

## LexisNexis® Agricultural Law *NetLetter*

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Tuesday, August 21, 2018 - Issue 402

### HIGHLIGHTS

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- \* The Saskatchewan Court of Appeal has conducted a comprehensive review of the legislative and judicial history of The Agricultural Implements Act (Saskatchewan), including principles which should be applied in interpreting the Act. The decision focuses on two issues: (a) whether an alleged breach of the statutory warranty that new farm equipment must "perform well the work for which it was intended" should be assessed on a subjective or objective standard, and (b) the provisions of the Act which give farmers the right to declare void any contract which contains "illegal" provisions that contravene the Act. The Court upheld a trial decision which concluded that an objective standard should be applied in concluding whether this statutory warranty had been breached, and that farmers who alleged that a dealer and manufacturer of a \$328,000.00 self-propelled high clearance sprayer breached the warranty because the sprayer was underpowered, had failed to discharge the burden of proving the breach. The Court relied, in part, on the fact that both the dealer and the farmer had neglected to fill in a blank in the contract relating to the power of the sprayer. The Court also upheld the trial Judge's decision that the farmers did not have the right to declare the purchase as void, even though parts of the contract contained illegal provisions, because the farmers were estopped in doing so because they had already elected to rely on the contract by giving notice to reject the sprayer pursuant to the Act. (Coward v Kramer Ltd., [CALN/2018-021](#), [\[2018\] S.J. No. 316](#), Saskatchewan Court of Appeal)

### NEW CASE LAW

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Coward v Kramer Ltd.;

Saskatchewan Court of Appeal,

N.W. Caldwell, P.A. Whitmore and L.M. Schwann J.J.A.,

August 15, 2018.

[CALN/2018-021](#)

Full Text: [\[2018\] S.J. No. 316](#) | [2018 SKCA 63](#)

**Agricultural Implements Legislation — The Agricultural Implements Act (Saskatchewan) — Interpretation of Warranty Provisions and Provisions which Allow Farmers to Declare Sales Contracts Void.**

James Coward and Merrylyne Coward (the "Cowards") appealed to the Saskatchewan Court of Appeal from the decision of a trial Judge who dismissed their claims against Kramer Ltd. ("Kramer") and AGCO Canada Ltd. ("AGCO") under The Agricultural Implements Act, *RSS 1978, c A-10* (the "Act").

The Cowards' claims related to their purchase from Kramer of a 2010 AgChem 1184 RoGator self-propelled, high-clearance sprayer manufactured by AGCO (the "Sprayer").

The Cowards owned a 2,300 acre farm in the Drinkwater District of Saskatchewan.

In 2010 the Cowards decided to buy a new high clearance crop sprayer eventually settling on the purchaser of the Sprayer for \$328,500.00, which was paid for in part by their trade-in of a 2003 RoGator sprayer, leaving a balance of \$156,126.00 owing after the application of a \$172,500.00 trade-in allowance.

The Sprayer was delivered to the Cowards' farm on May 11, 2010. They started using it on May 12, 2010.

On May 12, 2010, one of Kramer's sales representatives attended to the farm when the Sprayer arrived to familiarize the Cowards with the operation of the Sprayer.

Mr. Coward complained at that time that he believed the Sprayer was "underpowered".

Kramer's representatives responded to this complaint and between May 15 and 17, 2010, Kramer's service technicians went out to the farm and adjusted the Sprayer engine. A service test was done on May 27, 2010 in the Kramer yard in Regina, on a comparable sprayer, to investigate any power issues. Following these tests an AGCO representative went to the Cowards' farm on June 10 and rode with Mr. Coward on the Sprayer for 3 hours while Mr. Coward sprayed.

The AGCO representative concluded that the Sprayer worked as intended.

The Cowards disagreed and continued to complain that the Sprayer was underpowered. On June 4, 2012 the Cowards sent Kramer a notice of rejection pursuant to s. 36 of the Act.

Section 36 of the Act gave Kramer 7 days to try to fix the alleged problem however by that time Kramer and AGCO had concluded that any problems with respect to the Sprayer had been remedied, and that the Sprayer was working properly. They therefore took no further action.

The Cowards retained a lawyer who sent a demand letter to Kramer shortly thereafter rejecting the contract and asking for the Cowards' money back.

