

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *AGT Food and Ingredients Inc. v. Fibreco
Export Inc.*,
2025 BCSC 2203

Date: 20251106
Docket: Vancouver
Registry: S251428

Between:

**AGT Food and Ingredients Inc., AGT Foods Switzerland SA,
and Alliance Pulse Processors Inc.**

Plaintiffs

And

Fibreco Export Inc.

Defendant

Before: The Honourable Justice Loo

Reasons for Judgment

Counsel for the Plaintiffs:

J.K. McEwan, K.C.
E.A. Kirkpatrick
A.M. Beddoes

Counsel for the Defendant:

D.L. Miachika
J. Cabott
C.W. MacKinlay

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Introduction

[1] The dispute giving rise to this action concerns the alleged breach of a long-term contract between the defendant Fibreco Export Inc. (“Fibreco”), the owner of a marine terminal on Burrard Inlet in North Vancouver (the “Terminal”), and the plaintiff AGT Food and Ingredients Inc. (“AGT”), one of the world’s largest suppliers of agricultural food products, known as “agriproducts”.

[2] The contract at issue is a Terminal Services Agreement entered into between Fibreco and AGT on December 18, 2017 (the “TSA”). The TSA was amended on July 6, 2018. Under s. 6.1 of the TSA, AGT agreed to ship a minimum throughput of 1,000,000 tonnes of agriproducts through the Terminal per year. Under s. 19.9, AGT agreed to ship all agriproducts shipped by AGT from the west coast of Canada exclusively through the Terminal.

[3] Section 5.1 of the TSA required AGT to pay approximately \$1,000,000 per month (the “Fixed Fee”) to Fibreco regardless of whether it shipped any product through the Terminal, in addition to variable fees and charges for the terminal services provided by Fibreco.

[4] Section 17 of the TSA required AGT to maintain a \$15,000,000 irrevocable standby letter of credit from a Canadian chartered bank (the “LOC”) as security for the payments required to be made by AGT under the TSA and to replenish the LOC to \$15,000,000 when depleted, within three business days of the depletion.

[5] On January 30, 2025, AGT wrote to Fibreco purporting to terminate the TSA, effective January 31, 2025. AGT ceased shipping any commodities through the Terminal, stopped paying the Fixed Fee and ceased replenishing the LOC.

[6] This Court’s task on this summary trial is to determine whether that purported termination was valid, and if not, what remedies ought to be ordered. Fibreco seeks specific performance of the TSA.

Background and chronology

[7] In 2014, AGT was looking for opportunities to ship bulk vessels through the west coast of Canada. At approximately the same time, Fibreco, whose operations had previously been limited to the handling of wood pellets and wood chips, began to consider expanding its business to include the handling of agriproducts.

[8] In 2015, the parties met for the first time and discussed the terms of a possible agreement between them, including a proposed facility to be constructed by Fibreco at the Terminal (the “Agriproducts Facility”).

[9] As stated, the parties entered into the TSA on December 18, 2017.

[10] Under s. 3.1 of the TSA, Fibreco’s obligation to provide terminal services to AGT was subject to Fibreco obtaining, among other things, “third party financing in an amount sufficient to fund the total costs and expenses associated with the design and construction of the Agriproducts Facility”.

[11] Section 20.8(d) of the TSA provides that the parties shall enter into an agreement with the “Financer” (CIBC) which includes terms prohibiting AGT from terminating the TSA without the Financer’s prior consent and requiring AGT to provide the Financer with 90 days’ notice of any intention to terminate.

[12] On February 28, 2018, Fibreco and CIBC entered into a credit agreement in relation to the construction of the Agriproducts Facility. On that same date, Fibreco, CIBC and AGT entered into a Consent Agreement (the “Consent Agreement”) whose terms mirror those set out in and required by s. 20.8(d) of the TSA.

[13] Fibreco argues that the Consent Agreement precludes AGT from terminating the TSA without the prior consent of CIBC which was not obtained and notice to CIBC which was not provided. That argument will be addressed below.

[14] In 2018, Fibreco began the construction of the Agriproducts Facility to permit the handling of grain at the Terminal. The project involved the construction of new

infrastructure, such as new storage silos, support towers, conveyors and loaders for the loading and unloading of agriproducts.

