MACPHERSON LESLIE & TYERMAN LLP
LAWYERS

Doing Business in a Litigious Society

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This paper does not constitute legal advice. Legal counsel must review each case on an individual basis and fully consider the implications of any particular situation. Non-practitioners are strongly advised to consult legal counsel with respect to the specific factual circumstances of their case.

Introduction

This paper is meant to complement the oral and power point presentation being provided at the joint professional development session on July 9 at the CGSA and CTSA joint annual meeting. It contains more detailed references to some of the points discussed in the presentation.

The overall goal of the presentation is to briefly explain the basic foundation of a legal action involving seed in order to help you better understand the type of practices that can be adopted to best position yourself in relation to seed litigation.

Basic Legal Foundation

LIABILITY UNDER LEGISLATION

SEEDS ACT

The Seeds Act and Seeds Regulation require various minimum quality standards for germination rates, seed purity, etc. in order for seed to be sold as certified seed. By selling as certified seed the buyer can reasonably expect that the seed does in fact meet or exceed the minimum requirements. The requirements will generally be given deference by the Courts and treated as indicators of acceptable seed quality.

SALE OF GOODS LEGISLATION

All provinces have Sale of Goods legislation which implies certain terms into most contracts. These include warranties that the goods will be of "merchantable quality" and that the goods will be "fit for their purpose." Liability for breach of these implied warranties is strict in the sense that it is no defence for the seller to show that he exercised reasonable care or that the defect in the goods was undiscoverable.[1]

The express or implied knowledge of the seller of the buyer's intended purpose for the good, coupled with reliance on the seller's skill or judgment are requisite elements of the legislation.[2] For the buyer to succeed in demonstrating breach of the condition of merchantability he must show that the defect was such to destroy the workable character of the thing sold.[3]

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[1] *Products Liability* 4th Ed., S.M. Waddams (2002: Carswell, Toronto) and *Sale of Goods in Canada* (5th ed.)., Fridman G.H.L. (2004: Carswell, Toronto) (2004) at pp. 182, "The liability of the seller under the implied condition is not dependent upon negligence by him (whether he be the manufacturer or not)."

[2] The sale must also be made in the ordinary course of the seller's business. Fridman at p. 170.

[3] Fridman p. 181.

The focus of unfitness in a sale of goods analysis is whether the good is effective to carry out the buyer's purpose. Knowledge on the part of the seller of the purpose of the goods is a threshold requirement of strict liability for breach of an implied condition of fitness of purpose.[4] Knowledge of the purpose can be implied by the context of the contract.

Generally, in terms of germination this legislation will impose a warranty that the seed will germinate with sufficient vigor to produce at least an adequate crop in the circumstances of which it is grown. That is a purpose of purchasing certified seed. This can reasonably be assumed and implied.

However, if the buyer requires seed for more unique purposes such as to participate in a special program that has stringent requirements, the seller will be responsible for making sure the seed sold is sufficient for that purpose as long he is informed of the purpose and agrees to sell the product on that basis.

An example is *Duecker v. Saskatoon Co-operative Association* 2006 SKPC 53 where the buyer needed seed to participate in the Greencover Canada Land Conversion Program. This program had a standard of zero toleranace for downy brome. The seller agreed to provide seed on this basis without fully realizing the stringent nature of the program. Although the seller met normal standards for weed count, in these special circumstances it was liable for selling seed that contained low levels of downy brome and which disqualified the plaintiff from the program. This is an example of a more stringent warranty being inserted in the contract due to special circumstances.

However, it is important to note that Sale of Goods legislation will not apply if the contract can be construed as excluding the legislation and/or is worded to exclude the legislation.

CONSUMER PROTECTION LEGISLATION

This type of legislation varies between the provinces but is generally similar to Sale of Goods legislation in some ways. It also implies certain warranties of quality into sales contracts. However, acceptable quality is determined by reference to an objective standard of what a consumer should reasonably expect in the circumstances rather than by reference to the specific purpose the particular buyer had in mind. Generally, this means what is acceptable is what would be acceptable to the average person or average situation rather than special or unique situations.