Kramer and AGCO did not agree to give their money back.

The Cowards parked the Sprayer at their farm and never used it again. They eventually sold the Sprayer by public auction on March 29, 2012.

The Cowards claimed damages in the sum of \$146,667.31.

Section 34(6) of the Act provides that every contract for the sale of a new implement is deemed to include a warranty that:

"If the new implement is properly used and operated, it will perform well the work for which it was intended."

Section 36 of the Act provides, in part:

"Warranties re sale of new implement

36(1) Every contract for the sale of a new implement is deemed to include the express joint and several warranties on the part of the dealer and the distributor that are mentioned in this section.

(2) The warranties mentioned in this section are to apply for the longer of:

- (a) one year from the date of first use of the new implement; and
- (b) any longer period that is provided by this Act is set out in the sales contract.

(3) Every contract for the sale of a new implement is deemed to include a warranty that the new implement is well-made and of good materials.

(4) Every contract for the sale of a new implement is deemed to include a warranty that, if the new implement is properly used and operated, it will perform well the work for which it is intended.

(5) Every contract for the sale of a new implement is deemed to include a warranty that the purchaser may do the things mentioned in subsection (6) if:

- (a) the new implement does not perform well the work for which it is intended within a period that is the earlier of:
  - (i) the first 10 days of use by the purchaser during the season of use; and
  - (ii) the first 50 hours of use by the purchaser during the season of use;
- (b) within the period mentioned in clause (a), the purchaser gives written notice to the dealer at the address given for the dealer in the sales contract, or to the distributor, that the implement does not work well; and
- (c) within a period of seven days following receipt of the written notice mentioned in clause (b), the dealer or the distributor does not make the implement perform well for the work for which it is intended.

(6) In the circumstances mentioned in subsection (5):

- (a) the purchaser may, by giving written notice to the dealer or the distributor within the three days immediately following the seven-day period mentioned in clause 5(c), reject the implement; and
- (b) if the purchaser rejects the implement in accordance with clause (a):
  - (i) the sales contract is ended;
  - (ii) the purchaser is entitled to a return of any moneys paid or notes given by the purchaser for the purchase of the implement and of the freight charges paid by the purchaser; and.

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(9) Every contract for the sale of a new implement is deemed to include a provision that if, within the seven-day period mentioned in clause (5)(c), the dealer or distributor makes the new implement perform well the work for which it is intended and if the purchaser's failure to make the implement perform well was due to the purchaser's own improper management or want of skill in operating the instrument, the purchaser shall pay the expenses incurred by the dealer or distributor in making the implement work well."

The form of contract mandated by the Act required the parties to provide the following information:

"16. The dealer and distributor warrant that the implement(s) is capable of developing \_\_\_\_\_ power at: power take off \_\_\_\_; drawbar \_\_\_\_; or \_\_\_\_\_ (check one) if properly maintained and operated under suitable conditions.

17. The above implement(s) shall perform well the work or functions for which it was intended and which principally includes \_\_\_\_\_."

In this regard, Kramer and the Cowards added Schedule "A" to the New Farm Implement Contract which was slightly modified, and incompletely filled in, which stated:

"13. The dealer and distributor warrant that the implement(s) is/are capable of developing \_\_\_\_\_ power at: power take off \_\_\_\_; drawbar \_\_\_\_; or \_\_\_\_\_ (check one) if properly maintained and operated under suitable conditions.

14. The above implement(s) shall perform well the work or functions for which it was intended and which principally includes: Spraying"

A Machine Order was also prepared with the contract documents. The Machine Order contained a number of "Conditions of Sale" that included the following:

11. This contract contains the entire agreement between the Seller and the Buyer and there are no other agreements, expressed or implied.

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17. Both parties agree that there are no oral representations outside this written Contract that will alter the terms of this Contract. Kramer Ltd. may only change this Contract in writing and with by both parties signing the changes.

