

## LexisNexis® Agricultural Law *NetLetter*

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### HIGHLIGHTS

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- \* The Supreme Court of Canada has recently dismissed an application for leave to appeal from a decision of the Manitoba Court of Appeal. The Manitoba Court of Appeal had upheld a lower Court's decision that dismissed a Manitoba cattle farmer's claim for damages of \$810,000.00 allegedly sustained by his cow-calf operation as the result of the provision of defective mineral supplements by Federated Co-operatives Limited. Federated Co-operatives Limited had admitted liability, and that it was in breach of contract for not providing the mineral supplements specified by the farmer. Causation and damages were, however, strongly contested and the Court of Appeal directed that the issues involved were so complex that examinations for discovery and trial were required to properly assess the claim. The decision sets out the test for causation of damages as it relates to breach of contract claims. (*Berscheid v. Federated Co-operatives Ltd.*, [CALN/2019-007](#), [\[2018\] M.J. No. 63](#), Manitoba Court of Appeal)

### NEW CASE LAW

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#### Berscheid v. Federated Co-operatives Ltd.;

Manitoba Court of Appeal,

M.A. Monnin, F.M. Steel and D.M. Cameron JJ.A.,

March 19, 2018.

[CALN/2019-007](#)

[\[2018\] M.J. No. 63](#) | [2018 MBCA 27](#)

#### **Damage Claims for Defective Feed Supplements — Test for Causation — Trial to Assess Causation and Quantum.**

Timothy Berscheid ("Berscheid"), a Manitoba farmer, sued Federated Co-operatives Limited and Swan Valley Consumers Co-operative Limited ("Federated") for damages sustained by his cattle herd and his cattle feeding operation as a result of defective mineral supplements

manufactured by Federated which were sold to Berscheid through Swan Valley Consumers Co-operative Limited between March, 2009 and February, 2011.

Berscheid claimed damages exceeding \$810,000.00.

Federated, in its Statement of Defence, admitted liability, and a breach of contract with respect to all supplements supplied to Berscheid. However Federated disputed the extent and quantum of damages claimed and applied for disclosure and production of documents from Berscheid in order to properly evaluate and assess the claim for damages.

Berscheid brought a motion for summary judgment for damages based on his own detailed Affidavit evidence and the Affidavit of his consultant. He refused to produce the documents sought by Federated. The Chambers Justice ([2017 MBQB 25](#)) observed that Berscheid's calculation of damages was based on the theory that inadequate nutrition made his cattle sicker than they would otherwise have been and that this delayed their growth and reproduction cycles and lead to the premature death of some animals that could otherwise have been sold. Berscheid's theory also was that the fact this herd was sicker and smaller in size than they otherwise would have been required him to feed them over longer periods of time to prepare them for market and that this increased his operating cost and reduced his cashflow and income. The Chambers Judge:

1. Dismissed Berscheid's application for summary judgment and directed that the matter proceed to trial on the issues of causation of damages and quantum of damages.
2. Made a finding of liability against Federated for breach of contract with respect to the purchase and sale of the deficient supplements and for breach of the Sale of Goods Act, [CCSM c S10](#).
3. Directed that Berscheid provide full and fair disclosure of all requested documents within 30 days and full examinations for discovery following the disclosure.

Berscheid appealed the Chambers Justice dismissal of his claim for damages and his direction for disclosure of documents to the Manitoba Court of Appeal. Berscheid also alleged that the Chambers Judge's order should be set aside on the basis of bias.

Decision: Steel, JA (Monnin and Cameron JJA concurring) dismissed Berscheid's appeal with costs [at para. 35].

Steel, JA observed that Berscheid's numerous assumptions including assumptions with respect to fluctuations in past and future fertility rates, delays in pregnancies and future price of beef all needed to be supported by oral evidence and tested through cross-examination [at para. 17].

Steel, JA agreed that Berscheid's calculations of the claim were very complex; that the effect of trace mineral deficiencies are also complex and that the articles and academic publications relied upon by Berscheid's consultant were heresay [at para. 18, 20 and 21].

With respect to Berscheid's ability to provide evidence with respect to his loss, Steel, JA observed [at para. 21]:

"...Berscheid is an experienced farmer, and as a party to the action, he can certainly testify. However, he cannot provide independent or external expert testimony in support of his own case (see *Kon Construction Ltd v Terranova Developments Ltd.*, [2015 ABCA 249](#); and *Kaul v The Queen*, [2017 TCC 55](#)."

Steel, JA also observed that the Chambers Judge did make an error in relation to what constitutes a breach of contract with respect to causation but indicated that this error was not material to the decision to dismiss the summary judgment motion [at para. 23].

Steel, JA observed that the correct test for causation with respect to breach of contract is as follows [at para. 22]:

"...The test for causation does not require a plaintiff to show that the breach of contract of the defendant was the sole cause of the plaintiff's loss. See, for example, Bruce MacDougall, *Introduction to Contracts*, 3rd ed (Toronto: LexisNexis Canada Inc., 2016) at 348 and GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 683-845. Various authorities use different language to describe the causation test in contract, including: whether the breach of contract was an effective cause of the loss; whether the loss was directly attributable to the breach; or whether the damage would have occurred but for the breach of contract (see *Blackman v Merrill Lynch Canada Inc*, [2013 NSSC 87](#) at para 76; and *Water's Edge Resort Ltd v Canada (Attorney General)*, [2015 BCCA 319](#) at para 39). However, the exact nature of the test and its application to these facts is best left for the trial judge."

Steel, JA saw no merit to set aside the decision of the Chambers Judge because of bias [at para. 28 to 35].

Berscheid applied for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. On March 18, 2018 this application was dismissed ([\[2018\] S.C.C.A. No. 269](#)).

## CREDITS

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