Consumer protection legislation can not be varied or contracted out of (which is possible with Sale of Goods legislation).

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[4] Thus noisy propellers, coal that could not be burned in certain boilers, tractors that could not be used for certain types of road construction, a boat that could not be used for recreational purposes, are all examples of goods that were found not to be fit for their purpose. The same goods could be used for other purposes and were not necessarily negligently designed or constructed. However, the goods were not suitable for the buyer's purposes within the specific contractual relationship before the court. Fridman at pp. 180-181.

Some consumer protection legislation also provides legal consequences for verbal or written representations accompanying or preceding a sale. Excessive promotion can result in liability if the courts construe the representations to be misleading or in the nature of performance guarantees rather than statements of known and provable facts about the nature of the product.

Saskatchewan's *Consumer Protection Act* applies to seed sales to farmers. Although there is one Manitoba case that suggests Manitoba's *Consumer Protection Act* applies to farmers there is an argument that the legislation was not intended to apply to any business owner consumer including farmers.[5]

There are no reported cases I am aware of about whether Alberta's *Fair Trading Act* applies to seed sales. This legislation is focused more so on the consequences of representations about goods rather than imposing terms of quality into contracts.

LIABILITY IN CONTRACT

In addition to terms imposed into contract as a result of legislation, the parties are free to include other terms into sales contracts. Similarly, a contract can seek to exclude or limit responsibility for the sale of seed. Verbal representations leading up to a contract may or may not be included as terms of the contract depending on the circumstances.

The basic goal of a contract should be to limit any warranties to the actual testing that has been done. A warranty can be provided that the seed conforms to the label or tag it is being sold with but the seller should try to disclaim responsibility for anything else including matters such as the weather, pest, etc, and matters within the buyer's control after the sale of the seed such as operational and farm practice decisions.

Defective Seed Cases

For the most part, plaintiff farmers have had limited success in bringing claims regarding defective seed. The majority of cases involve circumstances where the seed did not germinate properly and the plants lacked vigor and did not yield well. There are several principles that arise from the reported cases:

- The plaintiff must prove more than he or she simply experienced a poor crop and poor yields. There are many causes of crop failure and they should be reasonably be eliminated so that defective seed remains as the probable reason for the failure:
  - *Saskatchewan Wheat Pool v. Steffenson*, 2006 SKQB 103, "The defendant has not established, upon the balance of probabilities, that the Innovator canola seed sold to him by the plaintiff was defective. The defendant has not proved that

[5] *Sumka v. Manitoba Pool Elevators*, [1976] W.W.D. 175 (Man. Q.B.).

the court should reject the other probable causes of the crop failure. The evidence must eliminate, on the balance of probabilities, all other causes for the defendant's crop failure attributable to his conduct in order that the court may infer that the crop failure was attributable to defective seed."[6]

- The courts acknowledge that the reasons for a crop failure are diverse and each requires examination:
  - *United Grain Growers Ltd. v. Johansen,* 2001 SKQB 145, "A reduction in yield can occur for any number of reasons including weather, pests, plant disease, farming practices, etc. The Defendant has not offered any evidence that the seed purchased was deficient. What he has offered, is an opinion that the seed is responsible as opposed to the other various factors referred to above. This opinion is not evidence, because the Defendant is not qualified to give such an opinion, and there are no underlying facts to support the opinion. The Defendant does not dispute the Plaintiff's evidence that no customer who received seed from the same batch as he did made any complaint about the quality of the seed."[7]
  - In *Ulrich v. Saskatchewan Wheat Pool* 1997 CanLii 11457 (Sask. Q.B.) the plaintiffs neglected to test for germination and their seeding methods were found to be the more likely cause of the crop which germinated and established poorly resulting in very low yields.
- Since the burden of proof is on the plaintiff, if they are unable to retain a proper sample for testing, this can be undermine their case especially if there are no complaints from others about the same seed:
  - In *Saskatchewan Wheat Pool v. R.V. Argo Ltd.,* 2000 SKQB 316, the plaintiff, an experienced farmer, purchased barley that was supposed to have at least 85 percent germination. Despite being sown in accordance with good farming practices, it failed to germinate properly. Justice Malone considered the fact that there were no other complaints from other farmers who had used similar seed, the fact that the seed was not analysed by the plaintiff, the fact that it was unclear whether all the seed eventually sold to the farmer had come from the defendant, as well as evidence to the effect that poor germination can be caused by reasons other than faulty seed. He held that he