In no event shall either party be liable for any indirect, special, consequential, incidental, or punitive damages of any sort, loss of profits, loss of revenues or loss of use any property or capital of the other party or any other person, or for disgorgement of profits or other restitutionary relief, whether based on contract, indemnity, statute, tort, negligence, restitution, strict liability or any other legal or equitable principle arising directly or indirectly from any breach of this Agreement, fundamental or otherwise or from any tortious acts or omissions of their respective employees, agents, or representatives. This paragraph shall be independent of and shall survive any failure of the essential purpose of any limited remedy under the terms of this agreement, and shall apply even in the event of a fundamental breach of this agreement. The Seller's liability for damages, or other remedy of a monetary amount, arising out of or related to this agreement in any way, shall be limited to the value of the goods sold hereunder giving rise to the claim, and in no case shall exceed \$156126 in aggregate."

The contract also contained a document entitled "Form A" which provided that if there was an inconsistency between the Contract and the Machine Order, the provisions of "Form A" and the Contract shall prevail.

Section 46 of the Act provides:

"46(1) No contract, order or security made or taken in connection with the sale of an implement shall contain any statement to the effect that the dealer is not responsible for the representations of his agent or contain any other statement limiting or modifying the legal liability of the dealer or distributor, including limiting or modifying the liability of the dealer or distributor for incidental or consequential damages resulting from a breach of warranty, as provided in this Act or in the forms prescribed in the regulations; and the insertion of any such statement has no effect upon the contract, order or security.

(2) A breach of this section renders the contract, order or security void at the option of the purchaser."

The Cowards alleged, in their Amended Statement of Claim, that the Contract for the Sprayer was void because it violated this section.

The trial Judge considered the following issues:

1. Whether the Sprayer had failed to "perform well the work for which it was intended" and thereby breached the statutory warranty under s. 36(4) of the Act: The trial Judge concluded that the Cowards had the onus of proving this warranty had been breached; that they failed to discharge this burden, and that, in any event, the evidence showed that the Sprayer worked well and that there was no statutory breach.
2. Whether the Cowards had provided written notice of their intention to reject the Sprayer in accordance with s. 36 of the Act: The trial Judge concluded that notice had been provided. This issue was not contested on appeal.
3. Whether the Cowards could rely on s. 46 of the Act to void the contract against Kramer: The trial Judge concluded that the Machine Order used by Kramer would have offended s. 46 but that it was not a "primary contract" but an internal Kramer document, and that other contractual documents were more than adequate to remove any concerns that the agreement was meant to be governed by s. 46. The trial Judge also found that the Cowards were, in any event, estopped from relying on s. 46 in the circumstances of this case.
4. What damages flow to the Cowards: The trial Judge concluded that the Cowards would have experienced a nominal loss only which included the cost of custom spraying.
5. Whether the Cowards were entitled to punitive damages: The trial Judge concluded that there was no grounds to award punitive damages against Kramer. This conclusion was not appealed.

Before the Court of Appeal, the following two issues were considered:

- (a) Whether there had been a breach of the statutory warranty under s. 36(4) that the Sprayer would "perform well the work for which it was intended"; and
- (b) Whether the sales contracts were an illegal contract by virtue of s. 46 of the Act, which

rendered the sales contracts void.

Decision: Caldwell, JA (Whitmore and Schwann, JJ. concurring) dismissed the appeal [at para. 114].

Caldwell, JA considered the following issues:

(a) Whether there had been a breach of the statutory warranty under s. 36(4) that the Sprayer would "perform well the work for which it was intended"; and

Caldwell, JA observed that the disposition of this issue turned primarily on whether breach of this warranty should be determined on a subjective or objective assessment of the performance of the Sprayer [at para. 13] and that the trial Judge had concluded that an objective standard was appropriate.

Caldwell, JA also observed [at para. 23] that the wording of the Act gave no direct indication as to whether the assessment should be made on an objective or subjective basis and that it was possible to interpret the Act to require an assessment based on the subjective assessment of the buyer, a subjective assessment of the dealer, an objective assessment of a reasonable person, or a blended objective-subjective assessment of a reasonable farmer.

Caldwell, JA therefore concluded that a further enquiry was necessary based on the principles adopted by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v Canada*, [2005 SCC 54](#), [\[2005\] S.C.J. No. 56](#) [\[2005\] 2 SCR 601](#) and *Rizzo & Rizzo Shoes Ltd. (Re)*, [\[1998\] SCJ No 2](#) (QL) (SCC), [\[1998\] 1 SCR 27](#).

