the basic monthly service charge paid by bulk-metered service locations does not reflect a fair and reasonable rate for billing, meter reading, and account administration. The plaintiff also asserts that the charge is unlawfully discriminatory. The plaintiff pleads that SaskPower has been unjustly enriched by the excess basic monthly service charge.

[11] The plaintiff also claims that in order for a SaskPower rate to be valid, the rate must be advertised in a rate schedule available for public inspection at SaskPower's corporate offices, as set out in *The Power Corporation Act*. The plaintiff claims no such schedule is available for "bulk metering" rates, but that even if one were available, this would not provide a juristic reason for the unjust enrichment SaskPower has received on the bulk-metered service charge.

[12] The plaintiff also claims against the defendant cities. The plaintiff claims that the defendant cities receive a municipal surcharge from SaskPower that is added to the monthly accounts of SaskPower customers. The plaintiff claims that the municipal surcharge is calculated based on the amount of the "basic monthly service charge", collected from each SaskPower customer. The plaintiff asserts that the defendant cities are unjustly enriched insofar as the municipal surcharge is based on an unlawfully high basic monthly service charge.

[13] On March 28, 2011, the plaintiff issued its statement of claim. On December 10, 2012, the plaintiff filed its motion for certification. On February 12, 2013, Swift Current filed its motion to strike the pleadings. On February 13, 2013, Regina filed its motion to strike the pleadings. On February 19, 2013, Saskatoon filed its motion to strike the pleadings. On February 21, 2013, SaskPower filed its motion to strike the pleadings. On March 8, 2013, the plaintiff filed a proposed amended notice of motion for certification. On April 29, 2013, the plaintiff filed a second amended notice of motion for certification. On April 30, 2013, SaskPower filed an amended notice of motion to strike the pleadings. On June 15, 2013, the plaintiff filed a third amended notice of motion for certification.

[14] SaskPower's application is to strike the plaintiff's claim pursuant to former Rule 173(a), (c) and (e) of the former *Queen's Bench Rules*. The defendant cities also apply to strike the within claim pursuant to former Rule 173.

III. Decision of the Chambers Judge

3 The Chambers judge struck out paras 16, 17 and 18 of the Statement of Claim (the provisions that speak to the rate schedule not being available for public inspection as required by *The Power Corporation Act*, RSS 1978, c P-19 [*Act*]) as frivolous, vexatious, or an abuse of process pursuant to former Rule 173(c) and (e) of *The Queen's Bench Rules*.

4 The Chambers judge held that the evidence was uncontroverted that the rate schedule existed, that the rate schedule sets out the basic monthly service charge applicable to bulk-metered service locations, and that the rate schedule was available at SaskPower's business offices during regular business hours to any member of the public (see para 38). She then went on to consider whether the claim should be struck out under former Rule 173(a) (disclosing no reasonable cause of action).

5 The Chambers judge held that the claim with respect to unjust enrichment could not succeed as s. 8(3) of the *Act* provided a juristic reason for any enrichment. She also held that any common law duty of fairness that obligated SaskPower to set fair and reasonable prices for services was supplanted by the "existence of a statutory regime authorizing rates and services" (see para 67). She justly found that the appellant had not successfully articulated a common law duty of fairness in the first place.

6 The Chambers judge ultimately concluded that the claim against SaskPower disclosed no reasonable cause of action and struck the entire claim. She then considered the applications of the three cities to strike the claim. She held that the claim against the cities was derivative of the claim against SaskPower and, since that claim had been struck, it was plain and obvious that the appellant's claim against the cities could not succeed and was struck.

7 Finally, the Chambers judge considered the costs issue as set out in the former s. 40 of *The Class Actions Act*, SS 2001, c C-12.01, and former Rule 173 of *The Queen's Bench Rules*. She held that since the motions to strike were not tied to the certification application, s. 40 did not preclude an award of costs and made an order that each of the defendants were entitled to costs of the application.

IV. Legislation

8 The relevant provisions of *The Power Corporation Act* are:

> **8**(3) Notwithstanding any other Act but subject to subsection (5), every person who accepts, uses or otherwise is the recipient of a service provided by the corporation shall:
>
> (a) pay any charges and rates; and
>
> (b) comply with any terms and conditions;
>
> established and revised by the corporation.
>
> (3.1) When required to do so by the Crown Investments Corporation of Saskatchewan, the corporation shall submit to the Crown Investments Corporation of Saskatchewan for review and prior approval any rates, charges and prices at which any goods, utilities or services are sold or provided by the corporation and that the corporation proposes to establish or revise pursuant to subsection (3).
>
> (4) The charges, rates, terms and conditions mentioned in subsection (3) shall be set out or described in a schedule that the corporation shall make available for public inspection at the business offices of the corporation during business hours.
>
> (5) A charge, rate, term or condition is not valid unless the schedule mentioned in subsection (4) and in which it is set out or described has been made available for public inspection in the manner provided in that subsection.

V. Analysis

A. Application to strike out under former Rule 173(c) and (e) of The Queen's Bench Rules

9 In our view, the appellant's allegation that the Chambers judge made an overriding and palpable error in her review of the affidavit evidence was unfounded. After a meticulous review of the affidavit evidence, the Chambers judge made findings of fact, which she summarized in para 37 of her decision:

> [37] Mr. Lawn's evidence is clear and uncontroverted on the following points: i) the rate schedule exists; ii) the rate schedule sets out the basic monthly charge applicable to bulk-metered service locations; iii) it is SaskPower's standard practice to make its complete rate schedule available to the public; iv) SaskPower's rate schedule has constantly been available for inspection at SaskPower's corporate office by any member of the public who asks to see it; v) following receipt of the Hoedel and Fluter affidavits on March 19, 2013, SaskPower re-confirmed that its corporate offices continue to have a copy of the rate schedule available for members of the public; vi) the rate schedule has been available on SaskPower's website since March 5, 2011 for inspection by the public (a print-out of the relevant web page is attached to Mr. Lawn's affidavit as an exhibit); vii) SaskPower has complied with requests for copies of its rate schedule, including from external agencies such as Statistics Canada; and viii) SaskPower does not know of any occasion where it was unable to comply with a specific request for the rate schedule.

10 We agreed with her statement that the material evidence on these points was uncontroverted and that there was no triable issue.

11 We also agreed with her finding that there was uncontroverted evidence that the schedule was available for public inspection in the manner provided by s. 8(4) of the *Act*. Her specific finding that the appellant's assertion to the contrary was devoid of merit was amply supported by the evidence. As a result, we did not give effect to this ground of appeal.

B. Application to strike under former Rule 173(a) of The Queen's Bench Rules

1. Unjust enrichment

12 The appellant acknowledged that the Chambers judge identified the proper framework for consideration for an unjust enrichment claim as set out in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.) [*Garland*].

13 The appellant did not dispute the conclusion of the Chambers judge that s. 8(3) of the *Act* provided the juristic reason necessary to defeat a claim for unjust enrichment (see *Filson v. Canada (Attorney General)*, 2015 SKCA 80 (Sask. C.A.) at para 51, (2015), 388 D.L.R. (4th) 66 (Sask. C.A.) [*Filson*]).

14 The appellant simply suggested that if this Court had reversed the finding of the Chambers judge that SaskPower had satisfied its obligation pursuant to s. 8(4) of the *Act*, then this Court would be obligated to reverse the Chambers judge's dismissal of the claim for unjust enrichment. Since we confirmed the decision of the Chambers judge relating to s. 8(4), we did not have to consider this argument because of the concession by the appellant.

2. Common law duty of fairness

15 The Chambers judge struck this portion of the claim as disclosing no reasonable cause of action. She held that if such a duty did exist in this case, it was supplanted by s. 8(3) of the *Act*, which provided statutory authorization for the basic monthly charge levied against bulk-metered service corporations. We found no error in this conclusion.

16 In addition, we noted that s. 8(3.1) of the *Act* provided a mechanism for SaskPower rates and charges to be reviewed and approved by the Crown Investments Corporation of Saskatchewan. In our view, this pointed to clear legislative intention as to how rates are to be set. Furthermore, this Court in *Swift Current (City) v. Saskatchewan Power Corp.*, 2007 SKCA 27, 293 Sask. R. 6 (Sask. C.A.), recognized that the design of rates and charges is a complex process intended to achieve numerous and often competing goals and objectives. The Court noted:

> [63] ... The setting of the rates itself may involve policy decisions involving a myriad of competing interests and competing policy objectives, for example, and only by way of example, a policy decision to cross-subsidize home consumers or small businesses or to benefit particular sectors of the economy, or another example, to delay or minimize rate increases pending the occurrence of certain circumstances.

17 Simply put, the policy considerations that must be analyzed in situations where rates are set are best left to the Legislature, unless there is clear statutory authority for the courts to intervene.

18 As well, courts have rejected the proposition that common law obligations can offer or modify valid statutory authority. In *Dennis v. Canada*, 2013 FC 1197, 114 L.C.R. 1 (F.C.), aff'd 2014 FCA 232 (F.C.A.), leave to appeal refused (2015), [2014] S.C.C.A. No. 541 (S.C.C.), the plaintiffs commenced a class action alleging unjust enrichment arising from legislation that abolished the Canadian Wheat Board's marketing monopoly and replaced its exclusive mandate with a free market scheme. The plaintiffs argued that the legislative amendments unlawfully expropriated the Board's assets in which they claimed to have an interest. In striking the claim in unjust enrichment as failing to disclose a cause of action, the Federal Court noted:

> [33] ... In my opinion, the validly enacted *MFGFA* serves as a juristic reason for the incidental enrichment that the plaintiffs allege. The legislation clearly sets out the uses for the contingency fund, the change in the operations of the CWB, and

> the transfer of assets in the case of an eventual dissolution. Since the *MFGFA* has already been found to have been validly enacted in *Friends of the Canadian Wheat Board*, it cannot be said that the changes following these provisions are unjust. As stated by the Ontario Court of Appeal in *Zaidan Group Ltd v London*, [1990] 64 DLR (4th) 514 (Ont CA) at para 11 and cited by the Supreme Court in *Gladstone v Canada (Attorney General)*, 2005 SCC 21 at para 20, "[t]he common law cannot characterize competent legislation as unjust..." Thus, the claim for unjust enrichment should be struck out.

19 In *Filson* much of the reasoning of the Federal Court was confirmed by this Court.

20 Reference can also be made to *Jackson v. Canadian National Railway*, 2013 ABCA 440, [2014] 4 W.W.R. 427 (Alta. C.A.), where the Alberta Court of Appeal rejected the argument that a legislative rate regime existed alongside a common law obligation to charge only fair and reasonable rates on two grounds. First, the Court found (at para 36) that the plaintiff was seeking to impose an inappropriate rate-setting role on the Court. Second, the Court cited the well-established principle that legislation supersedes the common law where that intention is clear from the particular provision.

21 In a nutshell, any common law obligation, if one does exist, was supplanted by s. 8(3) of the *Act*, which was unequivocal in its intent: the recipients of SaskPower's services shall pay "any" rates and charges and comply with "any" terms and conditions established by SaskPower, subject only to the requirement that SaskPower's rate schedule be made available for public inspection at SaskPower's business offices during business hours (per ss. 8(4) and 8(5) of the *Act*).

VI. Application by the Cities to Strike the Claim

22 As noted, the cities all brought motions to strike the claim distinct from SaskPower's motion. The cities received a municipal surcharge from SaskPower. The surcharge was compensation for the fact that the Provincial Crown was exempt from municipal taxation but still enjoyed the benefit of municipal services. The surcharge was paid in lieu of taxes pursuant to s. 36 of the *Act*.

23 The Chambers judge held that the claims against the cities were derivative of the claim against SaskPower. Since the claim against SaskPower had been struck, it was plain and obvious that the claim against the cities could not succeed. We simply confirmed this finding.

VII. Costs

24 The Chambers judge awarded costs against the appellants in the Court of Queen's Bench. All of the parties agreed that this Court's decision in *Filson* , which was decided subsequent to the decision in this case, now governs. As a result, all of the parties agreed that the order for costs in the court below should be set aside and no costs be awarded in this Court. We confirmed this agreement and set aside the costs ordered in Queen's Bench and ordered no costs in this Court, except for the costs to settle the contents of the appeal book, which we fixed at $1,000 payable by the appellants to respondent, SaskPower, within 30 days.

VIII. Conclusion

25 For these reasons, the appeal was dismissed against all respondents, except for the modification to the order for costs as noted above.

Appeal dismissed.

TAB 12

2020 ABQB 317
Alberta Court of Queen's Bench

Tarpon Energy Services Ltd. v. Lal

2020 CarswellAlta 921, 2020 ABQB 317, [2020] A.W.L.D. 1800, 318 A.C.W.S. (3d) 334

Tarpon Energy Services Ltd. (Plaintiff) and Peter Lal, Peter Lal, operating under the trade name Audio Dynamics, and Jane Doe (Defendants)

K.D. Yamauchi J.

Heard: March 11, 2020; March 12, 2020
Judgment: May 12, 2020
Docket: Calgary 1301-02878

Counsel: Christopher J. Felling, for Plaintiff
Hardeep S. Sangha, for Defendants

Subject: Contracts

Headnote

Personal property --- Bailment and warehousing — Hire of services or work — Bailee's liability to bailor for loss or damage — Miscellaneous

Vehicle owned by plaintiff was involved in accident — Vehicle was totalled such that it was written off — At time of accident, vehicle was in possession of defendant — Defendant performed services on vehicles owned by plaintiff, including some mechanical maintenance — Defendant kept key for vehicles being serviced — Defendant claimed that on night before accident, vehicle was locked, secured and covered with tarp — Defendant discovered vehicle missing on following morning — Defendant advised plaintiff that vehicle was missing but did not call police — Police did not meet with defendant or lay any charges related to vehicle — Plaintiff's insurer disposed of vehicle and made full payout to lessor of vehicle, less deductible — Payout amount was $47,426.91 — After sale of vehicle for salvage, insurer suffered loss of $37,680.05 — Plaintiff commenced action against defendant for damages suffered as result of damage to vehicle — Action allowed — It was not necessary to find that defendant was driving vehicle when damage occurred — Defendant did not meet onus of to show that non-delivery of vehicle to plaintiff was not due to absence of care and skill — Defendant also failed to discharge duty to take care of vehicle — Defendant was liable for plaintiff's loss — Plaintiff's claim was subrogated claim — Defendant was liable for insurer's net loss of $37,680.05.

ACTION by plaintiff for damages suffered to vehicle while in care and possession of defendant.

***K.D. Yamauchi J.*:**

I. Introduction

1 On September 10, 2010, at 6:15 a.m., a white 2009 GMC Sierra, serial number 1GTHK43639F118994 (the "GMC"), ran into a light standard on Strathcona Boulevard SW, Calgary. The GMC, which was registered in the name of the Plaintiff Tarpon Energy Services Ltd ("Tarpon"), was "totalled," such that it was written off. Although the GMC suffered severe damage, and the GMC's air bags on the driver's side and passenger's side activated, the police did not find the GMC's driver. The police categorized the accident as a "hit and run."

2 At the time of the accident, the GMC was in the possession of the Defendant Peter Lal, who operated under the trade name, Audio Dynamics (collectively, "Mr. Lal").

3 Tarpon commenced an action against Mr. Lal, in which it seeks to have this Court find Mr. Lal liable for the damages it suffered as a result of the damage to the GMC. This Court heard the trial of this matter.

II. Background

4 Mr. Lal operates an automotive repair business. He operates his business, Audio Dynamics, out of his home, which is located in the Altadore district of Calgary. He apprenticed with GSL Chev City, and has 24 years' experience in the automotive repair business. He started operating as Audio Dynamics in 1994, which does "everything auto-related, from tires to sunroof and everything in between."

5 He worked on personal vehicles that a person named Scott McLeod owned. Mr. McLeod became employed with Tarpon. He introduced Mr. Lal to Tarpon's fleet manager sometime in 2010, as an individual who could service Tarpon's trucks. Before their first meeting, the fleet manager asked Mr. Lal to bring his driver's license and driver's abstract to the meeting. Mr. Lal's first job was to clean the fleet manager's truck, which he did. The fleet manager was pleased, so Tarpon continued to use Mr. Lal's services. There was no written agreement. Mr. Lal was simply told what to do with the vehicle and he would do it. He would then render an invoice.

6 Mr. Lal's services progressed from vehicle cleaning to performing some mechanical maintenance on them, such as replacing damaged parts, and arranging for subcontractors to perform services on the trucks, such as replacing broken windshields, or transmission work.