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[6] In this case it was claimed that the "canola crop failed to germinate, emerge and develop in a normal manner and that the seed germination was poor and emergence was slow. The emerging plants lacked vigour and failed to produce seed of acceptable quality". Also see *Negrave v. Pioneer Grain Co.,* 2009 SKQB 492 for similar reasoning.

7 The same reasoning is found in Urban Grain Growers Ltd. v. Palfy, 2001 SKQB 342. United Grain Growers Limited v. 613470 Saskatchewan Ltd., 2001 SKQB 111 (CanLII), 2001 SKQB 111; [2001] S.J. No. 126 (QL); United Grain Growers Limited v. Johansen, 2001 SKQB 145 (CanLII), 2001 SKQB 145; [2001] S.J. No. 164 (QL) and Ulrich v. Saskatchewan Wheat Pool, [1997] S.J. No. 760 (QL) (Q.B.).

was not satisfied that the plaintiff has proven its case on a balance of probabilities, and the action was dismissed.

- On the flipside, where the farmer can test a retained sample that was stored properly and there is evidence of other problems having similar problems with seed that comes from the same sample, the Court is much more likely to attribute any proven crop losses to the seed.
    - In *Sumka v. Manitoba Pool Elevators*, [1976] W.W.D. 175 (Man. Q.B.), the plaintiff purchased oat seed from the defendant which failed to germinate. The court stated that, "On a balance of probabilities, taking the evidence as a whole, I have reached the conclusion that the failure of the plaintiff's oat crop in 1974 was caused by poor seed supplied by the defendant. I am impressed with the fact that in November, 1974, both the plaintiff and the witness Becker, who farms about thirty miles away from the plaintiff, purchased from the defendant seed which was part of the same lot, both planted the seed in March, 1975, and both had a crop failure because the seed failed properly to germinate. Both received similar germination test results.
- *Demuynck v. Bittner* [1977] 4 W.W.R. 200 (Alta. S.C.) is authority that a plaintiff must be able to prove that any testing it did of a retained sample was conducted pursuant to accepted procedures by qualified personnel and the sample was a proper sample. Failure to do this results in a lack of evidence of the condition of the seed and a resulting inability to prove that the seed did not germinate properly because of seed quality issues rather than some other cause not attributable to the seed retailer or developer.
- Although the Court recognizes that many factors can affect yield where the Court is satisfied that germination was lower than it should have been and adequate farming practices were used, a yield reduction can fairly be attributed to the lack of germination.
    - In *Regier v. Denis*, 2002 SKQB 369 the court found that a yield reduction from half of the farmer's normal yield could be attributed to seed that had only 45% germination, "I know the germination rate was half of what it should have been. Common sense dictates that would have a negative effect on the yield….At the same time, I recognize that any number of things can effect a crop yield…. If the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages. If the amount is difficult to estimate, the tribunal must simply do its best on the material available…"

It is clear that a seed retailer/developer has the ability to test and probe the farmer's evidence to show that there were other causes for the poor performance rather than seed quality issues. However, it is also clear that a seed retailer/developer can make a

plaintiff's case even more difficult by incorporating good business management practices.

The ability to provide evidence of past practice regarding seed sampling and seed storage is critical. Further, the ability to trace a tested sample to a particular lot and to the seed under scrutiny is equally critical. A Court will view valid test results as a strong evidence of sufficient quality.

However, the test results are dependent on whether the sample was a representative sample, whether adequate testing procedures and methods were employed and whether it can be demonstrated where the plaintiff's seed originated from. There are no reported cases squarely dealing with this issue that I am aware of but as long as industry practices are rooted in science and can be justified they should be identified and followed.

Similarly, there are no reported cases that I am aware of that discuss the impact of storage and the passage of time on seed viability. However, it is accepted in the industry that these factors affect seed germination and vigor. As a result best industry practices should be identified and followed.