Caldwell, JA conducted an extensive review of the legislative history of the Act, which was first passed during the 1913-1914 session of the Legislative Assembly of Saskatchewan based on a Royal Commission Report at para. 27 to 47, concluding, at para. 34 and 35:

[34] As is obvious, the Royal Commission's recommendations were aimed at fundamentally altering the contractual relationship between farmers and implement dealers with a view to fairly protect farmers' interests. However, the Royal Commission also recognised the position of implement dealers throughout its report, ultimately concluding statutorily-mandated contractual warranties would "not affect the companies' interests beyond what is necessary to insure a fair deal to the farmer".

[35] The Royal Commission Report records what farmers had been concerned about in 1914, which included the efficiency of an implement. Today, agriculture is much different than it was in 1914. As is evident from the Royal Commission Report, agricultural implements and their buyers were not sophisticated in 1914 and engine technology was fresh and more basic than it is today. Today, agricultural implements are highly specialized and more technologically complex and their buyers are more knowledgeable and discerning and, as the legislative record indicates, this Legislature has amended farm implement legislation accordingly. To a degree, this tempers the usefulness of the Royal Commission Report in interpreting the modern legislation. Nonetheless, the Royal Commission Report remains of value because it was on the basis of its recommendations that the Legislature introduced and enacted The Farm Implement Act, SS 1915, c 28 [The Farm Implement Act, 1915].

Caldwell, JA also considered the legislative history and the amendments made to the Act since 1915 [at para. 36 to 47] concluding at para. 46:

[46] Nevertheless, even though the current legislation reflects 100 years of amendment, it still contains many of the cornerstone provisions first enacted in 1915, including s. 35 (standard form contracts), s. 36 (statutory warranties) and s. 46 (illegal contracts). In particular, the s. 36(4) warranty that an implement will "perform well the work for which it is intended" has been in the statute (for the most part untouched, except as noted) since 1915, as has what is now s. 36 of The Agricultural Implements Act. Other than as described above, what has changed over the years is the definition of implement, which has evolved to correspond with advances in agricultural technology and practices.

Caldwell, JA next considered the judicial interpretation of the Act [at para. 48 to 53] including decisions in *Murdoch v the Minneapolis Threshing Machine Co.* (1921), 1921 CanLII 76 (SK CA), [\[1922\] 60 DLR 284](#) (Sask CA); *Massey-Ferguson Industries Ltd. v Government of Saskatchewan*, 1981 CanLII 209 (SCC), [\[1981\] 2 SCR 413](#); *Chursenoff v Bailey Brothers*, 1924 CanLII 107 (SK CA), [\[1924\] 2 DLR 1105](#) (Sask CA); *Binnington v J.I. Case Company and Saskatoon Farm Equipment Ltd.*, [\[1965\] SJ No. 73](#) (QL) (QB); *Zazula v Belarus Equipment of Canada Ltd.* (1985), 1985 CanLII 2513 (SK QB), [45 Sask R 101](#) (QB); *Owens v Sperry New Holland*, [\[1987\] SJ No 512](#) (QL) (QB); *Whitehead Farms Ltd. v Farm Rite Equipment Ltd.* (1989), 1989 CanLII 4512 (SK QB), [74 Sask R 241](#) (QB); *Cowan Properties v Apollo Distributing Corp.*, [2004 SKQB 228](#), [\[2004\] S.J. No. 357 248 Sask R 60](#); *Beutler v Leon's Manufacturing Company Inc.*, [2010 SKPC 48](#), [\[2010\] S.J. No. 251](#) and *Nikonetz v Farm World Equipment Ltd.*, [2004 SKQB 303](#), [\[2004\] S.J. No. 474 251 Sask R 45](#).

Caldwell, JA concluded, at para. 64 to 67, that the legislative history and the judicial interpretation of the Act supported an objective assessment, stating:

[64] Having reviewed the legislative history and judicial interpretation of the statute, I find very little support for the proposition that the question of breach of the statutory warranty under s. 36(4) of The Agricultural Implements Act calls for a subjective assessment. The history of this legislation reveals clear intention to level the playing field between farmers and implement dealers so as to establish contractual fairness. An interpretation of s. 36(4) as giving rise to a subjective analysis of breach, whether subjective to the farmer or to the implement dealer, would be inconsistent with the purpose of the legislation. The legislation is designed to enforce contractual fairness by eliminating power imbalance, not by creating one. This strongly weighs in favour of an objective assessment of performance.