[15] The construction was carried out by a third-party contractor, Ag Growth International Inc. In October 2019, defects were found in the towers and infrastructure surrounding the newly constructed silos and, on September 11, 2020, one of the silos collapsed.

[16] Fibreco issued notices of force majeure to AGT in October 2019 and September 2020. These notices were disputed by AGT. Fibreco’s claim of force majeure and other issues relating to the defects found in the towers and infrastructure and the collapse of the silo are the subject of separate proceedings in this Court before Justice Masuhara.

[17] Fibreco loaded agriproducts onto bulk vessels for AGT starting in 2019, by way of “direct hit” (meaning immediate transfer from train to ship, without storage at the facility).

[18] Fibreco started using silos to store grain by October 2021.

[19] In May 2022, the parties entered into a letter agreement in which they agreed that the Commencement Date under the TSA was April 1, 2022, and that AGT would ship all of its agriproducts being shipped from the west coast of Canada exclusively through the Terminal until March 31, 2029. There were adjustments made to the pricing under the TSA and to AGT’s commitments regarding shipping volume.

[20] The Terminal is licensed by the Canadian Grain Commission (“CGC”), which administers the *Canada Grain Act*, R.S.C. 1985, c. G-10 [*Grain Act*], the regulations made under that Act, and any Orders issued thereunder. Each shipment of grain loaded at a licensed terminal must be inspected by the CGC Inspector, following which a certificate is issued stating a grade for the product in accordance with the Official Grain Grading Guide.

[21] The inspection process requires sampling which occurred in this case based on one-kilogram samples from 2,000 metric tonne increments. The *Grain Act* regulations provide that all samples must be “taken in such a manner as to ensure that it is an average and representative sample of the parcel of grain from which it is taken.” Neither party disputes that the samples in this case were taken in accordance with this regulation.

[22] Section 57 of the *Grain Act* prohibits grain facilities from receiving into an elevator “any material or substance for storage other than grain, grain products or screenings”, except as may be authorized by regulation or by order of the CGC.

[23] Starting in 2022, the CGC issued exemption orders permitting Fibreco to utilize the same handling equipment for wood pellets as they utilized for grain at the Terminal. The Order made in 2024, identified by number 2024-49 (the “CGC Order”), is central to the dispute in this case and will be discussed further below. The relevant parts of the CGC Order state:

Introduction

1. Fibreco Export Inc. operates a licensed terminal elevator at Vancouver, BC which handles grain regulated under the *Canada Grain Act* (the Act) and wood pellets which are not regulated under the Act.

2. Paragraph 57(b) of the Act prohibits receiving into licensed elevators “any material or substance for storage other than grain, grain products or screenings”, except as may be authorized by regulation or order of the Canadian Grain Commission (the Commission).

...

4. The Commission has authority under paragraph 117(b) of the Act to make orders exempting a particular elevator or operation from the licensing or any other requirements of this Act or Regulations ...

5. Fibreco Export Inc. utilizes the same handling equipment for wood pellets as they do for grain at their licensed terminal elevator at Vancouver, BC. With the support of Commission personnel, Fibreco has developed an authorized CGC “clean out” procedure, which is intended to mitigate the risk of commingling grain and wood pellets that may result from using the same equipment.

...

Pursuant to s. 117(b) of the Act, the Commission makes the following order:

1. Fibreco Export Inc. may receive and discharge wood pellets at their licensed terminal elevator at Vancouver, BC, subject to the following conditions:
 - a. Fibreco Export Inc. is required to declare their intention to handle wood pellets at their licensed terminal elevator at Vancouver, BC to the Commission's Licensing Unit prior the beginning of each crop year; and
 - b. Fibreco Export Inc. must, upon receipt and discharge of wood pellets at their licensed terminal elevator at Vancouver, BC, use the CGC authorized cleanout procedure.
 - c. Fibreco Export Inc. will dedicate the three older 1500 MT silos (identification number: 14, 21, 18) for grain storage only.
2. In the event that one or more of the conditions set out in subparagraphs 1. a., b., c. of this order are not met, the Commission may stipulate a reasonable period for compliance or terminate this order and notify Fibreco Export Inc. in writing of its decision.
3. If wood pellets are detected in grain being discharged from Fibreco Export Inc.'s licensed terminal elevator at Vancouver, the Commission will review certification options for the grain shipment in the contaminated hold(s). Grain certification will be held as "Grain Type, Extraneous Material", until the shipment is reviewed by the Chief Grain Inspector.
4. When being discharged, if wood pellets are detected, in order for the Commission to proceed with certification of the grain shipment as grade ordered, Fibreco Export Inc. must adhere to the following procedures:
 - a. Remove grain and wood pellets from the vessel hold(s) in question;
 - b. Treat the grain as advised by the Chief Grain Inspector; and
 - c. Provide the Commission with a sample of the material removed from the vessel hold(s) in question and any other information that is needed for the Commission to determine if certification of the shipment can be made.

[24] During January 2023, wood pellets were detected in shipments of grain being loaded onto three vessels at the Terminal:

- a) On January 6, 2023, wood pellets were found mixed with canola in three samples taken from increments being loaded onto a vessel called the Aljazi. The inspection reports stated that wood pellets constituted 0.16%, 0.0025% and 0.0023% of the samples by weight.
- b) On January 15, 2023, wood pellets were found mixed with durum wheat in one sample taken from an increment being loaded onto a vessel called the

Maryam D. According to the inspection report, wood pellets constituted 0.421% of the sample by weight.

- c) On January 23, 2023, wood pellets were found in a sample from an increment from a wheat shipment being loaded onto a vessel called the Jin Xiang. According to the inspection report, wood pellets constituted 0.046% of the sample by weight.

[25] In respect of each of these events, the Chief Grain Inspector certified the shipment at the grade at which AGT was intending to sell the grain and issued a Certificate Final.

[26] Following these events, Fibreco took steps to put in place updated clean-out procedures which were intended to minimize or prevent the further comingling of wood pellets and grain.

[27] On December 15, 2024, there was a further wood pellet detection event with respect to a vessel called the Girasole River. The evidence regarding the detection of wood pellets is not particularly clear, but Brandon Tang, an operations and logistics manager with Fibreco, concedes that the loading of red lentils onto the Girasole River was paused “after the CGC detected a wood pellet in the autosampler in their offices”.

[28] A Fibreco report with respect to this event referred to it as a “grain contamination incident”. The Fibreco report, in a section entitled “root causes”, states:

- [wood pellets] found in areas previously deemed not a risk for contamination
- areas were overlooked / deemed to have minimal risk of hang-ups
- angles were deemed sufficient for cargo flow

[29] The CGC did not require Fibreco to discharge the lentil load. The Chief Grain Inspector certified the lentil shipment and issued a Certificate Final.

[30] On January 7 and 8, 2025, 1,302 metric tonnes of red lentils were loaded onto a vessel called the Star Topaz. These lentils were part of the same cargo of lentils that had been loaded onto the Girasole River. Inspectors detected wood pellets in samples taken from two increments.

[31] The Star Topaz, bound for the United Arab Emirates, was put on hold by the CGC pending a decision from the Chief Grain Inspector, Derek Bunkowsky, as to whether the shipment had to be offloaded from the vessel and disposed of.

[32] Upon learning the Star Topaz was being held, the president and chief executive officer of AGT, Murad Al-Katib, contacted Mr. Bunkowsky. Mr. Al-Katib assured Mr. Bunkowsky that the Star Topaz was going to a market and to a customer that AGT could “manage”. Mr. Bunkowsky allowed the lentils in the Star Topaz to depart the Terminal, but issued a certificate with the words “Lentils, Condemned”.

[33] The Star Topaz subsequently docked at another Vancouver terminal referred to as “G3”. AGT obtained a certificate from an independent certifier, SGS, certifying the combined lentils loaded at the Terminal and G3 at Grade 2.