7 Mr. Lal would drive his personal vehicle to Tarpon's premises, leave his vehicle there, and pick up the vehicle on which he was going to work. He would complete the work and return the vehicle, along with his invoice. Along the way, he would put fuel in the truck, as a courtesy, using Tarpon's credit card, which was located in the truck. He would leave the vehicle's keys in the ignition.

8 He knew that he was only entitled to use Tarpon's vehicles to repair them. He could not use them for personal use.

9 He did this for a few months. He performed services on the same vehicles, from time to time, as there were only a limited number of vehicles that Tarpon used.

10 The GMC was one of the vehicles on which he worked. On the occasion in question, he had the GMC for a number of days, as it needed more work than most. It needed its windshield replaced and its transmission needed servicing. Subcontractors performed both of these tasks, which Mr. Lal had arranged. Mr. Lal did the other work on the GMC.

11 Other than when the sub-contractors were performing their work, Mr. Lal kept possession of the keys for the GMC. When he returned the GMC to Tarpon on the occasion in question, someone at Tarpon noticed that a headlight was burned out, so Mr. Lal retained the GMC to fix the headlight. He took the GMC back to his shop to fix it, and was intending on returning the GMC to Tarpon the next day. Mr. Lal's shop was at a residence in Altadore, but, at the time, he was staying with friends in a house on Elmont Bay SW, Calgary. No one at Tarpon knew that Mr. Lal was staying in the Elmont Bay residence. He took the GMC to the Elmont Bay residence once he fixed the headlight.

12 Mr. Lal testified that there was a spare key for the GMC in the centre console of the GMC. This was the first time during this litigation that he indicated that fact to Tarpon.

13 Before he completed his work on the GMC, he, along with a person who was helping him at that time, a woman named "Ricki," went to the car wash. Ricki cleaned the interior of the vehicle and the inside of the windows. Ricki would have known about the spare key in the centre console. Mr. Lal paid Ricki in cash. After they completed their work on the GMC, Mr. Lal dropped Ricki off in the Montgomery area of Calgary, which is some distance from both the Altadore shop and the Elmont Bay residence.

14 Mr. Lal testified that when he retired for the night, he locked the GMC, the windows were up, and the tool box was locked. He had a security device called a "Club," which he said he probably "dummied" on the steering wheel, which means he just placed it there without locking it. In the GMC, he left the credit card and the spare key in the console. He had parked the GMC on the street beside the Elmont Bay residence. It was not in a garage or on a driveway. During cross-examination, he testified that no one else was in the Elmont Bay residence that night. However, during further questioning, he testified that Ricki visited him that night. He and Ricki had a "scruffle" and "she was pretty upset and she was quite impaired." He escorted Ricki outside and told her to leave.

15 Mr. Lal became aware of the collision the next morning when he noticed that the GMC was not where he had left it. He telephoned Tarpon to advise it that the GMC was missing. He did not call the police or attempt to locate the whereabouts of the GMC. Mr. McLeod picked Mr. Lal up later that day and took him to Tarpon's place of business. Mr. Lal gave the GMC's keys to Amanda Robertson. He did not see the GMC at that time.

16 He did see the GMC later that month, as he needed to see whether he had left his wallet in it. His cleaning items were still in the GMC, along with three plastic bags of clothing. His Club was on the floor. He never did find his wallet. He did not see the spare key that was in the centre console. Mr. Lal did not recall any damage to the interior of the GMC, although he did note that the windshield was badly damaged. He thought this was a shame, as he had just replaced it. The GMC had a tarp on it, so he could not see the whole vehicle. He entered the GMC without difficulty through the driver's side door. As well, he saw that the ignition was not damaged. Nor did he see damage to the other windows, the console, or the dash board.

17 Mr. Lal received a telephone message from the police, as they were trying to make arrangements to meet with him. They played "telephone tag," but never did meet. Mr. Lal was never charged with any offence.

18 This Court qualified Michael Schritt, without any objection from Mr. Lal, as an expert on the functions and operation of the anti-theft system in the GMC, and how it relates to the operation of the GMC. Mr. Schritt has been a parts manager for 27 years at Davis GMC Trucks in Medicine Hat, Alberta. He has worked there for 40 years as a parts counter person, in the service department, and as a service advisor. He apprenticed there and is a journeyman automotive technician. He works on General Motors vehicles.

19 How has he become knowledgeable in the workings of the GMC? He has spent years of working with them, and has studied their service and parts manuals. He has also reviewed and applied technical bulletins, and he is qualified to do servicing work on them, including general work, but also specific work in cutting keys to key code them to a specific vehicle.

20 Mr. Schritt has knowledge of the GMC's theft-deterrent system, which was introduced in this model in 2007. He advises customers on the workings of the system. The theft-deterrent system must communicate with the vehicle before the vehicle will start. He explained the communication system to this Court in great detail, and provided further detail when this Court specifically questioned him. This detail is contained in his expert report dated April 30, 2019. In summary, the GMC cannot be started without a key specifically cut and programmed for that vehicle. Without such a key, the GMC cannot be started or operated.

21 Mr. Schritt also testified that the GMC would have been sold with two keys. The keys would be identical, but the transponder would have a different code. It would not be possible to determine which key started the GMC on a particular occasion.

22 Byron Fedosa is Tarpon's fleet manager. He testified that the GMC was towed to Tarpon's facility after the accident. It then sat at Tarpon's facility for some time while appraisers and an adjuster viewed the GMC. Tarpon got its own estimate to make sure the appraised value of the GMC was correct. Mr. Fedosa viewed the GMC, and noted that it was severely front-end damaged from an abrupt impact. The windshield was fragmented but its other windows were intact. He did not recall if there was any damage to the exterior locks, and there did not appear to be anything abnormal concerning the steering column, except that the driver and passenger air bags had deployed. He saw no other damage to the dashboard. Nor did he notice any damage to the console or the ignition.

23 Mr. Fedosa identified the estimate that Shaw GMC Pontiac Hummer Inc had conducted on Tarpon, along with Economical Insurance's estimate, and an "Autosource Valuation" that Economical Insurance had commissioned. Economical Insurance was Tarpon's insurer. He also identified an invoice from the City of Calgary for its repair to the light standard, which he forwarded to Economical Insurance for payment.

24 Mr. Fedosa was only aware of one set of keys for the GMC, which was the set that Mr. Lal had in his possession. He knew that the GMC came with two sets of keys, but he was not aware of the whereabouts of the second set.

25 After Economical Insurance disposed of the GMC, Tarpon's lessor, Emkay Canada Leasing Corp. ("Emkay") received the full payout less the deductible. The full payout was comprised of the capital cost of the lease amount, which was $47,426.91. This was shown in the lease between Tarpon and Emkay. Emkay, on Tarpon's behalf, executed a bill of sale showing its transfer of the GMC to Economical Insurance for that amount.

26 Graham Campbell played two roles before this Court. In his first role, he was retained by Economical Insurance to appraise the damage to the GMC. His second role was to provide this Court with his expert opinion on the appraisal of the GMC, the value of the damage, and the interpretation of the damage. Without Mr. Lal's objection, this Court qualified Mr. Campbell to provide his expert opinion.

27 Mr. Campbell started his career in the automotive industry in 1973, when he worked for a General Motors dealer. In 1985, he opened an autobody shop, which he sold in 1985 when he started doing automobile insurance appraisals. He purchased JB Appraisals in 2006. He estimates that he has appraised over 10,000 motor vehicles during his career, of all different makes and models.

28 Mr. Campbell is frequently hired by insurance companies, and he is familiar with the insurance claims process. He also knows what insurance companies should recover through salvage auctions.

29 He provided this Court with two documents. The first was his estimate, which estimates the damages to the GMC that he viewed during the time he inspected it. Economical Insurance provides him with the basic information concerning the vehicle, and he completes the rest of the document concerning the repairs necessary to fix the vehicle.

30 The second document he presented to this Court is what is referred to as an Autosource Valuation, which Mr. Campbell would do if a vehicle sustains a near total loss. An Autosource Valuation is, essentially, a database software programme that is operated through an entity known as Audatex. Through it, an appraiser can obtain a specific vehicle's valuation, based on local, fair market values for total loss vehicles. It considers both standard and optional equipment installed in the specific vehicle. It also provides values for comparable vehicles listed in or around the Calgary area. Mr. Campbell would insert information related to the specific vehicle in question, namely the GMC. Mr. Campbell actually inspected the GMC on March 25, 2011. He had no idea who was driving the GMC when it was damaged.

31 His first estimate came from a visual inspection of the exterior of the GMC. He estimated the value to repair the GMC to be $21,071.20. The Shaw GMC Pontiac Buick Hummer Inc estimate to repair the GMC was $22,359.23. He supplemented this with a "tear-down" inspection, which took place after the hood was opened and the fenders were removed. This would allow him to see additional damage. As he stated, he "can't estimate what I can't see." His estimate to repair the GMC after the tear-down was $44,798.27.

32 He was advised that he was inspecting a collision, not a theft. If it were a theft, he would be looking specifically for damage to the door locks and the windows. The door locks were not damaged, but he was not looking at them from the perspective of a theft. When first saw the GMC, he noted the damage to the front-end of the GMC, mostly on the left side. The windows were all intact, and he did not note any damage to the console. The dashboard was not damaged, except for the two airbags that had deployed. He noted no damage to the steering column, but he was not specifically looking at it. He did not look at the ignition.

33 In the affidavit that Mr. Campbell swore in the proceedings at bar, he deposed concerning Mr. Lal's evidence that he placed the Club on the steering wheel of the GMC before retiring for the night, as follows:

> . . . From my review of the [GMC], I saw no indication that the [GMC] had been stolen. I observed that the steering wheel was entirely intact and undamaged, as may be seen in the third photo from the left at the top of page 6 of Exhibit C. I did not quote Economical [Insurance] any cost for repairs to the steering wheel in my estimate on March 29, 2011 as I did not observe any signs of damage or forcible removal of a club.
>
> Mr. Campbell's Affidavit sworn on December 21, 2016, at para 4.

34 The Autosource Valuation provided a total loss value of $48,510. To repair the GMC would have cost $44,798.27. If the damage to the vehicle is 25% of the value of the vehicle, the vehicle is considered to be a total loss. In the case at bar, the GMC is considered a total loss. The insurance company will recover approximately 25% of the value of the vehicle as salvage value.

35 Because this was a total loss, Tarpon sent the GMC to Impact Auction to have it sold for salvage value. The GMC was sold for $10,100 plus goods and services tax. Impact Auction's fees were then removed, so Economical Mutual received a cheque for $9,746.86.

36 Emkay sold the GMC to Economical Insurance for $47,426.91. As Economical Mutual recovered $9,746.86 from the auction, so Economical Insurance's loss is $37,680.05. As well, Tarpon claims a loss for the cost of the light standard, which Economical Insurance paid to the City of Calgary for $7,927.00.

37 This is a subrogated claim, so any loss that Economical Insurance suffered is claimed against Mr. Lal through Tarpon.

III. Discussion

38 This is a case of bailment. Mr. Lal concedes this. In *Punch v. Savoy's Jewellers Ltd.* (1986), 26 D.L.R. (4th) 546 (Ont. C.A.) at 551, (1986), 33 B.L.R. 147 (Ont. C.A.), Cory JA, as he then was, defined bailment as:

> . . . the delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form as soon as the time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor and bailee can exist independently of a contract. It is created by the voluntary taking into custody of goods which are the property of another.

39 In the case at bar, Mr. Lal possessed or took the GMC "into custody" on trust. He would perform the repairs, clean the GMC, and return it to Tarpon in its altered or improved form.

40 The trust did not end once Mr. Lal completed the work on the GMC, but continued until Mr. Lal delivered the GMC to Tarpon, or Tarpon relieved Mr. Lal of his contractual obligation: *St-Isidore Asphalte Ltée v. Luminex Signs Ltd. / Enseignes Luminex Ltée* (1996), 176 N.B.R. (2d) 135 (N.B. Q.B.) at 140-41, (1996), 33 C.C.L.I. (2d) 309, 447 A.P.R. 135 (N.B. Q.B.), *affd* 1997 CarswellNB 65, [1997] N.B.J. No. 72 (N.B. C.A.).

41 Once Tarpon establishes that a bailment exists, the burden shifts to Mr. Lal to prove on a balance of probabilities that he met the standard of care required of him: *Letourneau v. Otto Mobiles Edmonton (1984) Ltd.*, 2002 ABQB 609 (Alta. Q.B.) at para 42, (2002), 315 A.R. 232, 8 Alta. L.R. (4th) 385 (Alta. Q.B.). What is the standard of care? In *Punch*, Cory JA said the following:

> The bailee for reward must exercise due care for the safety of the article entrusted to him by taking such care of the goods as would a prudent man of his own possessions. Significantly, a bailee is liable for the loss of goods arising out of his servant's theft on the grounds that he is responsible for the manner in which his servant carries out his duty. In the result, it matters not whether the servant is careless, whether the goods are stolen by a stranger, or if the servant himself steals them.
>
> ***Punch*** at 552.

42 Cory JA refers to a bailee for reward. In *Letourneau*, Johnstone J made the following comment, with which this Court agrees:

> . . . [I]t makes little difference today whether bailment is gratuitous or for reward. The obligation of a bailee in either case is to take the same care of the goods received as a prudent owner, acting reasonably, might be expected to take of his or her own chattels.
>
> ***Letourneau*** at para 46 [emphasis added].
>
> See also *Gaudreau v. Belter*, 2001 ABQB 101 (Alta. Q.B.) at para 3, (2001), 290 A.R. 377 (Alta. Q.B.). In *Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd. / Weyerhaeuser Canada Ltée*, 1999 ABQB 561 (Alta. Q.B.) at para 10, (1999), 249 A.R. 53, 73 Alta. L.R. (3d) 30 (Alta. Q.B.), Binder J said, "[a] bailee is bound to take reasonable care to see that the chattel is in proper custody, to protect it against unexpected danger should it arise, and to recover it, if it be stolen."

43 Once Tarpon has proved that the damage to the GMC occurred while the GMC was in Mr. Lal's possession, there is an inference of negligence on Mr. Lal's part: *Munroe v. Belinsky* (1995), 103 Man. R. (2d) 12 (Man. Q.B.) at para 17. Mr. Lal has the burden to negative negligence by showing that Tarpon's loss was without any fault or misconduct on his part or the part of his servants: *ibid*; *Letourneau* at para 52. In *Calgary Transport Services Ltd. v. Pyramid Management Ltd.* (1976), 1 A.R. 320 (Alta. C.A.) at para 10, (1976), 71 D.L.R. (3d) 234, [1976] 6 W.W.R. 631 (Alta. C.A.), Prowse JA, for the court said the following:

> . . . [T]he appellant had to establish the bailment and non-return of the bailed goods and this follows from the rule of evidence which is that where goods are damaged or disappear while in the possession of a bailee, who is under a duty to care for them, the bailee must explain or offer a valid excuse for having failed to do so.

44 In *Pyramid*, Prowse JA provided the following quotation from *"Ruapehu" (The), Re* (1925), 21 Ll. L. Rep. 310 (Eng. C.A.) at 315, which appears to be on all fours with the case at bar:

> Before proceeding to discuss the Judge's findings I find it necessary to consider the question of law as to onus of proof in such a case as this. If this were a pure bailment, a delivery of a chattel to a bailee entrusted with the chattel to execute repairs on it and then re-deliver it to the owner, I apprehend that the bailee would be under the obligation to exercise reasonable care and skill in preserving the safety of the chattel. If he failed to deliver the chattel at all the onus would be upon him to show that the non-delivery was not due to absence of care and skill on his part.
>
> ***Pyramid*** at para 12.

45 How must Mr. Lal discharge his onus? In *"Ruapehu" (The), Re*, Lord Justice Atkin said the following:

> The bailee knows all about it: he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that that duty has been discharged.
>
> ***Pyramid*** at para 13.

46 It is interesting to note that in *Letourneau* and *"Ruapehu" (The), Re*, the courts refer to the fact that the bailee must exercise reasonable care and skill, or must act reasonably. Neither case refers to the bailee having to take extraordinary measures to protect the subject of the bailment.

47 In the case at bar, the GMC was at all material times in Mr. Lal's exclusive possession. The GMC did not disappear while it was in the possession of the transmission or windshield repair shop. Those tasks had been completed. The GMC disappeared while it was in Mr. Lal's possession.