[65] I further conclude that an objective approach fairly permits a trial judge to reach a contextual determination of what the adverb well in the phrase "perform well" might mean in any particular context and that this does not render the opinion of the purchaser irrelevant. Moreover, if the statutorily-mandated form of contract is completed properly, then there should be no issue as to whether an objective assessment might somehow disregard how well a dealer or distributor represented that a new implement would perform. This has been the case since the earliest interpretation of the statute in *Murdoch*.

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[66] Lastly, as the foregoing indicates, the jurisprudence strongly supports the conclusion that the courts have predominantly approached this question on an objective basis.

[67] Therefore, I conclude the Legislature intended the courts to employ an objective standard when assessing the performance of an agricultural implement for the purposes of determining whether the vendor has breached the statutory warranty under s. 36(4) of The



Agricultural Implements Act. As such, I find that the trial judge correctly approached this matter when he assessed the performance of the 1184 Sprayer on an objective basis.

Caldwell, JA also concluded [at para. 68 to 86] that there was no basis to interfere with the trial Judge's findings of fact. Caldwell, JA observed [at para. 74] that it was important that the provisions of the contract which required the parties to address horsepower had been left blank by the parties [at para. 74] while the provisions with respect to the performance of the equipment for spraying had been included, and that the Cowards bore the onus of proving a breach of this warranty [at para. 76].

(b) Whether the sales contracts were an illegal contract by virtue of s. 46 of the Act, which rendered the sales contracts void.

Caldwell, JA concluded [at para. 42] that the Machine Order was a contractual document although it was poorly drafted [at para. 92] but that the illegal provisions in the Machine Order had been cured by the wording in "Form A" which provided that the provisions in the Contract took precedence over the Machine Order [at para. 94 and 96] and that s. 46(1) should be interpreted as making contracts which contravene the Act ineffective, stating at para. 101:

[101] However, s. 46(1) also states that any limitation of the liability of a dealer or distributor under a sales contract has "no effect upon the contract, order or security". That is, the Legislature has deemed all contractual provisions that contravene s. 46(1) of The Agricultural Implements Act to be ineffective - i.e., because they are illegal, they do not affect the legal relationship. This, then, is the effect of s. 46(1): unless s. 46(2) is invoked by a purchaser, illegal provisions are simply to be ignored by the courts for the purposes of interpreting the sales contract. No harm to the purchaser; no foul to the purchaser; and seemingly, no risk to the dealer or distributor under s. 46(1).

but that it is risky for a dealer to rely upon the apparent "no harm; no foul" rule because s. 46(2) grants every purchaser the right to treat a sales contract as void by reason that it contains an illegal provision [at para. 102], stating:

[102] .I say this is very risky thinking because, under s. 46(2), the Legislature has granted every purchaser the right to elect to treat a sales contract as void simply by reason that it contains an illegal provision. Nothing more need be proven by the purchaser. The obvious business risk wrought by this one-sided statutory option ought to steer any prudent dealer or distributor away from inserting illegal provisions in a sale contract. Put simply, there is nothing to be gained (and much to be lost) by voluntarily giving a purchaser an unqualified, unilateral option to void a sale contract for an agricultural implement worth, potentially, well over a half-million dollars.

Caldwell, JA concluded that the Cowards could not, however, exercised their option to declare the agreement void, because they were estopped from doing so as they had already elected to treat the contract as enforceable by rejecting the Sprayer, stating, at para. 108 and 109:

[108] Having reviewed the matter and the legislation, I agree that the Cowards had the choice (and had to elect) either to treat the contract as enforceable under s. 36(4), thereby allowing them to reject the 1184 Sprayer (s. 36(4)), or to void the contract by reason of its illegal terms (s. 46(2)). Those two courses of action are entirely inconsistent.



[109] In this case, in applying the doctrine, the trial judge found the Cowards had elected to treat the contract as enforceable and the evidence at trial amply supports that finding.

## CREDITS

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