[34] In summary, there were five shipments of grain loaded at the Terminal for AGT in which wood pellets were detected. These instances will collectively be referred to in these reasons as the “Wood Pellet Detection Events”:

Date	Vessel	Commodity
January 6, 2023	Aljazi	Canola
January 14, 2023	Maryam D	Duram
January 22, 2023	Jin Xiang	CWRS
December 15, 2024	Girasole River	Lentils
January 7, 2025	Star Topaz	Lentils

[35] As stated, AGT wrote to Fibreco purporting to terminate the TSA on January 30, 2025 (the “Termination Notice”). The Termination Notice stated three grounds for termination but, during the hearing, AGT advised the Court that it would not be seeking to justify its termination of the TSA based on the second and third grounds.

[36] Accordingly, AGT relies only on ground (a). The Termination Notice states in relevant part:

We write to advise Fibreco of the termination of the TSA effective January 31, 2025 on the following grounds: (a) AGT’s exercise of its termination right under section 15.5(a) of the TSA as a result of Fibreco’s failure to comply with s. 104(d) of the *Canada Grain Act* and corresponding Order No. 2024-49 (Fibreco Export Inc. – Handling Wood Pellets) dated May 29, 2024, which has in AGT’s reasonable opinion had a material negative effect on AGT...

[37] Section 15.5(a) of the TSA permits immediate termination of the agreement by AGT where “Fibreco has committed an unlawful act that has or could have, in the Shipper’s reasonable opinion, a material negative effect on the Shipper”.

[38] This action was commenced on February 25, 2025. AGT seeks, *inter alia*, a declaration that the TSA was duly terminated effective January 31, 2025, and general damages. Fibreco seeks, *inter alia*, a declaration that AGT’s purported termination of the TSA was invalid, and specific performance or damages.

Issues

[39] As stated, there are two broad issues on this summary trial: whether AGT’s purported termination of the TSA was valid, and if not, what remedies ought to be ordered in favour of Fibreco.

[40] Regarding termination, this Court must determine:

- a) Whether AGT was precluded from terminating the TSA as it did by the terms of the Consent Agreement; and

- b) Whether there was otherwise a valid termination under s. 15.5 of the TSA on the grounds that Fibreco committed an “unlawful act” which in AGT’s reasonable opinion had or could have a material negative effect on it.

[41] It will be necessary to determine the appropriate remedy only if the termination was invalid. In this regard, this Court will address whether Fibreco is entitled to specific performance or whether damages are an adequate remedy.

Suitability

[42] Under R. 9-7(15) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, the Court may grant judgment on a summary trial unless it is unable, on the whole of the evidence, to find the facts necessary to decide the issues of fact or law, or if it is of the opinion that it would be unjust to decide the issues on the application. If the Court determines that judgment is appropriate, it must then determine whether the applicant has established entitlement to the relief sought.

[43] In *C.K.M. v. H.R.M.*, 2021 BCSC 1297 at para. 14, this Court cited the well-known decision in *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 214, 1989 CanLII 229 (C.A.), where the Court of Appeal set out the factors a judge may consider when determining whether it would be unjust to grant judgment in a summary trial. These factors include:

- a) the amount of money involved;
- b) the complexity of the matter;
- c) the urgency of the case;
- d) the prejudice likely to arise by reason of delay in taking the case to trial;
- e) the cost of taking the case forward to a conventional trial in relation to the amount involved; and
- f) the course of the proceedings.

[44] Both parties seek to have the issues in this action resolved summarily, and both parties agree that it is their interests to have those issues determined as quickly as possible.

[45] Although the amounts involved appear to be very substantial, I have concluded that I can find the facts necessary to decide the issues of fact and law, and that it is just to decide the issues on this application. The issues regarding the Consent Agreement and the validity of AGT's termination under the TSA can be resolved, as will be seen from analysis below, largely on the basis of the contractual documents. I note that no evidence was adduced regarding the operation of the Consent Agreement.

[46] Any issues of credibility, most of which relate to the remedy issue and the consequences that may befall Fibreco if a specific performance order is not made, can be resolved on the basis of the contemporaneous documents and the cross-examinations that were conducted during the course of this eight-day hearing.

[47] As will be seen below, I have declined to reach a factual conclusion as to whether Fibreco complied with the applicable cleaning protocols. In my view, the conflicting and unclear evidence makes it difficult and potentially unjust to find the necessary facts in relation to this issue on the affidavit materials before the Court. Given my other conclusions set out in these reasons, it is not necessary to determine that issue.