48 Mr. Lal argues that the GMC was too large to park in the garage at the Elmont Bay address. He did park it on the street next to the Elmont Bay address, and he testified that he locked the tool box. And he "dummied" the Club device on the steering wheel, which meant it was not locked, but simply placed on the steering wheel.

49 None of the witnesses, including Mr. Lal, testified that the back or side windows of the GMC were damaged before or during the collision. Nor were the steering column or exterior locks damaged. This Court accepts Mr. Schritt's evidence that the only way the GMC's engine could be started was through the use of a key specifically made for the GMC. Mr. Lal concedes that he had a key for the GMC. As well, he testified that he was aware that another key was in the GMC's console.

50 If there was no second key, the only person who could have been driving the GMC at the time it sustained damage was Mr. Lal, as he was the only one who had a key that could start the GMC's engine.

51 Mr. Fedosa testified that he thought there was only one key for the GMC. However, Mr. Schritt testified that a vehicle comes with 2 keys, and Mr. Fedosa was aware of this fact. If there was a second key, Mr. Fedosa was unsure where it would be. He testified that when a driver uses a vehicle and returns to the warehouse, the driver would return the key to the warehouse where it would remain until the next driver retrieved it. But what happened to the other set?

52 Mr. Lal testified that the other set would remain in the vehicle that he had for repair, along with a Tarpon credit card. He would use the credit card to fill up the vehicle, as a courtesy, when he returned the vehicle to Tarpon. Although one might be inclined to think that this was a rather cavalier attitude to the treatment of a credit card and a spare key, this Court is not here to determine the propriety of such an approach. Mr. Lal's evidence appears to make some sense, because on at least one of the invoices he provided to Tarpon he indicates that he fueled the vehicle.

53 Mr. Lal testified that he recalls seeing an extra key in the console of the GMC. This Court questions whether he has that specific recollection, as some of his evidence, even during his questioning, was equivocal. However, it is possible that Mr. Lal deduced this from his handling of other vehicles where an extra key was in those vehicles, along with a Tarpon credit card.

54 No one from Tarpon knew that Mr. Lal was staying at the Elmont Bay residence. In fact, besides Mr. Lal, no one, except Ricki, knew that Mr. Lal was staying at that residence. Thus, no one from Tarpon could have accessed the GMC if there were an extra key in Tarpon's possession.

55 So, who accessed the GMC and took it on a joy ride which ended when the GMC hit the light standard? It was someone with a key. It could have been Mr. Lal, as he certainly had a key. If there was a key in the console, it could have been Ricki, as she had access to the interior of the GMC when she was cleaning the interior windows and floors of the GMC earlier in the day and might have secreted the key. If Mr. Lal did not secure the GMC before he retired for the night, and there was a key in the console, anyone could have accessed the GMC on the night it was stolen, whether Ricki or some other person. Remember, there was no sign of anyone breaking into the GMC by breaking a window or damaging the exterior locks.

56 If it was Mr. Lal, he would surely be liable for the damages to the GMC. If it was not Mr. Lal, he has not met his onus of to show that the non-delivery of the GMC to Tarpon was not due to absence of care and skill on his part. Nor has he discharged the duty to take care of the GMC. Mr. Lal has the burden to negative negligence by showing that Tarpon's loss was without any fault or misconduct on his part or the part of his servants, in this case Ricki. Mr. Lal's duty was to protect the GMC against unexpected danger should it arise. And, as Binder J said in *Dorico*, "to recover it, if it be stolen." Mr. Lal did not telephone the police when he discovered that the GMC was missing. In fact, he never took the initiative to call the police at all. He responded to telephone calls from the police.

57 In *Sabean v. Moran* (1991), 117 N.B.R. (2d) 329 (N.B. Q.B.), the defendant was able to satisfy the court that he took the necessary care and exercised the required diligence. In that case, the vehicle was locked and the vehicle was vandalized. In the case at bar, this Court is not satisfied, on a balance or probabilities, that the GMC was locked. As well, the GMC was not simply vandalized. It was stolen.

58 Johnstone J also referred to a case *Edelson v. Musty's Service Station & Garage*, [1956] O.J. No. 334, [1956] O.W.N. 848 (Ont. C.A.) for its discussion on contributory negligence. It should be noted that Mr. Lal does not argue strongly that contributory negligence applies in the case at bar, but this Court felt that it should address it. Johnstone J described *Edelson* as follows:

> . . . When the defendant parked the plaintiff's car on the nearby public street, the defendant left the car unlocked but took care to remove the keys and bring them inside the service station. Unbeknownst to the defendant, however, the plaintiff had placed a second set of keys in the locked glove compartment of the car. It was argued by the defendant that the plaintiff had been contributorily negligent in doing so, since the car had been stolen with the use of the second set of keys. The trial judge held the plaintiff was not contributorily negligent. This ruling was upheld on appeal, the Court concluding that the plaintiff was entitled to expect the car would be locked if it was to be left on a public street all day. The Court did note, however, that the plaintiff had locked the keys away in the glove compartment.
>
> ***Letrouneau*** at para 61.

59 She prefaced her discussion of *Edelson* by saying, "[c]ontributory negligence on the part of the bailor is rarely found in bailment cases": *ibid.* In the case at bar, Tarpon was not contributorily negligent, even if it left a second key in the console of the GMC. It could reasonably expect that Mr. Lal would lock the GMC when he was not occupying it, or that he would maintain possession of the extra key if he chose to keep the GMC unlocked when he left it.

60 Tarpon asks this Court to find that Mr. Lal was the person who was driving the GMC when it was damaged. This Court need not make that finding. The point is that the GMC sustained the damage while it was in Mr. Lal's possession and he has not satisfied his burden to negative his negligence. As a result, he is liable for Tarpon's loss.

61 What is the quantum of his liability? Mr. Lal argues that the limit of his liability is the deductible that Tarpon paid to Economical Insurance, which is $2,500. Tarpon argues that this is a subrogated claim. This Court agrees with Tarpon.

62 Mr. Lal provides this Court with *Ramco Sales Inc. v. Gergely*, 2007 ABPC 152 (Alta. Prov. Ct.). In that case, LeGrandeur PCJ said, "[t]he party suffering damages is only entitled to be compensated to the extent of the damage and is not entitled to receive a benefit over and above the damage": *Ramco* at para 52. This Court agrees with that statement. In the case at bar, Tarpon is not seeking anything beyond the damages it (or its insurer) suffered. Again, this is a subrogated claim, so Tarpon would not be retaining the damages that this Court awards, except for the deductible it had to pay to Economical Insurance. There is no double recovery. Economical Insurance, through its insured, Tarpon, receives only the amount necessary to put it in the same position as it would have been had the damage not been sustained: *Dorico* at para 52.

63 The amount for which Mr. Lal is responsible is the amount for which Emkay sold the GMC to Economical Insurance, which was $47,426.91, less the amount Economical Mutual recovered from the auction, which was $9,746.86. This results in a net loss of $37,680.05. Those are the damages for which Mr. Lal is liable, along with pre-judgment interest at the prescribed rate.

64 Although Tarpon claims a loss for the cost of the light standard, its statement of claim did not claim that amount. Between the time it commenced this action to the date of the trial, it had ample opportunity to seek leave to amend its statement of claim. It did not, so this Court will not make an award for that amount.

65 Being the successful party, Tarpon is entitled to costs. This matter should have proceeded in the Provincial Court, and not the Court of Queen's Bench. As a result, this Court awards costs according to the Provincial Court tariff, Column 3, as set forth in Provincial Court Practice Note 2, dated January 2, 2019.

Action allowed.

End of Document

TAB 13

2018 ONSC 5638
Ontario Superior Court of Justice

Gravina v. Welsh

2018 CarswellOnt 22805, 2018 ONSC 5638, 302 A.C.W.S. (3d) 412, 53 C.C.L.T. (4th) 332

SHIRLEY GRAVINA (Plaintiff) and ROBERT L. WELSH (Respondent)

Gibson J.

Heard: May 22, 2018
Judgment: September 24, 2018
Docket: 4539/17

Counsel: Z.M. Kaslik, for Plaintiff
R. Deswal, P. Welsh, for Defendant

Subject: Civil Practice and Procedure; Contracts; Torts

Headnote

Personal property --- Bailment and warehousing — Gratuitous bailment — Bailee's liability to bailor for loss or damage — Burden of proof

Defendant was accountant who assisted plaintiff and plaintiff's father with personal income tax returns — Defendant prepared terminal tax return after father's death in 2009 — Plaintiff was executrix and beneficiary of father's estate — Plaintiff inherited coin collection as part of estate — Plaintiff gave coins to defendant in 2010 for purposes of obtaining appraisal of collection's value — Defendant never had coins appraised and did not know their current location — Plaintiff commenced action for recovery of coin collection or, alternatively, general damages in amount of $50,000 and punitive and exemplary damages in amount of $25,000 — Plaintiff brought motion for summary judgment — Motion granted on liability — Defendant was gratuitous bailee of coins — There was presumption of negligence as coins were lost while in defendant's possession — Defendant failed to take even minimal care to protect coins and provided no explanation in order to reverse presumption of negligence for loss of coins — Defendant was liable for loss — Trial of issue was ordered for determination of damages.

MOTION by plaintiff for summary judgment.

***Gibson J.*:**

Nature of the Hearing

1 At issue on this motion for summary judgment is loss of personal property — specifically, a coin collection — that the Plaintiff, Shirley Gravina, provided to the Defendant, Robert L. Welsh, for the purposes of obtaining an appraisal of the property's value.

2 In her statement of claim issued on November 8, 2017, Ms. Gravina sought the recovery of the coin collection and, in addition or in the alternative, general damages in the amount of $50,000 and punitive and exemplary damages in the amount of $25,000.

3 Mr. Welsh disputes his liability for the loss of the coins or, in the alternative, submits that the value of the coin collection is in the ballpark of $1,125 to $1,345.

Facts

4 Mr. Welsh is an accountant. From at least 2001 onwards, he assisted Ms. Gravina's father, Mr. Herbert Howes-Jones, with his tax returns, and subsequently undertook to prepare Mr. Jones' terminal tax return upon his death in 2009. Mr. Welsh also assisted Ms. Gravina with her personal income tax returns from sometime around 2005 until 2015.

5 Ms. Gravina is the sole executrix and beneficiary of her father's estate. As part of that estate, she inherited a coin collection.

6 The parties disagree on who initiated the discussion over an appraisal of this coin collection. Ms. Gravina claims that Mr. Welsh was a friend of her late father's and an avid coin collector, and that he represented to her that he would obtain a professional written appraisal from an American appraiser.

7 Conversely, Mr. Welsh submits that his relationship with Mr. Howes-Jones was purely professional, denies that he is an avid coin collector, and recalls that Ms. Gravina approached him on the possibility of obtaining the appraisal, which he would have obtained from a Toronto appraiser. In his cross-examination, he admitted to being a coin collector up until 1967, but has since only had a passing interest. Mr. Welsh also stated on his cross-examination that he only accepted the coins with the intention to help out the Plaintiff.

8 In either case, neither party disputes that Ms. Gravina gave the coin collection to Mr. Welsh in 2010 in order to have an appraisal completed to determine their value, or that Mr. Welsh undertook to return the coins subsequent to that appraisal.

9 Ms. Gravina admitted in cross-examination that she was merely curious about the coins' monetary value and had intended to pass on the coins to her children, and not to sell them. Mr. Welsh also believed the coins were not highly valuable.

10 Upon receiving those coins, Mr. Welsh created and delivered a hand-written list of the coins in his possession to Ms. Gravina. That list included a variety of U.S. and Canadian coins of various dates, some in tubes and rolls, and 22 1972 Munich Olympics coins.

11 Ms. Gravina claims that she inquired about the agreed appraisal on and off since 2010, but received a litany of excuses and delays. Mr. Welsh submits that Ms. Gravina only inquired about the coins in 2014 or 2015.

12 Regardless, Mr. Welsh admits that he never had the coins appraised and does not know their current location. In fact, he does not even recall what he did with the coins after walking out of Ms. Gravina's home with the property in his possession.

13 Around December 2016, Mr. Welsh provided Ms. Gravina with a box of coins he found in his home. Ms. Gravina informed him by email on December 13, 2016, that this box was not hers.

14 Mr. Welsh responded the next day, indicating he would endeavour to find the coins.

15 As part of his endeavours to find the coins, Mr. Welsh requested information from the police about the date of a break-in to his home. This theft occurred in 2008, however, before he received the coins, and he submits that this is merely evidence of his attempt to find the coins.

16 On December 7, 2017, Gray J. ordered Mr. Welsh to preserve the coin collection and provide a full accounting and tracing of receipt, possession, disposition, and proceeds.

17 Mr. Welsh was unable to comply with this order, as he does not know the location of the coins or have any memory as to what he might have done with the property. He claims he went through his home and packed up his possessions, but was still unable to find the coins.

Positions of the Parties

Plaintiff's Position

18 Ms. Gravina advanced numerous causes of action in her statement of claim, including conversion; wrongful detention and detinue; unjust enrichment; and breach of fiduciary duty, contract, and duty of care.

19 In responding to the Respondent's defence of gratuitous bailment, described below, Ms. Gravina contests its procedural admissibility, given that she did not attest that Mr. Welsh was a bailee, the defence was not pleaded in his Statement of Defence, and the defence was not evidenced in his Responding Affidavit to the Motion: see *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, r. 25.07, 25.07(4). In the alternative, she submits, even if the Defendant is deemed a bailee, he committed gross negligence in losing the coins.

20 On the issue of bailment, Ms. Gravina argues that the standard of care in cases where property is lost is as follows: the bailee must demonstrate that he or she was not guilty of even slight negligence.

21 In assessing the value of the coins, Ms. Gravina points to online research performed by her daughter of various auction websites for the types of coins placed in Mr. Welsh's care. On the basis of this research, Ms. Gravina originally claimed $50,000 in damages for the value of the coins.

22 Ms. Gravina also claimed $25,000 in punitive and exemplary damages. In her Statement of Claim, she alleged that the Defendant's conduct constituted egregious, callous and wilful disregard of her rights and of his own professional obligations, and that he was motivated by his desire for personal gain and wealth.

Respondent's Position

23 Mr. Welsh does not specifically address Ms. Gravina's various causes of action other than to deny any liability. Instead, he puts forward an overarching defence of gratuitous bailment. On this defence, he argues that the standard of care required to find a gratuitous bailee liable is "gross negligence."

24 Further, he submits that the Plaintiff has provided no proof of deliberate or negligent deprivation of property.

25 Regarding the value of the coins, Mr. Welsh submits that as the Plaintiff, Ms. Gravina has the onus to prove the value of her personal property. As Ms. Gravina has failed to provide sufficient evidence for the value of the coin collection, he submits, he requests a dismissal of the motion.

26 In the alternative, he contests the value of the coins as outlined by the Plaintiff. Relying on the report of Mr. Garth Wright, a "member in good standing with the Canadian Personal Property Appraisal Group," he lists the value of the coins as falling between $1,125 and $1,345, a stark difference from Ms. Welsh's claim of $50,000. Mr. Wright cautioned that this report was created in the absence of the coins to be valued, which are still missing.

27 Mr. Welsh points to the treatment of the coins by Ms. Gravina and her father to illustrate his assertion that the coins had no significant value. Mr Welsh points, specifically, to the fact that there was no list of the coins prior to the creation of the hand-written note; no receipts from coin dealers or other collectors; the coins were not specially insured; and many of the coins were merely in plastic bags and tubes, and were placed in a closet, rather than a safe. Ms. Gravina's late father, as a purported coin collector, he argues, surely would not have treated the coins in such a fashion if they were valuable.

28 Further, undue delay in seeking the return of bailed goods may discount their value.

29 Finally, Ms. Gravina admitted in cross-examination that she was merely curious about the value of the coins when she asked for an appraisal, and did not believe they were truly valuable.

30 In his Statement of Defence, Mr. Welsh denies any motivation for wealth or personal gain, or monetary advantage, in response to the issue of punitive damages.

The Law

Summary Judgment

31 Pursuant to rule 20.04(2) of the *Rules of Civil Procedure*, the Court shall grant a summary judgment where:

> a) The court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> b) The parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

32 In meeting this test, the court must determine whether a full appreciation of the evidence and issues in order to make dispositive findings can be achieved through a summary judgment.