Overall, the strength of the defence will increase if the business practices are professional, pursuant to valid industry standards, and well documented.

Insurance

Liability insurance is a further method of protection. Even sound business practices will not prevent unmeritorious lawsuits where the fault lies with the plaintiff purchaser. Anyone is free to at least start a weak claim. Even in these cases a close look at the purchaser's farming practices and circumstances is necessary to defend the claim. This is time consuming and requires significant attention to detail. As a result even if a good settlement is ultimately reached or a successful result is achieved at trial, significant legal and expert costs will have accrued by that point.

The insurance policy will cover legal costs in addition to any damages amount you may be liable for or which is paid in the context of a settlement agreement.

Any insurance that is purchased should cover economic losses for errors and omissions. A narrow linkage between insurance coverage for seed and property and/or bodily harm should be avoided since the vast majority of seed claims are economic loss claims.

Our Firm

MLT is an expertise-based, full-service law firm of 110 lawyers serving clients across the West from offices in Regina, Saskatoon, Calgary and Edmonton. We have been practicing in Western Canada since 1920 and have an intimate knowledge of the region's business, legal and political landscapes. Over the past decade we have developed a significant regional presence in the Canadian prairies. One third of our lawyers practice in Alberta, the balance in Saskatchewan.

MLT is nationally recognized, most recently as a *FORTUNE Magazine* "Go-To Law Firm" since 2008. We have also been recognized as one of Western Canada's top five Western Canadian law firms by *Canadian Lawyer Magazine* (based on regional service coverage, client base, significant mandates, service excellence, and legal excellence and expertise). The high caliber of our work and service has also been noted by *Lexpert*, Canada's national business magazine for lawyers.

MLT is globally connected through *Lex Mundi*, the world's largest association of independent law firms with 160 member firms in 560 offices in 100 countries worldwide. Our lawyers have represented clients with interests throughout North America and around the world.

Our Philosophy

We view ourselves as partners in our clients' undertakings. Our primary role is to help our clients succeed by bringing our experience and analytical thought processes to each project. We invest in understanding our clients' business, the issues they face, their goals and objectives, as well as their legal, political, regulatory and other challenges.

We commit ourselves to being highly responsive. We achieve this by assigning a senior lawyer as the principal contact to ensure high standards of work product and service delivery are maintained at all times. That lawyer becomes the point person and is responsible for interfacing with the client to ensure legal needs are assigned to the appropriate person on MLT's team who can provide the most experienced and cost-effective solution, with supervision as required. At MLT we believe and operate on the fundamental premise that every client is a client of the firm and not of any individual lawyer. This philosophy has served both MLT and its clients very well since the inception of the firm 90 years ago.

Our Agribusiness Experience

MLT is actively involved in value-added agricultural projects to maximize financial return for producers and investors, and create opportunities for rural communities. Our lawyers work closely with producer groups, co-operatives and agribusiness organizations to plan business and financing structures for grain companies, feed lots, intensive livestock operations, ethanol plants, processing facilities and other projects important to the development of the Western Canadian economy.

We have assisted producers in Alberta and Saskatchewan to develop value-added business and have also assisted them in expanding their businesses into new markets. Many of these arrangements have involved agreements between local producers and major industry players.

We have also acted for lenders and venture capitalists who provide capital to the agricultural sector. Knowing the needs of the industry as well as the needs of those providing capital allows us to assist our clients in growing their businesses.

We work closely with inventors of new technologies, helping to address complex intellectual property, financing and regulatory issues. We have dealt with marketing boards including reaching unique and innovative agreements with those boards in order to benefit all parties involved.

Our lawyers have a broad range of experience with the legal issues affecting biotechnology, and can assist with every stage of your business venture. We can help you secure protection for your new technology and other intellectual property; we can help you structure financing arrangements and strategic alliances that will allow you to derive the greatest benefit from your work; and we can assist with the negotiation and drafting of licensing agreements.

Whether your agribusiness venture is a start-up or a multinational, you can count on receiving knowledgeable, value-based, priority service from MLT.