33 As stated in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), at para. 49, there is no genuine issue requiring a trial if the court can render a fair and just determination on the merits of the motion for summary judgment. This will occur where:

> 1) The court can make the necessary findings of fact,
>
> 2) The court can apply the law to the facts, and
>
> 3) The motion is a proportionate, more expeditious, and less expensive means of reaching a just result, as compared to a trial.

34 The court may, in the process of the motion for summary judgment, weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence. In exercising these powers, the court may order the presentation of oral evidence: r. 20.04(2.1)-(2.2), *Rules of Civil Procedure*.

35 The Defendant submits that the issues can be determined without exercising these powers but, in the alternative, requests that these powers be exercised.

36 The parties agree in this case that a summary judgment motion is suitable to resolve all of the issues.

37 Alternatively, the Plaintiff submits that where the only issue before the court is one of quantum of damages, the court may grant judgment to the Plaintiff and order a trial of the quantum issue; or have an accounting or reference; or as the court may direct: r. 20.04(3), *Rules of Civil Procedure*. The Court may also direct a reference under sub-rule 54.02(1) of the *Rules of Civil Procedure* where a substantial issue in dispute requires the taking of accounts.

38 The Defendant replies that there is no need for an accounting, trial, or reference on the quantum of damages, as the Plaintiff has failed to meet her burden to show the coins were valuable.

Bailment

39 The law of bailment is at times shrouded in mystery, and boasts a long history rife with disagreement over its meaning and the extent of liability for different types of bailees. It is not therefore unduly surprising that the parties have different conceptions on the nature of bailment and the requisite standard of care owed in this case.

40 Bailment exists where one person, the bailor, delivers personal chattels into the hands of another person, the bailee, with the understanding that those chattels will be returned to the bailor, either in their original or an altered form, once the time for their use has passed or a particular purpose for which they were bailed is performed: *Punch v. Savoy's Jewellers Ltd.* (1986), 54 O.R. (2d) 383 (Ont. C.A.), at para. 17.

41 While bailment is not a traditional "trust" relationship attracting fiduciary responsibilities, there is a duty to hold bailed property safely until its return is demanded: *Elgin Loan & Savings Co. v. National Trust Co.*, [1903] O.J. No. 2 (Ont. C.P.), at paras. 52-54.

42 A bailment relationship can exist without a contract. Indeed, the nature of bailment is that of both contract and tort, and may garner remedies such as detinue, conversion, or negligence: *Minichiello v. Devonshire Hotel (1967) Ltd. (No. 2)* (1977), 79 D.L.R. (3d) 656 (B.C. S.C.), at para. 20; see also *Punch*.

43 The seminal case on the issue from the House of Lords, *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, 92 E.R. 107 (Eng. K.B.), lists six forms of bailment, at pp. 912-13:

> 1. A bare bailment of goods, delivered by one party to another to keep for the use of the bailor ("*depositum*" or "naked bailment")
>
> 2. A gratuitous lending of goods or chattels to a bailee for the latter's use ("*commodatum*")
>
> 3. A bailment of goods to a bailee for the latter's use in hire ("*locatio et conductor*")
>
> 4. A pledge of goods or chattels to a bailee as security for money loaned from the bailor to the bailee ("*vadium*")
>
> 5. A delivery of goods to the bailee, who is to do something to or with the goods for reward to be paid by the bailor;
>
> 6. A delivery of goods to the bailee, who is to do something to or with the goods gratuitously, without any reward for his or her work ("*mandatum*").

44 There is some jurisprudence that rearranges these six types of bailment into five categories. For the purposes of this case, however, categories 1, 2, and 6 (*depositum*, *commodatum*, and *mandatum*) are "gratuitous bailments" where there is no traditional consideration granted to the bailee.

45 Both *depositum* and *mandatum* are wholly for the benefit of the bailor, whereas *commodatum* is wholly for the benefit of the bailee: *Canada (Attorney General) v. Canadian Sturgeon Conservation Center Ltd.*, 2005 NBQB 287, 141 A.C.W.S. (3d) 958 (N.B. Q.B.).

46 The standard of care for a gratuitous bailee is controversial. The historical authority, based in *Coggs*, is that gratuitous bailees have a lower standard of care and are only liable for gross negligence: *Carlisle v. Grand Trunk Railway* (1912), 20 O.W.R. 860 (Ont. H.C.), at para. 10.

47 Some decisions suggest that the standard of care of gross negligence only applies to gratuitous bailees where the bailment of goods is for the benefit of the bailor alone: *Carlisle* at para. 20, citing *Palin v. Reid* (1884), 10 O.A.R. 63 (Ont. C.A.). The Defendant advances the position that gross negligence applies in this case.

48 More recently, some decisions have suggested that the standard of care for gratuitous bailees is negligence: *Giovannetti v. Riotrin Properties (Vaughan 2) Inc.* (2004), 132 A.C.W.S. (3d) 777, 2004 CarswellOnt 3100 (Ont. S.C.J.), at para. 36.

49 Still others argue that the overarching standard for *all* types of bailees, gratuitous or otherwise, is what a reasonable and prudent person would have done in the circumstances: *Dodd v. Johnson*, [2010] O.J. No. 6195 (Ont. S.C.J.), at paras. 21-22.

50 It may be that this newer trend exists as a partial rejection of the six categories in *Cogg*. Various cases indicate that where the bailee is receiving the whole benefit, even if they are gratuitous, they should be held to the same standard as bailees for hire. However, in that context, it may seem odd to hold gratuitous bailees where the *bailor* receives the whole benefit to a lower standard of negligence. Thus a distinction could be made between (a) bailees for hire and gratuitous bailees who receive the whole of the benefit, and are held to a negligence standard, and (b) gratuitous bailees where the bailor receives the whole of the benefit, who are held to a gross negligence standard.

51 Finally, some decisions indicate that the gratuitous bailee is only responsible for gross negligence, but also state that the standard of care is therefore what one might expect of a prudent owner in taking care of his or her own goods in similar circumstances: see *Enofe v. Capreit Limited Partnership*, [2017] O.J. No. 3649 (Ont. S.C.J.), at paras. 30-32.

52 Further, and to complicate matters, a different standard of care arises where goods are damaged or lost. In all cases, the jurisprudence indicates that a presumption of negligence arises where the bailee, gratuitous or otherwise, has lost or damaged the property: *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481 (S.C.C.), at para. 18. The standard to rebut that presumption, however, is a matter of some controversy.

53 The majority of cases take the approach that all bailees, gratuitous or otherwise, are subject to the same type of liability where goods are lost or damaged. That liability has been phrased in various ways, whereby the bailee can rebut the presumption of negligence by showing:

- That there was no neglect, default, or misconduct on his or her part: *Punch* at para. 19; *Carlisle* at para. 32;

- That he or she took reasonable and proper care for the due security and proper deliver of the bailment: *Duncan v. Allen* (1983), 22 A.C.W.S. (2d) 303 (Sask. Q.B.) [1983 CarswellSask 414 (Sask. Q.B.)], at para. 20, citing *Houghland v. R.R. Low (Luxury Coaches) Ltd.*, [1962] 2 All E.R. 159 (Eng. C.A.); see also *MacNaughton v. Farrell* (1982), 17 A.C.W.S. (2d) 181 (N.S. T.D.) [1982 CarswellNS 242 (N.S. T.D.)]; or,

- That the loss was not a result of the bailee's failure to take such care and diligence as a prudent and careful person would take in relation to their own property: *Tech-North Consulting Group Inc. v. British Columbia (Minister of Skills, Training & Labour)* (1997), 71 A.C.W.S. (3d) 163 (B.C. S.C. [In Chambers]) [1997 CarswellBC 1161 (B.C. S.C. [In Chambers])], at para. 14; *McCauley v. Huber* (1920), 54 D.L.R. 150 (Sask. C.A.), at para. 11.

54 Other cases maintain that even where property is damaged or lost, some types of gratuitous bailee are still held to the standard of disproving "gross negligence" in rebutting the presumption: *Enofe*, at paras. 36-37. See also *Campbell v. Pickard*, 1961 CarswellMan 19 (Man. Q.B.), rev'd on appeal, (1961), 30 D.L.R. (2d) 152 (Man. C.A.), at paras. 45-46 (the Court of Appeal made no comment on the standard of care used to rebut the presumption).

55 The Plaintiff cites *Riverdale Garage Ltd. v. Barrett Brothers*, [1930] 4 D.L.R. 429 (Ont. C.A.), for the proposition that a gratuitous bailee must prove that he or she was not guilty of even slight negligence where the property is lost. However, that decision was dealing with bailment that is wholly for the benefit of the bailee. Bailment that is wholly for the advantage of the bailor requires "negligence of an aggravated character," even for lost goods (Riddell J.A.).

56 Overall, and regardless of the applicable standard of care, a determination of whether a bailee has failed to meet the standard of care owed depends on the law and the facts: *MacKinnon v. Cudmore*, 2017 PESC 20, 283 A.C.W.S. (3d) 417 (P.E.I. S.C.), at para. 28.

57 Turning to damages, counsel for Mr. Welsh is correct when he asserts that the normal practice in bailment is to return the bailor into as good a position as if the property had not been lost: *Duckworth v. Armstrong*, [1996] B.C.J. No. 1337 (B.C. S.C.), at para. 35. This is usually based on market value: *Mason v. Westside Cemeteries Ltd.*, [1996] O.J. No. 1387 (Ont. Gen. Div.), at para. 34.

58 Finally, it is true that where the owner unduly delays his or her request for the return of the property, the court may discount the loss to be repaid: see *Ironside v. Delazzari Estate*, [2014] O.J. No. 768 (Ont. S.C.J.), at paras. 61-62.

Analysis

59 I accept on the facts of this case that Mr. Welsh was a gratuitous bailee of the coins, and is procedurally entitled to advance this position as a defence to the claims of the Plaintiff. It is therefore necessary to assess what flows from this.

Defence of Bailment

60 The relationship between Mr. Welsh and Ms. Gravina appears to exist in the context of gratuitous bailment, specifically that of the sixth category ("mandatum"). Ms. Gravina delivered the chattel, the coin collection, into the hands of Mr. Welsh for the purposes of obtaining an appraisal, after which the goods would be returned. Mr. Welsh received no compensation.

61 The Court could hold that Mr. Welsh should be held to a standard of gross negligence or of mere negligence based on different lines of authority.

62 It should be kept in mind that this is a case where the bailor wholly benefited from the gratuitous arrangement, and Mr. Welsh received no apparent benefit. On the other hand, the more recent trend appears to be that all bailees are held to the standard of negligence.

63 Regardless, as the goods were lost while in his possession, there is a presumption of negligence.

64 Mr. Welsh alleges that he was not obliged to take greater care of the coins than he would have done if they were his own, or as the successive owners had done.

65 That is not the law. None of the cases cited above suggest that the standard for rebutting the presumption of negligence is what the actual owner would have done with the goods. Rather, the question is "reasonable and proper care," or the care of a "prudent owner," or "no neglect, default, or misconduct" on the part of the bailee.

66 It is nonetheless important to consider the context of this case. When Mr. Welsh received the coins, he was unaware of their purported value. The factual matrix of this case indicates that both parties were merely curious about the value of the coins. Mr. Welsh thus could not have been expected, as a "prudent" owner or otherwise, to take extreme measures to protect the coins.

67 On the other hand, it is fairly elementary that even on a minimal standard of care, a person given custody of property should have at least placed the goods in a relatively secure location. Mr. Welsh states that he has no memory of what happened to the coins after he picked them up. He cannot even recall where he put the coins. This lack of memory is indicative of a lack of care and consideration in preserving the property in question. At the very least, it indicates that Mr. Welsh did not even take minimal care to protect the property.

68 Mr. Welsh has also provided no explanation in order to reverse the presumption of negligence for the loss of the goods. Previous cases have held that where goods are lost by a bailee, the "onus lies upon him to shew circumstances negativing negligence on his part:" *McCreary v. Therrien Construction Co.*, [1951] O.R. 735 (Ont. C.A.), at para. 8; see also *Moysey v. Barcelona* (2004), 135 A.C.W.S. (3d) 722 (Ont. S.C.J.) [2004 CarswellOnt 5146 (Ont. S.C.J.)], at para. 20.

69 In *Coggs*, the Court cautioned that "reason is strong against the case, to charge a man for doing such a friendly act for his friend" (Holt C.J.). Yet "the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management."

70 There is nothing to indicate in this case that Mr. Welsh intentionally and maliciously lost the coins.

71 Nonetheless, even gratuitous bailees are held to some standard of care, and are presumed to be negligent where the goods are lost. Mr. Welsh has provided no reasonable excuse or explanation for the loss of the coins, and has not discharged any of the standards of care listed in the jurisprudence. He was clearly negligent.

72 On the facts as presented to the Court, there is no genuine issue for trial on the question of liability. Mr. Welsh was negligent in losing the coins, and is liable to Ms. Gravina for that loss. Summary judgment will go for the Plaintiff.

73 The remaining issue is the amount of damages. Pursuant to Rule 20.04(3), in this circumstance a Court may order a trial of that issue or grant judgment with a reference to determine the amount.

Orders

74 The Court Orders that:

1. The Plaintiff shall have summary judgement on the issue of liability against the Defendant; and,

2. The quantum and amount of damages to which the Plaintiff is entitled from the Defendant shall be determined by the trial of an issue.

Costs

75 The Parties are encouraged to agree upon appropriate costs. If the Parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs). The Plaintiff may have 14 days from the release of these reasons to provide her submissions, with a copy to the Defendant; the Defendant a further 14 days to respond; and the Plaintiff a further 7 days for a reply, if any. If no submissions are received within this timeframe, the Parties will be deemed to have settled the issue of costs as between themselves. If I have not received response or reply submissions within the specified timelines after the Plaintiff's initial submission, I will consider that the Parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

Motion granted on liability.

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TAB 14

1931 CarswellSask 32
Saskatchewan Court of Appeal

N.M. Patterson & Co. v. Carnduff

1931 CarswellSask 32, [1931] 2 W.W.R. 221

N. M. Patterson & Company, Limited (Plaintiff) Appellant v. Carnduff (Defendant) Respondent

Turgeon, Martin and Mackenzie, JJ.A.

Judgment: May 11, 1931

Counsel: *J. A. Cross, K.C.*, for plaintiff, appellant.
J. H. McFadden, for defendant, respondent.

Subject: Corporate and Commercial; Public
Headnote
Creditors and Debtors --- Relationship of debtor and creditor
Grain Laws --- Grain elevators
Agency — Bailment — Pledges — Advance of Money on Security of Stored Grain — Remedies of Lender — Implied Promise to Repay — Elevator Company Given Power to Sell — Whether Failure to Sell Constitutes Negligence.
Where an elevator company advances money on the security of grain delivered to it in storage which it is authorized by the contract between it and the borrower to sell without notice at any time it deems itself insecure, the company is not, in the absence of an express agreement to that effect, restricted to resorting to the pledged grain to obtain repayment, but can sue on the implied promise to repay which is ordinarily incident to a loan; and, moreover, the company is not obliged to sell the grain and, if it does sell it, cannot be held to have been negligent and, therefore, liable to the borrower merely because it did not sell at a time when it could have received a higher price than it did receive.
The judgment of the Appellate Division of the Supreme Court of Alberta in *United Grain Growers v. Mabey*, [1925] 1 W.W.R. 19 (reversed, without reasons given, by the Supreme Court of Canada) not agreed with.

Appeal from the dismissal by Bigelow, J. of an action to recover the balance owing on account of moneys advanced to the defendant on the security of grain delivered to the plaintiff's elevator. Appeal allowed with costs, and judgment, with costs, directed for the plaintiff.

***Turgeon, J.A.*:**

1 The defendant is a farmer who grew and harvested a crop of grain in the season of 1929. The plaintiffs operate a country elevator at Carnduff. At various times, beginning on August 3 and ending on November 27, the defendant obtained from the plaintiff's elevator agent advances amounting to $5,435 on the security of his grain. The first advances, amounting to $275, were made "on grain to be delivered by October 1st," later advances totalling $5,000, "on grain in store," and the last advance of $160, "on grain in store or in granary."

2 On the occasion of each advance the defendant signed a document creating in favour of the plaintiffs a lien and charge upon his grain for the amount of the advance, with interest at the rate of eight per cent, and authorizing the plaintiffs to sell the grain, in whole or in part, at any time when they might deem their position as lenders insecure, of which contingency they were to be the sole judges; and by the terms of the document the defendant released the plaintiffs from all claim for damages by reason of any sale they might make.

3 The defendant delivered to the plaintiffs' elevator a large quantity of grain, the exact number of bushels not being mentioned and not being of importance. Graded storage receipts were issued by the plaintiffs to the defendant in respect of each delivery and were then retained by the plaintiffs as part of their security. 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 [now 1930, ch. 5]; so that for all intents and purposes pertinent to this action the parties are in the same position as if the grain had remained in the possession of the plaintiffs until it was sold.

4 The market-price of grain moved downwards in the fall of 1929 and the winter of 1930. The plaintiffs sold the de fendant's grain on March 10, realizing much less than the amount of their advances. This action is brought to recover the balance of these advances from the defendant.

5 The learned trial Judge dismisses the action on two grounds: In the first place, he holds that the defendant is not under a personal obligation to pay the plaintiffs, but that by the nature of the transaction the latter must look to the grain alone to recoup their advances. With great deference, I cannot agree with this view of the case. I do not see how such a conclusion could be arrived at unless we were to construe the transaction as a sale of the grain to the plaintiffs for a sum equivalent to the amount advanced. But the documents put in evidence make such a construction impossible. Of course, apart from the theory of a sale, the parties might have come to an agreement of the kind which the learned trial Judge evidently had in mind. The plaintiffs might very well have undertaken to repay themselves out of the grain and to bear whatever loss might occur. But it would require clear evidence to support such an unusual contract. In this case everything points the other way. In my opinion the case is the ordinary one of a loan upon which security is given. The advances, having been made to the defendant at his request, raised a contract by parole for the repayment, independently of the giving of the security: *Yates v. Aston* (1843) 4 Q.B. 182, 12 L.J.Q.B. 160, 114 E.R. 866.

6 In the second place, the learned trial Judge holds that the plaintiffs cannot recover from the defendant because they brought about the loss which occurred by their negligent manner of dealing with the security. This negligence consisted, he concludes, in the failure of the plaintiffs to sell the grain earlier, while the market-price was high enough to repay them in full. In support of this position, the learned trial Judge refers to the Alberta case of *United Grain Growers Ltd. v. Mabey*, [1925] 1 W.W.R. 19, and he cites with approval lengthy extracts from the judgment of the Alberta Appellate Division in that case. I regret to say, with the greatest respect, that I cannot agree with what was said in that judgment upon the question with which we are now dealing, namely, the position of a person who has advanced money upon the security of grain in storage which he is authorized to sell to protect himself. Moreover I find that the judgment in the Alberta case was reversed in the Supreme Court of Canada, [1] but with out reasons given. I find nothing in the written lien which obliged the plaintiffs to sell the security at all, or at any particular time. It was, of course, beyond their power to foretell with any degree of certainty whether the market would fall or rise as time went on. How, then, can they be taxed with negligence for having sold on one day rather than another? And in any case, the defendant had already released them from all claims for damages by reason of any sale they might make. The facts also show that the defendant might have instructed the plaintiffs to sell his grain at any time when the market-price was still high, and they would have carried out his instructions. The defendant knew this, but he gave no instructions. In my opinion he himself was hoping and expecting that the market would rise instead of continuing to fall.

7 In my opinion the appeal should be allowed with costs, and judgment entered below in favour of the plaintiffs for the amount of their claim and costs.

***Martin, J.A.*:**

8 This action has been brought to recover the sum of $2,146.07, and interest thereon at eight per cent from March 11, 1931, being a balance alleged to be owing by the defendant to the plaintiffs on account of moneys advanced by the plaintiffs to the defendant at various times between August 3 and November 27, 1929, both dates inclusive, after crediting the proceeds of the sale of certain of the defendant's grain.

9 The plaintiffs are operators of a grain elevator at Carnduff, and in the month of August, 1929, the defendant, who is a farmer, visited the elevator and asked the plaintiffs' agent for advances of money, his intention being to deliver his grain, when it was harvested and threshed, to the plaintiffs' elevator. As to the request of the defendant, the plaintiffs' agent testified:

> In August, 1929, he came to me for some advances — for a loan of money — until he cut his grain — to bring in the grain afterwards. I gave him the advances, and before the time of the delivery of the grain.

10 In all, 15 advances were made. At the time of each advance, the plaintiffs' agent gave the defendant a document which is called "Order on the paymaster and receipt from the shipper." The first part of the document was an order on the Bank of Montreal, signed by the plaintiffs' agent, and directing the bank to pay to the defendant the sum stated therein and which was the advance on each occasion. The second portion of the document consists in part of a receipt to be signed by the defen dant on receiving the amount stated from the bank, and which receipt in each case contained the words, "Advance on grain." The first seven orders were issued between August 3 and August 27, inclusive, and were for a total sum of $275; in the case of these orders, as the defendant had not yet delivered any grain, the words are, "Advance on grain to be delivered by October 1st." The next seven orders represent advances aggregating $5,000, made between September 12, 1929, and November 19, 1929, after the defendant had delivered grain to the plaintiffs' elevator, and contained the words, "Advance on grain in store." The last order, representing an advance of $160, was made on November 27, and contained the words, "Advance on grain in store and in granary;" the explanation being that the defendant still had some grain in his granary on the farm, which he proposed to deliver to the plaintiffs' elevator. It is admitted that the defendant signed all the documents, and received the amounts stated therein, in all the sum of $5,435.

11 Each of the documents contained the following provisions:

> In consideration of the above advance I/we hereby give and grant a lien and charge on the said grain, and hereby pledge the same to the said N. M. Patterson & Co., Limited, for the amount of such advance with interest at the rate of eight per centum per annum and all storage and handling charges, commission, freight and all other charges and expenses of or paid by said Company in connection with the said grain, and hereby authorize and empower the said Company to sell at any time without any notice to me (us) if the said Company deem itself unsafe or insecure, of which contingency the said Company shall be the sole judge, the whole and any part of the said grain at such time and at such price and to such persons (including the said Company) as the said Company in their discretion deem advisable, either as cash grain or on track, or for future delivery, as the Company deem advisable, the Company being hereby further authorized to vary or rescind any such contract of sale as they may deem advisable from time to time.
>
> I/we hereby release the said Company from all claims for damages or otherwise by reason of any such sale or sales.

12 At the time when the defendant delivered each load of his grain at the plaintiffs' elevator, the plaintiffs' agent issued to him a graded storage receipt, and these graded storage receipts with the knowledge and consent of the defendant were retained by the agent, and by him sent to the plaintiffs' head office in the city of Winnipeg, to be held by the plaintiffs as security for the advances made to the defendant. The amount of the various loads of grain delivered to the plaintiffs by the defendant need not be stated, as there is no dispute on this point.

13 Each of the graded storage receipts was in the form provided by the *Canada Grain Act*, R.S.C., 1927, ch. 86, sec. 148, form B. in the first schedule to the Act (now 1930, ch. 5).

14 In the month of February, 1930, the price of grain had materially decreased, so much so that the value of the defendant's grain, at the prevailing market-prices, did not equal the advances made to him by the plaintiffs, and the plaintiffs' agent, on or about the 15th of that month spoke to the defendant, and told him that his account was overdrawn and that security was necessary; to this the defendant replied that he would see what he could do, and would do the best he could. About two weeks later the plaintiffs' agent again interviewed the defendant, when the defendant stated that he did not know what he could do, as he had no more grain to deliver; the plaintiffs' agent then informed him that something would have to be done "about that balance that he owed us;" to which the defendant replied that he would see what he could do and let the plaintiffs' agent know.

Again at a later date, namely, on March 7 or 8, the plaintiffs' agent interviewed the defendant, and showed him a statement of the account which he had received from the plaintiffs in Winnipeg, and which set out the standing of the account as of March 6, on the basis of grain prices for that day, and showed that the defendant owed the plaintiffs the sum of $2,123. The defendant, on being shown this statement said that there was no more grain to deliver, and that he did not know what he could do, that he would do whatever he could, but did not know where he could get the money. The plaintiffs' agent advised them on the result of the interviews with the defendant, and on March 10, 1930, the plaintiffs sold the grain on the Winnipeg Grain Exchange, and after crediting the proceeds thereof to the defendant, a balance remained due by the defendant of $2,146.07, after taking into account interest and handling charges.

15 In the statement of claim the plaintiffs rely upon the agreements signed at the time of each advance, alleging that the defendant pledged his grain as security for the advances, and that they had the right under the agreements to sell the grain pledged, without notice to the defendant, and credit the proceeds on account.

16 In the defence it is stated that the plaintiffs under the terms of the agreements obtained full control of the grain and had the exclusive right to sell the grain; that they neglected to dispose of the grain, contrary to the provisions of the agreements, and that their action resulted in any deficiency which exists; it is also stated that the agreements in writing constitute the entire contract between the parties, and that there is no provision obligating the defendant to repay the advances or any part of them. There is also a defence that the plaintiffs were negligent in not selling the grain according to the regular, general, and proper custom of the grain trade, and so as to prevent loss.

17 The learned trial Judge dismissed the action with costs, on two grounds: (1) That the plaintiffs advanced the money on the security of the grain only; there was no express promise to repay, and an implied covenant to repay could not be read into the contract. (2) That the plaintiffs should have sold the grain to protect themselves, and cannot now be permitted to set up a claim for losses incurred through their poor judgment. From this judgment the plaintiffs now appeal.

18 Under the provisions of the agreements, pursuant to the terms of which the advances were made, the defendant, in consideration of the advances, expressly *pledged* his grain to the plaintiffs for the amount of the advances, together with interest, charges and freight. Moreover the plaintiffs' agent testified that the defendant asked for a "loan" before any grain was delivered, and in this way obtained seven advances, or sums aggregating $275, and on each occasion the agreement signed contained the words: "Advance on grain to be delivered." Grain was delivered pursuant to the pledge and in fulfilment thereof, and on each occasion when it was delivered at the elevator by the defendant he received a graded storage receipt in the form set out by the *Canada Grain Act*. This receipt does not constitute a sale of the grain, but it states that the grain is received in storage, and that upon return of the receipt and payment of lawful charges, the quantity of grain of the same grade is deliverable to the person on whose account the grain has been taken into store.

19 The delivery of grain to an elevator in storage, according to the provisions of the *Canada Grain Act*, sec. 213, although the grain delivered be mingled with other grain, constitutes a bailment and not sale. I cannot see how, in view of this provision, and also in view of the provisions of the agreements in which the various transactions are definitely stated to be pledges, the defendant can successfully contend that the plaintiffs purchased the grain from him and had exclusive control over it.

20 In *Beal on Bailments*, at p. 133, "pledge" is defined as follows:

> Pledge is a delivery of goods to a creditor as security for his debt, and the right to the property vests in the creditor so far as is necessary to secure the debt. The pledgee has merely a special property in the goods pledged until the debt is paid off.

21 Delivery is necessary to constitute a pledge, and the pledgee's right or special property is to hold the goods as security for the debt, and on default to sell the goods pledged. In the absence of an express agreement as to sale, the pledgee has the power to sell when a day has been fixed for payment of the amount due and default has been made in payment; where no day has been fixed for payment, the pledgee has no power to sell without proper demand and notice, but after such demand and notice, he may sell: *France v. Clark* (1883) 22 Ch. D. 830, 52 L.J. Ch. 362; affirmed 26 Ch. D. 257, 53 L.J. Ch. 585; *Williams on Personal Property*, 18th ed., p. 58.

22 In the present case there can be no question as to the right of the plaintiffs to sell, for in the contracts of pledge the defendant expressly authorized the plaintiffs to sell at any time, without any notice to him, when they deemed themselves insecure; and furthermore the defendant expressly released the plaintiffs from all claims for damages by reason of any sale or sales.

23 It was argued that no covenant to repay was contained in the instruments, and that none could be implied, and that therefore the plaintiffs could only exact repayment out of the grain pledged. I am of the opinion, however, that the requests of the defendant for advances, and the fact that the grain was pledged as security only, raise an implied promise to repay the sums advanced, and that the implied promise was not affected by the pledging of the grain: *Yates v. Aston* (1843) 4 Q.B. 182, 12 L.J.Q.B. 160, 114 E.R. 866; *Matthew v. Blackmore* (1857) 1 H. & N. 762, 26 L.J. Ex. 150; *Halsbury*, vol. 20, p. 50; *Fisher on Mortgages* (Canadian Edition) p. 416; *Leake on Contracts*, 7th ed., pp. 31, 43 and 44. At p. 31, the learned author states that in all cases of goods sold and delivered, money lent, work and labour performed, or services rendered, a promise to pay for the executed consideration is presumptively inferred, either from a previous request to execute it, or from a sufficient acceptance of it as executed.

24 The remaining contention of the defendant is that the plaintiffs should have sold the grain to prevent loss, and in not doing so they were negligent, and must suffer the results of such negligence. In support of this contention, counsel referred to the decision of the Appellate Division of the Supreme Court of Alberta in *United Grain Growers Ltd. v. Mabey*, [1925] 1 W.W.R. 19. This judgment was however reversed by the Supreme Court of Canada [2] in an unreported decision, and for this reason little assistance can be obtained from it.

25 However, the question as to whether or not the plaintiffs were bound to sell to protect themselves must depend on the terms of the contract of pledge. Generally, when a pledgee sells to realize his money, he is not liable for selling at a price lower than the articles pledged are worth if he has exercised his power to sell in good faith; and in deciding whether or not he has sold in good faith all the circumstances must be considered. In the present case the contracts confer upon the plaintiffs the right to sell at any time, without notice to the defendant, and at any time when they deem themselves insecure, and as to insecurity the plaintiffs are declared to be the sole judge. The evidence is that at all times from about the middle of February till March 10, the time of sale, the advances exceeded the value of the defendant's grain at the prevailing market-prices, and that the grain market was in a decidedly uncertain condition. Moreover, the plaintiffs, before selling, gave the defendant every opportunity to pay the deficit. There is no evidence whatever of bad faith, and when to this is added the fact that the defendant expressly released the plaintiffs from all claims for damages by reason of any sale or sales, it seems to me that he is precluded from making any claim.

26 The appeal should be allowed, with costs, the judgment below set aside, and judgment entered for the plaintiffs for the amount of their claim and costs.

***Mackenzie, J.A.*:**

27 In my opinion the learned trial Judge erred on both grounds upon which he based his judgment dismissing the plaintiff's action in this case.

28 In the first place, he held that the plaintiff advanced the money on the security of the grain only, and that there was no implied covenant on the part of the defendant to repay the advances which the plaintiff had made. The evidence shows, however, that the defendant asked for the advances, and that when he obtained them he signed orders pledging the grain as security for the amount thereof. The plaintiff therefore took delivery of the grain, not in extinguishment of the defendant's debt, but merely as security therefor. Under such circumstances I fail to see how the implied promise to repay, which is ordinarily incident to a loan, would be lost by such a transaction. Indeed authority seems to be all the other way. The cases are collected in *Chitty on Contracts*, 18th ed., p. 697, where the following statement, supported by the decision in *South-Sea Co. v. Duncomb* (1732) 2 Strange 919, 93 E.R. 942, which appears to be particularly pertinent to the present case, is to be found:

> Where money is lent generally or is secured by a deposit of goods, the lender has his remedy by action against the borrower without returning the goods, and to discharge the borrower there must be a general agreement to stand to the pledge only.

29 The second ground upon which the learned Judge based his decision was that the plaintiff company should have sold the grain sooner than it did, and when market-prices were higher, in order to protect itself from loss. In support of this conclusion he appears to rely largely upon the decision of the Appellate Court of Alberta in *United Grain Growers Ltd. v. Mabey*, [1925] 1 W.W.R. 19, being no doubt unaware that such decision was subsequently reversed by the Supreme Court by a judgment which is unreported, though note of the fact is to be found in the Second Permanent Supplement to *C.E.D.*, vols. 1 to 7, at pp. 9 and 10.

30 It seems to me, however, that in selling when it did the plaintiff was clearly within its rights, in view of the terms of the orders upon which the defendant pledged his grain. These expressly provide that it might sell at any time if it should deem itself unsafe or insecure, of which it should be the sole judge, the whole or any part of the grain, at such price and to such persons and upon such terms as it might deem advisable. Under such a power there was no legal obligation on the part of the plaintiff to make a sale; it could sell or not as it saw fit: *Western Flour Mills, Ltd. v. Hunter*, [1923] 3 W.W.R. 1065, 17 Sask. L.R. 540. It could not therefore, in my opinion, be held liable for any loss due to depreciation in the value of the grain resulting from its failure to sell sooner than it did, unless its action in this respect were in some way due to bad faith or negligence (49 *Corpus Juris*, pp. 997, 1005) but there is no evidence of such, unless it were negligence because the plaintiff failed to accurately forecast the future trend of the market, which seems unreasonable. The evidence in fact shows that the plaintiff simply continued holding the grain in storage, subject to the defendant's orders, until prices had so far receded that it found it necessary in its own interest to sell it in order to save itself from further possible loss. The defendant, who was experienced in grain matters, knew what the plaintiff was doing and could have ordered the grain to be sold sooner if he had seen fit to do so; indeed it appears that before selling the plaintiff gave him ample opportunity to express his wishes in this respect. Had the market by any chance gone the other way, it is not likely that he would question that the plaintiff had done the right thing.

31 Besides all this, there is the fact that in his orders pledging the grain the defendant released the plaintiff from all claims for damages or otherwise by reason of any sale or sales.

32 I would allow the appeal with costs; the judgment below should be set aside, and judgment entered for the plaintiff for its claim, with costs.

Footnotes

1 Noted in Second Permanent Supplement to *C.E.D.* (Western), pp. 9, 10.

2 Noted in Second Permanent Supplement to *C.E.D.*, (Western) pp. 9, 10.

End of Document

TAB 15

1952 CarswellOnt 325
Ontario Court of Appeal

Crawford v. Kingston

1952 CarswellOnt 325, [1952] 4 D.L.R. 37, [1952] O.R. 714, [1952] O.W.N. 613

Crawford v. Kingston and Johnston

Laidlaw, Roach and J.K. Mackay JJ.A.

Judgment: July 29, 1952

Counsel: *H.F. Parkinson, Q.C.*, for the defendant Johnston, appellant.
E. Guss Porter, for the plaintiff, respondent.

Subject: Property; Contracts

Headnote

Bailment — Essential Nature of Transaction — Distinction from Sale — Whether Title Passes — Delivery of Chattel with Agreement to Return Equivalent — No Bailment unless Identical Chattel to be Returned.

An appeal by the defendant Johnston from the judgment of Reynolds Co. Ct. J., of the County Court of the County of Frontenac. By the judgment appealed from the plaintiff was awarded damages of $1,468 and costs against the appellant, and the action was dismissed with costs as against the defendant Kingston.

J.K. Mackay J.A., delivering the written reasons for judgment of the Court, said that in 1944 the plaintiff entered into a verbal agreement with one Murray whereby Murray was to keep and care for two cows belonging to the plaintiff, to raise two heifers from these two cows in a period of three years and at the end of that period to return to the plaintiff the two cows and two heifers, being entitled to retain as his own any income he made from the cattle during those three years. Other cows were later left with Murray under similar arrangements. It was expressly agreed that Murray might from time to time sell and replace any of the cows, provided that he returned the number originally agreed upon at the end of the period. Murray did in fact sell and replace some of the cows, with the knowledge and concurrence of the plaintiff.

On 19th September 1949 Murray gave to the defendant Kingston a chattel mortgage on various chattels, including cows and heifers. Kingston assigned this mortgage to a finance company, and on 8th May 1951 the defendant Johnston, acting as bailiff under a warrant signed by the finance company, seized all the cattle on Murray's farm and sold them by auction, receiving $1,468, which he applied to the debt owing by Murray under the chattel mortgage.

The substantial question for determination was whether the transaction was a bailment or a sale — whether Murray was the beneficial owner of the cattle, or merely had possession as bailee, while the property remained in the plaintiff. The Court was of opinion that Murray was the beneficial owner.

Whenever there was a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of the identical subject-matter in its original or an altered form, this was a transfer of property for value, and not a bailment: *The South Australian Insurance Company v. Randell et al.* (1869), L.R. 3 P.C. 101. If the original chattel was to be returned title did not pass but the transaction constituted a bailment, with title in the bailor, but if the contract did not require the party receiving the chattel to return it in its original or an altered form but permitted him to return another chattel of equal value or pay the money value thereof, the relation of seller and buyer was created and the title passed. The essential difference between bailment and sale was the *locus* of the title.

In the present case Murray was required to return a stated number of cattle to the plaintiff, and was at liberty to sell or dispose of any or all of the stock and to make a profit by increase in the stock or otherwise. If the animals had been destroyed by fire or killed by lightning he would probably have had to bear the loss. Even if there were one or more of the original cattle in the herd seized (which was not established at the trial) there would be no difference in law. It was not upon the exercise of dominion, not subject to control, but upon the fact of having such dominion that beneficial ownership depended. Murray, having that dominion, was not bound to exercise it in any particular way or at any particular time, but his rights were wholly irreconcilable with the notion of holding the stock as bailee rather than as beneficial owner.

His Lordship proceeded to discuss the following cases: *Carpenter v. Griffin and Spencer* (1841), 9 Pai. Ch. 310, 37 Am. Dec. 396, considered in *Oliver v. Newhouse* (1883), 8 O.A.R. 122 at 127; *Reed v. Abbey* (1873), 2 N.Y. Supr. Ct. Repts. (T. & C.) 381; *Busse v. Edmonton Grain & Hay Company Limited*, 26 Alta. L.R. 83, [1932] 1 W.W.R. 296, [1932] 1 D.L.R. 744. The last of these cases differed in several material respects, which his Lordship pointed out, from the case at bar, and was clearly distinguishable.

By the application of well-established principles of law to the facts as found by the learned trial judge, the Court was bound to find that the legal title passed to Murray so as to give him the right to dispose of the cattle and to subject them to seizure and sale for his debts.

The appeal should be allowed with costs and the action should be dismissed with costs.

Appeal allowed with costs and action dismissed with costs.

TAB 16

1988 CarswellBC 551
British Columbia Supreme Court

Delta Smelting & Refining Co., Re

1988 CarswellBC 551, [1988] B.C.J. No. 2532, [1989] B.C.W.L.D. 203, [1989] C.L.D. 187, 13 A.C.W.S. (3d) 160, 33 B.C.L.R. (2d) 383, 72 C.B.R. (N.S.) 295

Re DELTA SMELTING & REFINING CO. LTD.

McLachlin C.J.S.C.

Heard: November 7 and 8, 1988
Judgment: December 12, 1988
Docket: Vancouver Nos. 01982; 660/83

Counsel: *G. Holeksa*, for consignment metal claimants.
R. Dresser, for return of metal claimants.
T.J. Maledy, for trustee, Pannell, Kerr, MacGillivray Inc.,
E.M. McDonald, for pay by cheque and credit accounts receivable claimants.
J.I. McLean, for hold on deposit claimants.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Priorities of claims — Secured claims

Preferred creditors — Customers of bankrupt metal refiner doing business with refiner in one of five ways, involving delivery of metal to bankrupt for refining and return or refining and sale — All five classes of creditors asserting priority rights to metals recovered by trustee in bankruptcy — Court finding no class entitled to assert direct proprietary interest in fund of metals or to return of metal from fund based upon claims in bailment or trust — Pro rata distribution of fund ordered.

A precious metal refiner which had speculated on the commodities market with some of its stored product went bankrupt after the 1981 crash of the silver market. Five classes of creditors sought to share in the proceeds of metals worth $543,738, including $541,326 in gold and silver, which had been recovered by the trustee in bankruptcy and held by the court-appointed receiver.

Held:

Fund of metal to be distributed pro rata among five classes of creditors.

The first two classes, known as the "pay by cheque" and the "credit accounts receivable" creditors could not claim a direct proprietary interest in the fund, since under s. 23(2) of the Sale of Goods Act they had conveyed the property in the metal-containing materials to the bankrupt when they had contracted for a price to be based on assay results. Neither could the "hold on deposit" creditors claim a proprietary interest because they had loaned their gold or silver to the bankrupt as a depositor loans money to a bank, and the property in the metal had then passed to the bankrupt. The bankrupt was not a bailee of the "return of metal" and "consignment" creditors, because they had contracted for a return of a certain amount of equivalent metal in kind, not the same property they had delivered to the bankrupt for refining. The bankrupt was not the fiduciary of those classes of creditors, having given no undertaking to act in their best interests; it owed them no duty of loyalty, its relationship with them had been at arm's length, and the relationship did not fall under any of the classes of special contracts to which the law assigns a higher duty. Alternatively, there was no enforceable trust where the metal allegedly impressed with a trust was no longer traceable, as the refined bars of gold and silver were not identified in proportions attributable to any particular customer. Thus, none of the five classes of creditors could assert a proprietary right in the metals held by the receiver, and since there was no legal basis on which to distinguish the various categories of claimants, the fund was to be distributed pro rata.

Application by way of interpleader to determine ownership of assets held by receiver of bankrupt.

***McLachlin C.J.S.C.*:**

I. Introduction

1 Delta Smelting & Refining Co. Ltd., now bankrupt, carried on the business of refining and storing precious metal. Unfortunately, as matters turned out, it used some of the metal in its possession for speculation on the commodities market. The crash of the silver market in 1981 plunged Delta into financial difficulty from which it never recovered.

2 The trustee in bankruptcy recovered $543,738 worth of precious metal, including $541,326 in gold and silver, which he still retains. By order of this court, a receiver was appointed to hold the metal, and the ownership of the metal was directed to be tried by way of interpleader.

3 Five classes of creditors seek to share the proceeds of the metal held by the receiver. They represent the creditors who had dealings with Delta in metal and ore. The five classes of claimants arise from the five different ways Delta recorded these transactions. Upon delivery to Delta, each customer's material was tagged by a receipt recording customer in formation. The official receipt contained four boxes which could be checked off to indicate classification of the transaction as one of accounts receivable, pay by cheque, hold on deposit or return of metal. The document also contained space for special instructions, which was used, among other things, to record the fifth category, consignment transactions.

4 Initially, each customer's material was kept separate and discrete. After being treated to remove impurities, the resulting product was tested to determine the percentage of precious metal. The assay results were recorded on the receipt, the pricing formula determined, and the custom

5 Up to this point each customer's material could be identified. But this changed in the refining process which pooled material from various customers together with metal Delta considered its own.

6 Gold and silver were refined by different processes. Gold was refined in small batches, normally representing the accumulation of metal over one week. The silver batch process continued for approximately four to six months. During the course of the batch, silver was continually added and removed from the batch.

7 At the end of a batch, the refined bars of gold or silver were placed in the vault. No attempt was made by Delta to identify proportions of a batch as being attributable to any particular customer. Metal was withdrawn from the vault for Delta's own purposes (including trading and speculation on the metal market) as well as for return or sale to customers, generally on a "last-in, first-out" basis. As a consequence of this policy none of the metal in the vault is specifically identifiable as coming from any of the particular claimants in this proceeding.

8 The metal which the receiver now holds came in part from the vault and in part from "clean-up". "Clean-up metal" is metal which the trustee recovered after bankruptcy by cleaning out furnaces and ducts, burning carpets, rerunning slag, collecting drillings and collecting metal content from the silver bath solutions.

II. The Issue

9 There are five categories of claimants to the fund: pay by cheque ("P.B.C."); credit accounts receivable ("C.A.R."); hold on deposit ("H.O.D."); return of metal ("R.O.M."); and consignment metal creditors ("C.C."). The main issue is what interest if any each class of claimant possesses in the metal held by the trustee. On the answer to that question hangs the respective entitlement of the five categories of claimants.

III. Discussion

A. The "pay by cheque" (P.B.C.) and "credit accounts receivable claimants" (C.A.R.)

10 The pay by cheque and credit accounts receivable claimants may be treated together. In both cases, their transactions with Delta involved the sale of material containing a content of precious metal, for a price to be determined at a later date based on the results of an assay.

11 The contracts were clearly for the sale of goods, conveying property in the metal to Delta. That conveyance occurred when the contract was made: s. 23(2) of the Sale of Goods Act. Property in the metal containing materials having passed to Delta, the P.B.C. and C.A.R. claimants can claim no direct proprietary interest in the fund.

B. The "hold on deposit" creditors

12 The hold on deposit creditors assert that under the terms of their contract with Delta property in the metal was retained in the depositor and did not pass to Delta. These creditors each purchased a "hold on deposit" contract for gold or silver from Delta. At the end of the contract they were to receive the metal back, together with interest. Although the contract purported to reserve property in the depositor, Delta was free to use, deal in or trade the metal as it saw fit for a certain period of time, and was not required to account to the depositor for the type of use to which the metal was put nor for any profits made. These facts are inconsistent with either bailment or trust, which would permit the property to remain in the creditors. The correct legal characterization is that the customers loaned their metal to Delta, at which time property passed to Delta.

13 The position of these creditors is indistinguishable from that of depositors at a bank. The relationship between banker and depositing customer is viewed as a contract of loan, under which property in the money loaned passes to the bank. Baxter, in The Law of Banking, 3rd ed. (1981), at p. 2 states:

> 14 But the ordinary business meeting of a bank deposit is not to create the banker or bailee, an agent, or a trustee for the money. It is not the purpose that the *identical res* should be returned, nor that the banker shall account to the customer for any profit made by the use of the money, or be subject to the law relating to trusts and trustees in the manner in which he invests or otherwise employs the money. The basic meaning of a bank deposit is that it is a loan of money by the depositor to the bank. *When the money is lodged it becomes the property of the bank to use as it sees fit, within the scope of its legal powers*. The customer thereafter has no *jus in re* in the money, and the bank is under no duty to account to the customer for the way in which it uses the money or for any profits earned upon it. The bank's main obligation is to repay the deposit according to the contract. Repayment means return of an equivalent amount of currency. It is misleading to regard the customer as having any rights of property in money after it has been deposited and has passed into the hands of the bank. [emphasis added]

15 It follows that the H.O.D. claimants can claim no proprietary interest in the property of the metal remaining in the fund.

C. The "return of metal" and "consignment" creditors

16 The return of metal and consignment creditors delivered metal to Delta for refining. After refining, Delta was obliged to return either the specific quantity of purified metal contained within the material delivered, or alternatively, a proportionate share of the specific bulk of pure metal into which the raw material was refined, less charges for the refining process.

17 These creditors assert that property in the metal which they delivered to Delta never passed to Delta. Delta obtained possession of the material, they contend, only so far as necessary to refine it to a pure product. The relationship, they submit, was one of bailment or trust. If this submission is correct, the R.O.M. and C.C. claimants would be entitled to priority to the metal held by the receiver over the P.C.B., C.A.R. and H.O.D. creditors.

18 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 basis that an equivalent quantity of the same type of material will be returned, the contract is one of sale, not bailment: *Crawford v. Kingston*, [1952] O.R. 714, [1952] 4 D.L.R. 37 (C.A.); *South Australian Ins. Co. v. Randell* (1869), L.R. 3 P.C. 101, 16 E.R. 755. (The facts are distinguishable from those in *Busse v. Edmonton Grain & Hay Co.*, 26 Alta. L.R. 83, [1932] 1 W.W.R. 296,

[1932] 1 D.L.R. 744 (C.A.), where no intermixing was contemplated and there was a right to return the identical grain and, the grain was not to be consumed.)

19 These principles negate the claim that Delta was merely a bailee with property remaining with the creditors. The refining process neces sarily involved the intermixing of metal derived from various customers together with Delta's own metal. The final product was indistinguishable as to source, and was treated as such in Delta's accounting and inventory systems. All the R.O.M. and C.C. customers bargained for was the return of a certain amount of equivalent metal in kind — not the same property they turned over to Delta.

20 In the alternative, the return of metal and consignment creditors claim metal from the fund on the ground that it is impressed by a trust in their favour.

21 In order for a trust to arise, Delta must be found to have stood in the position of fiduciary to the R.O.M. and C.C. creditors (Waters, The Law of Trusts in Canada, 2nd ed. (1984), at p. 10). The concept of fiduciary duty does not lend itself to a simple definition because of the diversity of situations in which such a relationship may be found. As Dickson J. (as he then was) stated in *Guerin v. R.*, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321 at 341, 55 N.R. 161 [Fed.]:

> 22 It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence should not be considered closed: see, *e.g., Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385 at p. 392, [1972] 1 O.R. 465 (C.A.); *Goldex Mines Ltd. v. Revill et al.* (1974), 54 D.L.R. (3d) 672 at p. 680, 7 O.R. 216 (C.A.) at p. 224.

23 Although it may be impossible to achieve a definition of fiduciary duty which is at once precise and universally applicable, certain concepts are fundamental in determining whether a fiduciary relationship exists in a given case. First, a fiduciary has a duty to act in the best interests of another, and not in his own: *Midcon Oil & Gas v. N.B. Dom. Oil Co.*, [1958] S.C.R. 314, 12 D.L.R. (2d) 705; *Evans v. Anderson*, [1977] 2 W.W.R. 385, 76 D.L.R. (3d) 482, 3 A.R. 361 (C.A.); *Can. Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371. Second, the term "fiduciary" imports a duty of loyalty: Waters, The Law of Trusts in Canada, 2nd ed. (1984), at p. 33; see also Shepherd, The Law of Fiduciaries (1981), at p. 45 et seq. Third, a fiduciary relationship involves scope for the fiduciary's unilateral exercise of power or discretion effecting the beneficiary's legal or practical interest, as a consequence of which the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary: see *Frame v. Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 78 N.R. 40, per Wilson J. dissenting.

24 Finally, an arm's length commercial contractual relationship generally does not give rise to a fiduciary duty. Although certain categories of contractual relationship have historically been regarded in law as being of fiduciary character (such as solicitor/client, principal/agent, partner-to-partner, etc.), the courts have not ordinarily found a fiduciary relationship between businessmen who enter into commercial dealings at arm's length, even if the contract creates continuing obligations between them, including a duty to act in a certain manner: *Jirna Ltd. v. Mister Donut of Can. Ltd.*, [1972] 1 O.R. 251, 3 C.P.R. (2d) 40, 22 D.L.R. (3d) 639, affirmed 12 C.P.R. (2d) 1, 40 D.L.R. (3d) 303 (S.C.C.); *Hosp. Prod. Ltd. v. U.S. Surgical Corp.* (1984), 58 A.L.J.R. 587 (Aus. H.C.); *Int. Corona Resources Ltd. v. Lac Minerals Ltd.* (1987), 62 O.R. (2d) 1, 28 E.T.R. 245, 46 R.P.R. 109, 18 C.P.R. (3d) 263, 44 D.L.R. (4th) 592, 23 O.A.C. 263 (C.A.). Gibbs C.J. Aus. in *Hosp. Products*, supra, at p. 597 put this proposition as follows:

> 25 On the other hand, the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by the Court as important, if not decisive, in indicating no fiduciary duty arose...

26 In the case at bar, Delta gave no undertaking to act in the best interests of the creditors who delivered metal to it for refining. It owed them no duty of loyalty. It was entitled to use the metal as it chose without accounting to the creditors, its only obligation being to ultimately deliver a specific quantity of metal to them pursuant to its contract with them. Delta's relationship

with these creditors was defined by an arm's length commercial contract. The relationship did not fall within any of the classes of special contracts to which the law assigns a higher duty. The relationship was simply one of contract for the sale or exchange of goods. Delta assumed no higher duty than the commercial duty set out in the contract.

27 I conclude that Delta was not the fiduciary of the return of metal and consignment creditors, and that their claim in trust must fail. But if I were wrong in that conclusion there is a further bar to the claim of the return of metal and consignment creditors. For a trust to be enforceable, the property originally impressed with the trust must be traceable. Courts of equity have always been acute to distinguish trust funds and will trace them however much their character or nature may be altered, provided the property which is claimed can be clearly identified as the fruit of the trust property. Conversely, no trust can be enforced if the trust property cannot be identified or traced into some specific fund or thing: *Re C.A. Macdonald & Co.* (1958), 26 W.W.R. 116 at 121, 37 C.B.R. 119, 17 D.L.R. (2d) 416 (Alta. T.D.) . When a beneficiary seeks to trace his property, he must be able to follow step by step the course of the property through whatever transformation occurred: *Br. Can. Securities Ltd. v. Martin*, 27 Man. R. 423, [1917] 1 W.W.R. 1313. It is essential that he show that his property is actually or notionally part of the property he seeks to trace. Thus if he seeks to trace funds into purchases, the claimant must show that his moneys were in the account when the purchase was made: *Br. Can. Securities Ltd. v. Martin*.

28 The return of metal and consignment creditors can establish that their metal went into Delta's operations. Thereafter, however, their metal lost its identity. It is impossible to say that the metal which the receiver now holds — the bars found in the vault and the proceeds of clean-up contain, actually or notionally, any particular customer's metal. It is equally possible that a particular customer's metal was incorporated in bars that were sold or used in speculation, as in the bars which remained in the vault. In short, the customers who brought their metal to Delta for refining cannot trace their metal to the metal which the receiver now holds. It follows that the principles of trust law cannot assist it.

IV. Conclusion

29 None of the five categories of claimants are able to assert a proprietary right in the metal held by the receiver. There is thus no legal basis on which to distinguish the various categories of claimants from each other. The fund of precious metal on hand should be distributed pro rata amongst the five categories of claimants.

Order accordingly.

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TAB 17

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

TRANSFERS OF INVESTMENT SECURITIES

Report No. 67

June 1993

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

ACKNOWLEDGEMENTS

This report represents both an extremely complex subject matter and a topic which has changed both in focus and comprehensiveness over the course of its history. This Institute is extremely fortunate to have had the benefit of Mr. Eric Spink as the counsel having charge of this project. The report demonstrates his clarity of analysis and expression and an understanding of the industry for which the recommendations will be both relevant and timely.

Many industry representatives have been consulted on both formal and informal bases, and in particular, Canadian Depository for Securities Inc., through its Vice-President, Mr. Toomas Marley, have provided information about the operation of their depository systems. The Alberta Securities Commission has provided significant assistance by way of review of the proposals, and their effect upon the regulatory regime. We are grateful to all who have assisted in providing the information which is represented by this report.

The Advisory Committee for this project consists of Adelle Fruman (formerly managing partner of Atkinson Milvain and now Madam Justice Fruman). Glenda Campbell, Senior Legal Counsel, Alberta Securities Commission and William H. Smith of McCarthy Tétrault in Calgary. We acknowledge their significant expenditure of time and skill over several drafts.

While this report represents a response to an Alberta need, it envisages a solution which would operate best if it were adopted uniformly across the country. The industry demands uniformity of rules and regulations and the proposals recognize that need and endorse it.

Note that the underlying agency relationship is critical. If the broker acts simply as vendor of the securities, and the client as purchaser, then even if the client has paid in full the relationship may be only that of creditor-debtor, unless securities in the possession of the broker have been set apart or earmarked as the property of the client.[182] If the client has not paid in full, it would also seem necessary for the broker to appropriate specific securities to the contract in order for a pledge to exist, because otherwise no property would pass to the purchaser.

The common law recognized a limited right in the broker to pledge the client's securities for an amount not exceeding the client's indebtedness to the broker.[183] If the broker desires the power to pledge the client's securities for any greater amount (e.g. to secure the broker's general indebtedness with a bank), then a clear and unequivocal agreement between the parties must be shown.[184] Even if the broker improperly pledges the client's securities to secure the broker's general indebtedness, the pledge will likely be effective, because the pledgee will generally have acquired the certificates in good faith and for value.[185]

(b) Bailment and trust

In a strict technical sense, the concepts of bailment and trust are completely separate and distinguishable.[186] However, both terms have been used to describe similar broker-client relationships, so it is necessary to

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[181](...continued)
(pp. 134-35). Note that this decision does not refer to the statutory transfer mechanisms under the OBCA.

[182] See *Re Stobie-Forlong-Matthews, Ltd.; Re Claims of Kern Agencies, Ltd.*, [1931] 1 W.W.R. 817 (Man. C.A.), and specifically the portions of the judgement dealing with the claim of Leany, and *Re R.P. Clark & Co. (Vancouver) Ltd.*, [1931] 3 W.W.R. 79 (B.C.S.C.).

[183] See *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R. 601, and *Clarke* v. *Baillie, supra*, note 6.

[184] *Ibid.*

[185] See Annotation "Stockbrokers' Bankruptcies", [1933] 4 D.L.R. 1, by Sidney Smith at 7-12. The pledgee's claim may be based either on the negotiability of the certificates, or on the fact that the client was estopped from denying the broker's authority to pledge the certificates. See also *supra*, note 91 and accompanying text.

[186] See N.E. Palmer, *Bailment*, 2nd ed. (Sydney: Law Book Co. Ltd., 1991) at 189-92; W.F. Fratcher, *Scott on Trusts*, 4th ed., vol. I (Toronto: Little, Brown & Co., 1987) at 56-64.

examine them together. This aspect of the broker-client relationship is of vital importance because it largely determines the rights of clients to securities held by the broker if the broker becomes insolvent. It is in this context that the decisions often reveal much confusion about the nature of the property interests held by brokers and clients in different situations.

It is also important to examine this area in some detail because CDS' position is that its relationship with its participants is that of bailee-bailor.[187]

As will become apparent during the discussion, there is some danger in placing too much reliance upon the terminology used to describe the broker-client relationship, because such terminology is not always used consistently or with precision. It is more important to recognize the fundamental characteristics that are found to exist in the broker-client relationship, and how these influence the client's rights, however these characteristics may be labelled.

We will briefly discuss the basic nature of bailment and trust, then proceed to examine how the courts in Canada and the U.S. have characterized the broker-client relationship. Finally, we will offer some suggestions on the proper terminology to be used in this area.

(i) Characteristics of bailment

It has been said that "bailment eludes precise definition because the term covers a host of legal relationships which have as a common denominator only that one is in possession of another's chattel".[188] A useful starting point is stated in Halsbury's 4th edition:

> A bailment, traditionally defined, is a delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on, which they were bailed shall have elapsed or been performed. Under modern law, a bailment arises whenever one person (the bailee) is voluntarily in

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187 Letter from CDS, March 14, 1991.

188 E. Tyler and N. Palmer, *Crossley Vaines' Personal Property*, 5th ed. (London: Butterworths, 1973) at 70.

> possession of goods belonging to another person (the bailor). [footnotes omitted][189]

It is clear that the reference to "trust" in the traditional definition is not used in the technical sense of legal title in trust for another who has the beneficial enjoyment. In bailment no legal or equitable title is acquired by the bailee.[190] This lack of title need not impair the bailee's ability to convey good title to a *bona fide* purchaser of the property.[191]

Because possession is the essential element of bailment, only tangible personal property can be bailed.[192] Thus, bailment can only apply to certificates, and not to the underlying shares.[193] Of course, the certificates are evidence of the shares, and if the certificates are also negotiable instruments, then from a practical standpoint they are the embodiment of the shares. This is reflected in the fact that the cases often use the term "shares" rather loosely. Sometimes the usage is innocuous, but it is occasionally problematic.

Fungible property may be bailed, but it is not clear whether this requires that the specific property remain identifiable, and returned *in specie.* In the U.S., the law does not maintain the requirement of redelivery *in specie,* and it has been clearly established that:

> in the case of a bailment of shares of stock the person in possession of the certificates may mingle them with others and satisfy his obligation by returning certificates of like kind, at least provided an equivalent amount of securities of the same description remain available, under his control, for delivery to the bailor.[194]

The conflicting view is that bailment concepts can apply only if it is made clear from the terms of the bailment itself that the fungible property is to be

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189 2 Hals. (4th ed. reissue), para. 1801.

190 See W.B. Raushenbush, *Brown on Personal Property,* 3rd ed. (Chicago: Callaghan & Co., 1975) §10.1 n.1; and Halsbury's, *ibid.* para. 1801 n.1.

191 For example, where the bailee is a mercantile agent as defined by the Factors Act, R.S.A. 1980, c. F-1, or where the property bailed is a negotiable instrument.

192 See Palmer, *supra,* note 186 at 7-8.

193 Or the underlying debt, as in the case of a bond.

194 *Re Ellis' Estate,* 6 A.2d 602 (1939) at 612. Note the reference to "a bailment of shares". See also *Brown on Personal Property, supra,* note 190 at 237-44.

returned *in specie* and not merely in an equivalent form.[195] Although this particular issue has not been directly addressed in Canada in relation to security certificates, "Canadian decisions confirm the trend of Australian case law in this area, and stress the need for redelivery *in specie* as a central feature of bailment."[196]

Almost all cases discussing bailment of securities have come from the U.S. and particularly in the context of pledges of certificated securities and §9-305 of the UCC. Prior to the 1977 amendments to the UCC, §9-305 provided for the perfection of a security interest in a security certificate by possession, including circumstances when the certificate was held by a bailee.[197] In Canada, Personal Property Security legislation, although similar to the UCC, does not use the word "bailee" in this context.[198]

(ii) Characteristics of trust

In the strict technical sense, a trust is a fiduciary relationship whereby a trustee acquires legal title to property and holds it for the benefit of the equitable owner, the beneficiary. This is obviously not a comprehensive

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195 See Palmer, *supra*, note 186 at 13 and 135-37; and G.W. Paton, *Bailment in The Common Law*, (London: Stevens & Sons, 1952) at 25-29, referring to *South Australian Insurance Co. Ltd.* v. *Randell* (1869), L.R. 3 P.C. 101, and *Chapman Bros.* v. *Verco Bros. & Co. Ltd.* (1939), 49 C.L.R. 306 (Aus. H.C.).

196 Palmer, *ibid.* at 137, citing *O'Flynn* v. *Carson* (1908), 7 W.L.R. 463; *Lawlor* v. *Nichol* (1898), 12 Man. R. 224; *Cargo* v. *Jovner* (1889), 4 Terr. L.R. 64; *Re Williams* (1871), 3 U.C.Q.B. 143; *Stephenson* v. *Ranney* (1852), 2 U.C.C.P 196; *Clark* v. *McClellan* (1892), 23 O.R. 465; *Crawford* v. *Kingston and Johnston*, [1952] 4 D.L.R. 37; and *Tilt* v. *Silverthorne* (1855), 11 U.C.Q.B. 619. See also *Busse* v. *Edmonton Grain & Hay Co.*, [1932] 1 D.L.R. 744 (Alta. S.C.A.D.). 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 Acts, so there has not yet been sufficient commercial pressure to produce a change in our common law of bailment. In an appropriate case involving investment securities, a court might consider following the U.S. position.

197 See R. Haydock, Jr., "When Is a Broker a Bailee or Is an Interest in Securities a General Intangible?" (1981) 35 Ark. L. Rev. 10.

198 See for example s. 24 of the Alberta PPSA, which refers to "possession of the collateral by the secured party, or on his behalf by another person" but also provides that "a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent".

TAB 18

1997 CarswellOnt 3890
Ontario Court of Justice, General Division (In Bankruptcy)

Coro (Canada) Inc., Re

1997 CarswellOnt 3890, [1997] O.J. No. 4704, 13 P.P.S.A.C. (2d) 175, 36 O.R. (3d) 563, 44 O.T.C. 388, 49 C.B.R. (3d) 183, 75 A.C.W.S. (3d) 367

In the Matter of the Bankruptcy of Coro (Canada) Inc., having its Head Office in the City of North York

Registrar Ferron

Judgment: October 21, 1997
Docket: 31-326688

Counsel: *Mr. Harvey G. Chaiton*, for the trustee.
Mr. Nicholas McHaffie, for the claimant.
Mr. Douglas F. Harrison, for the claimant and Appellant Enthone-OMI (Canada) Inc.

Subject: Insolvency; Contracts; Property

Headnote

Bankruptcy --- Priorities of claims — Secured claims — Forms of secured interests — Miscellaneous securities

Leased goods — Bankrupt C Inc. signed agreement with E Inc. to lease gold from latter for use in electroplating business — E Inc. appealed trustee in bankruptcy's rejection of its claim to gold — Trustee argued that agreement was sales contract that had to be registered under Act — Appeal allowed — Lease was not guise for conditional sales agreement — Payments made by C Inc. to E Inc. did not reflect true value of gold — C Inc. was not required to purchase gold at end of agreement — Agreement constituted true lease — Personal Property Security Act, R.S.O. 1990, c. P.10.

Personal property security --- Scope of legislation — True lease versus sales-financing

Bankrupt C Inc. signed agreement with E Inc. to lease gold from latter for use in electroplating business — E Inc. appealed trustee in bankruptcy's rejection of its claim to gold — Trustee argued that agreement was sales contract that had to be registered under Act — Appeal allowed — Lease was not guise for conditional sales agreement — Payments made by C Inc. to E Inc. did not reflect true value of gold — C Inc. was not required to purchase gold at end of agreement — Agreement constituted true lease — Personal Property Security Act, R.S.O. 1990, c. P.10.

Bailment and warehousing --- General principles — Bailment distinguished from other relationships — Buyer and seller

Bankrupt C Inc. signed agreement with E Inc. to lease gold from latter for use in electroplating business — E Inc. appealed trustee in bankruptcy's rejection of its claim to gold — Trustee argued that agreement was sales contract that had to be registered under Act — Appeal allowed — Fact that original gold was used and replaced by C Inc. did not render agreement into sales agreement — C Inc.'s right to deal with gold delivered by E Inc. was restricted to use in former's business — C Inc. was required to maintain same level of gold as was originally delivered by E Inc. — Agreement kept title of gold in E Inc.'s name and gold was not mixed with that of third parties — Agreement constituted bailment lease and not conditional sales agreement — Personal Property Security Act, R.S.O. 1990, c. P.10.

APPEAL by creditor of trustee in bankruptcy's rejection of its claim of priority in gold possessed by bankrupt.

***Registrar Ferron*:**

1 There are three issues in this appeal:

1. Is the lease made between the bankrupt, Coro (Canada) Inc., and Enthone-OMI (Canada) Inc., a "true" or "real" lease which does not require perfection under the *Personal Property Security Act*, or is it a financing vehicle which is subordinate to the trustee's interest in the assets leased unless perfected?;

2. Is the transaction which resulted in the lease in fact a sale of the gold?; and, finally,

3. Does the assignment of the security interest in the collateral of Coro in fact secure Enthone-OMI and, if so, to what extent?

2 Coro, the bankrupt, was engaged in the business of electro plating jewellery and other metallic products. In connection with this process, the company operated tanks containing various metals, some precious and some base, in which the products to be coated was immersed.

3 Originally, before the events leading up to the lease in issue, Coro purchased its gold requirements for its processes from a company called Engelhard Canada Limited for which it paid or was supposed to pay cash. Coro was at that time, and at all times, up to the transaction involved in this proceeding, the owner of the gold in its tanks which is the subject of the lease in question.

4 In January, 1996, Engelhard demanded payment of its account with Coro which was then in arrears. Coro did not have the funds to retire the indebtedness and turned to Enthone, which is in the same type of business as Engelhard, for financial assistance.

5 The negotiations which followed the demand and the request for financial assistance resulted in Enthone turning over to Engelhard 152 troy ounces of gold which was the amount necessary to pay off Coro's indebtedness to that company.

6 At the relevant time Coro owned 129.4 troy ounces of gold which was in its plating tanks and this was transferred to Enthone as part of the financial transaction involving Engelhard. Enthone then became the owner of the gold which Coro had in its tanks and which it used in its plating process.

7 In order that Coro, which required the gold for its operation, could remain in business Enthone entered into a lease agreement whereby it leased 152 ounces of gold to Coro including the 129.4 ounces which was then in Coro's inventory at the date of the transaction and which, as I have mentioned, was transferred to the ownership of Enthone. Nothing turns on the amount of gold which Coro had in inventory. The lease is for 152 ounces of gold which was the amount transferred by Enthone to Engelhard on Coro's account. That the full 152 ounces of gold was not, at any time, in Coro's processes is of no significance.

8 It was part of the transaction that Enthone became the supplier to Coro of its replacement gold required to maintain the gold solution in the tanks at an agreed level necessary for the plating process.

9 As part of the transaction, Coro was also required to give Enthone security over its silver and palladium inventory in order to secure the sale of replacement gold to Coro. This, of course, parallels the arrangement under which Coro had operated when Engelhard was its supplier. (Section 1, paragraph G).

10 Finally, Coro was required to give an irrevocable Letter of Credit in the final amount of $25,000.00 to secure Enthone in its sale of replacement gold and other plating products to Coro. It should be noted, that over the life of the lease, that is, from the inception of the lease until Coro's bankruptcy, Enthone sold 111 troy ounces of gold to Coro with which Coro "topped up" the leased gold in its tanks. At bankruptcy the Letter of Credit was paid which reduced the balance owing by Coro on Enthone's account. [See paragraph 10, affidavit of Nazir Noormohamed - May 13, 1997]

11 The lease in question is different from the leases usually dealt with by the court in that the subject of the lease is a gold solution which does not over time depreciate in value in the usual sense but which may appreciate or depreciate in value with the price of gold on the world market as fixed daily in London, England. Moreover, the quality of the gold under lease is constant although through its use by Coro in its plating process the quantity of gold in the tank decreases and had to be replaced by the

lessee's own gold from its supplier, Enthone. Accordingly, it was inevitable that the original subject of the lease was replaced at least in part by gold supplied by the lessee.

12 Henry, J. in *Speedrack Ltd., Re* (1980), 33 C.B.R. (N.S.) 209 (Ont. Bktcy.), *Ontario Equipment (1976) Ltd., Re* (1981), 33 O.R. (2d) 648 (Ont. S.C.) , and *Gatx Corporate Leasing Inc. v. William Day Construction Ltd.* (1986), 6 P.P.S.A.C. 188 (Ont. H.C.), discusses the indices which determine whether a lease is what it purports to be, on the one hand, or, whether, it is a financing arrangement on the other. I discuss this appeal using the tests set out in those cases.

13 The cases focus on the rental aspect of the lease transaction. In *Ontario Equipment (1976) Ltd., Re*, the court said at p.650 in setting out the test; "it is of the essence of a lease intended as security within the meaning of the *Personal Property Security Act* that the property in the subject of the lease is to pass ultimately to the lessee, who is obliged to pay the lessor what might be reasonably regarded as the purchase price with interest and carrying charges over the life of the lease. In such a case the transaction is not unlike a conditional sales agreement or a hire purchase agreement."

14 In other words, while it is entirely possible to hire out property at a reasonable price for its use, and give the lessee an option to purchase, if the so-called rental payments are in reality payments towards the purchase price of the goods, the court will pierce the shell of words with which the parties have hidden their true intention, and give the contract its true character as a financing vehicle for a conditional sale. Here, in this proceeding, no one could reasonably regard the lease fee as approaching the purchase price of the subject of the lease even if the lease itself were for a definite term. The rental or lease fee, as it is called, is 5% per annum of the daily value of the leased gold, a figure which represents the equivalent amount of money which Enthone would earn if it had the value of the leased gold in its bank account at interest. From the commencement of the lease to the date of bankruptcy in January 1997, the lease returned about $4,500.00 to Enthone. When one considers that the value of the gold leased is well in excess of $60,000.00, the rental provision calculated over any reasonable period bears no relationship to the price of the gold, and is, rather, purely nominal.

15 The lease was for a term of one year with a provision for its renewal automatically from year to year subject to a right of termination in either party on 30 days' notice. There is no fixed payment date in the usual sense. When, however, the lease is terminated in the way provided by the agreement, Coro was required to return the leased gold to Enthone. There was no requirement in Coro to purchase the gold although it had an option of buying the gold at market price as fixed in London without credit for rental payments made over the life of the lease. It is clear, that none of the indices said by Henry, J. to point to the lease, as a guise for a conditional sales agreement is present. Coro can use the leased gold and walk away from the contract having paid, not towards its purchase, but for its use only. I find, accordingly, that the lease is not one which secures the performance of an obligation and hence document did not require to be perfected under the *Personal Property Security Act*.

16 I now turn to deal with the more substantial position put forth by counsel for the trustee. The leased gold in the tank is used up in Coro's plating process. Under the lease Coro is under a contractual obligation to maintain 129.4 troy ounces of gold in its tanks at all time. To do so Coro's is required to purchase replacement gold from Enthone to replenish the gold as it uses it up in its own processes.

17 On the termination of the lease either by agreement or by reason of default, Coro, in required by the terms of the agreement to return to Enthone 152 troy ounces of gold comprising, in part, the gold in its plating tanks. In a technical sense, Coro, could not and was not expected to return the identical subject leased to it, the original gold having been mixed with Coro's own gold purchased to replenish the gold in the tanks, as I have mentioned. The delivery then, of a product which answers the generic description of the product leased will satisfy the terms of the obligation.

18 On those fact the trustee alleges that the transaction called the lease is, in reality, a sale because under bailment law the identical subject matter cannot be returned by the lessee to the lessor.

19 Halsbury's, Laws of England, (4th) Vol. 2 page 1801 sets this out in a statement which is universally accepted:

> A bailment, traditionally defined, is a delivery of personal chattels on trust, usually in a contract expressed or implied, that the trust shall be duly executed, and the chattels re-delivered in either their original or altered form, as soon as the time or use for, or condition on, which they were bailed shall have elapsed or been performed.

20 In *Crawford v. Kingston*, [1952] O.R. 714 (Ont. C.A.) cited by trustee's counsel, the Ontario Court of Appeal used much the same words:

> Whenever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity and not for the return of the identical subject matter, in its original or altered form, this is a transfer of property for value, it is a sale and not a bailment.

21 A great deal of the law in this respect was developed in connection with the grain trade. In the usual case, wheat is deposited by the farmer (bailor) with a depository, grain elevator (bailee) and mixed in a common mass with the wheat of perhaps hundreds of other depositors. The depositor has the right of receiving on demand a similar quantity and quality of wheat to that delivered, but, obviously, not the product identical to that delivered. 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. (See *Lawlor v. Nicol* (1898), 12 Man. R. 224 (Man. C.A.)). That is, if the identical product to that deposited with the bailee cannot be recovered the transaction cannot, by definition be a bailment and must be a sale.

22 In *Delta Smelting & Refining Co., Re* (1989), 72 C.B.R. (N.S.) 295 (B.C. S.C.), the bankrupt was a smelter and refiner of gold. Its customers turned over gold ore to it to be smelted and refined and the resulting gold was pooled together in a common mass, and each customer had the right to the return of an amount of gold equal to that deposited with the company. The court in describing the process said at p.298: "at the end of a batch, the refined bars of gold or silver were placed in the vault. No attempt was made by Delta to identify proportions of a batch as being attributable to any particular customer. Metal was withdrawn from the vault for Delta's own purposes (including trading and speculation on the metal market) as well as for the return or sale to customers, generally on a "last in, first out" basis. As a consequence of this policy none of the metal in the vault is specifically identifiable as coming from any of the particular claimants in this proceeding." It was held that since the creditors' metal was mixed together with the metal of many other customers in a common mass, "on the basis that an equivalent quantity of the same type of material, will be returned, the contract is one of sale, not bailment."

23 In this appeal, Enthone's gold is not deposited in a common mass. No other person's gold, save that of Coro's replacement gold, goes into Coro's tanks. There is not the mingling of Enthone's gold with the gold of many other depositors as in the wheat cases and in the Delta case. The leased gold is always identifiable and kept separate. The gold which Coro adds merely replaces the gold which it uses up in its plating processes. In a sense, Coro uses its own gold in its own plating processes so that Enthone's gold always remains in the tank.

24 Moreover, the court has always placed great emphasis on whether the bailee had, under the deposit agreement the right to deal with the bailed goods. In both Delta and Crawford, the bailees were at liberty to deal with the bailor's products as it saw fit. In Delta, the court said at p.299, "although the contract purported to reserve property in the depositor, Delta was free to use, deal in or trade the metal as it saw fit for a certain period of time, and was not required to account to the depositor for the type of use to which the metal was put nor for any profits made. These facts are inconsistent with either bailment or trust, which would permit the property to remain in the creditor. A correct characterization is that the customer loaned their metal to Delta, at which time property passed to Delta." In the *Crawford* case the court pointed out that the bailee, Murray, was, under the contract, required to return a certain number of cattle to the plaintiff and that, "from 1944 ... was at liberty to sell or dispose of any or all of the stock and to make a profit by means of increase in the stock or otherwise."

25 Clearly, if the bailee has under the contract the right to dispose of the bailed subject as it had both in the Delta case and the Crawford case the "locus of the title" must be in the bailee and the transaction is a sale.

26 Those cases are distinguishable from the facts of the case in this appeal. Here, Coro's use of the gold was clearly defined and limited to its plating processes. It had no right to deal with the gold in trade or as a pledge, or in any way. It had to account

for the use of the gold (Section 3, paragraph D). It was required to monitor the gold level at 129.4 troy ounces and was subject to audit. (Section 1, paragraph H, "report"). In this respect Coro's situation is closer to the facts in *Busse v. Edmonton Grain & Hay Co.* (1932), 26 Alta. L.R. 83 (Alta. C.A.), a case cited by the Ontario Court of Appeal in the Crawford case. There the plaintiff stored grain with the defendant storage company. The plaintiff's grain was put in a particular bin by itself and not mixed with the common mass. The agreement between the plaintiff and the defendant was that the defendant was bound to deliver it or its equivalent in quality and quantity whenever required by the plaintiff and not, necessarily the identical grain as deposited with the defendant. Afterwards, the plaintiff and defendant agreed that the plaintiff would sell the grain to the depositor, defendant, at any time the plaintiff elected to do so at an agreed price. The trial judge held that the agreement was a sale. On appeal, the court reversed that finding and put great stress on the fact that the defendant had no right to deal with the grain. At p.188, the court said, "the defendant has no right to deal with it other than in accordance with the contract. It was there for storage and storage only. It was not put into a consumable stock as in the Miller's case. The defendant was bound at all time to deliver it or its equivalent in quantity and quality whenever required by the plaintiff. It had no right to treat it as it saw fit...".

27 The court in the *Busse* case also thought the insurance to be a factor. It said "then there is still the more important fact that by the terms of the contract ... the defendant was required to insure the grain and the cost of that insurance was borne by the plaintiff showing that it was intended for his benefit."

28 Under the terms of the contract between Coro and Enthone, Coro was obliged to insure the gold leased to it. The contract states in Section 3, paragraph D, "upon request by Enthone, the company shall provide evidence that it has fully paid up insurance coverage which is sufficient to cover the current market value of all gold leased to the company by Enthone and all silver and palladium for which a security interest has been granted to Enthone and which names Enthone as additional insured."

29 Further, the parties to the lease have always recognized that the gold leased to Coro will, in a technical sense, vary or change by reason of Coro's own processes, but that essentially the same quality of gold will be returned at the termination of the lease. The parties by contract have provided for this. The lease confirms the title of the gold in Enthone and Coro specifically agrees not to deal with the gold in any way adverse to Enthone's title. The agreement nowhere contemplates that Coro would become the owner of the leased gold without paying for it and there is a specific provision in the lease for the payment and purchase of the gold for cash rather than its return in specie. The parties by their contract have gone to some trouble to make their contract one of bailment and not of sale. There is no reason why the parties cannot make a contract of bailment and not sale regardless of the form of the transaction and they have done so here.

30 Accordingly, I find that the lease is a true lease and one which is not required to be perfected by any of the methods set out in the *Personal Property Security Act*. Moreover, I find that the parties have entered into a bailment lease and that the lease having been terminated, Enthone, the lessor, is entitled to the return of its gold or so much as was in Coro's inventory at the day of bankruptcy.

Security Agreement

31 Coro was, under the lease agreement required to supply a security interest over its silver and palladium inventory. This did not happen. Rather, on the pay out of Engelhard, that company assigned its General Security Agreement to a company called Place Vendome which had advanced funds to Coro. Place Vendome, then hived off and assigned to Enthone an interest in Coro's assets. That interest unfortunately does not include the contents of the tanks listed as collateral. In other words, while the assignment from Engelhard of its G.S.A. to Place Vendome includes as collateral Coro's inventory, the assignment from Place Vendome to Enthone, gives Enthone only Place Vendome's, "interest as the secured party in, to and under the collateral described in Schedule "A". ...". A reference to Schedule "A" indicates that it speaks of security in the tanks and not in inventory. Presumably, the inventory, that is the silver and palladium solution remains in Place Vendome.

32 The parties could have, of course, amended the assignment or Enthone could have moved for its rectification.

33 However, once the trustee's interest appears it is too late to take either of those steps.

34 The assignment of security from Place Vendome to Enthone as registered is unsigned and, it appears, that despite diligent searches a signed copy of the assignment cannot be found. The trustee's position is that no such assignment exists and no effect can be given to it. However, it appears clear from the examination of Blair Jewell, Enthone's Manager of Finance, and from his affidavit that the assignment was in fact signed and this contention is supported by the fact that the assignment was registered and that the financing statement was signed by the solicitor for the assignor. In the circumstances it seems to me that the inability to produce a signed copy of the assignment is not fatal to the validity of that assignment.

35 In the end result I find that the only collateral secured by this assignment from Place Vendome to Enthone were the tanks belonging to Coro described in Schedule "A" of the assignment.

36 The question of costs may be spoken to.

Appeal allowed.