Validity of the purported termination

Notice under the Consent Agreement

[48] As stated, AGT, Fibreco and CIBC entered into the Consent Agreement on February 28, 2018. In that agreement, AGT agreed, *inter alia*, that it would:

- a) not terminate the TSA without the prior consent of CIBC: s. 4(a);

- b) provide CIBC with not less than 90 days' notice of any intention to give notice of termination of the TSA or such longer period as CIBC may reasonably require: s. 4(c); and
- c) permit Fibreco or CIBC (or any person acting on its behalf) to cure any event of default by Fibreco capable of being cured, and if the event of default is of a nature not reasonably curable by Fibreco or CIBC, AGT will not terminate the TSA so long as CIBC complies with the other material terms of the TSA: s. 4(d).

[49] It is uncontested that AGT did not obtain CIBC's prior consent to the termination, and that AGT did not give 90 days' notice of its intention to terminate.

[50] AGT did send a letter to CIBC after the fact advising CIBC that it had issued the Termination Notice to Fibreco. In response, CIBC wrote to AGT on February 14, 2025, stating that CIBC did "not recognize the validity of the Termination Notice" because AGT was obliged under s. 20.8(d) of the TSA and s. 4 of the Consent Agreement to provide not less than 90 days' notice or to obtain CIBC's consent before terminating.

[51] Fibreco submits that if the Court concludes that AGT failed to follow the required termination process in the Consent Agreement, then AGT's purported termination was invalid, and Fibreco is entitled to judgment on that basis.

[52] In support of its position, Fibreco cites the "related contracts doctrine": it submits that where multiple contracts are entered into as part of a single, integrated commercial transaction, the law requires that they be interpreted harmoniously to give effect to the overarching intention of the parties.

[53] That proposition is not particularly controversial: see *Argo Mezzanine Financing No. 1 Ltd. v. Plaza 88 Development Ltd.*, 2025 BCCA 73 at paras. 49–51. In this case, it means, at least, that the Consent Agreement ought to be assessed in light of s. 20.8(d) of the TSA. That said, in my view, it provides limited assistance to

the Court in determining how to construe the notice and consent provisions in the Consent Agreement.

[54] In my view, there are two primary issues arising from the Consent Agreement:

- a) Did the Consent Agreement require AGT to obtain CIBC’s prior consent or to give CIBC 90 days’ notice of its intention to terminate before purporting to terminate the TSA?
- b) If the answer to the first question is yes, what are the consequences in the circumstances of this case of AGT’s failure to comply with the terms of the Consent Agreement?

Was AGT required to obtain consent from or to give notice to CIBC?

[55] As discussed, s. 4(a) of the Consent Agreement states that AGT will not terminate the TSA without the prior consent of CIBC, and s. 4(c) states that AGT will provide CIBC with not less than 90 days’ notice of its intention to give notice of termination of the TSA. These provisions are not qualified in any way. Therefore, the plain meaning of the words favours Fibreco’s position on this issue.

[56] Fibreco explains that a plain reading of these provisions makes commercial sense. It submits that lenders would never advance funds on the strength of an agreement that permitted AGT to terminate unilaterally without notice or an opportunity to cure, “leaving the lenders wholly at the mercy of AGT’s whims”. Fibreco argues that project financing requires stability and predictability. AGT agreed to provide those benefits to CIBC—both in s. 20.8(d) of the TSA and in the Consent Agreement—as it was in AGT’s interests that Fibreco obtain financing from CIBC to construct the Agriproducts Facility.

[57] Not incidentally, this stability and predictability would also benefit Fibreco, in that any alleged defaults would first be raised with CIBC before termination could be invoked. Further, Fibreco would be provided with a notice period and an opportunity to cure defaults in appropriate circumstances.

[58] In response to Fibreco's submissions on this issue, AGT argues that s. 4 of the Consent Agreement cannot reasonably be read to apply to its immediate termination rights under s. 15.5(a) of the TSA because if read literally s. 4 would make immediate termination impossible.

[59] AGT argues that no matter how grievous the breach, Fibreco's reading of the section would require AGT to provide 90 days' notice to CIBC of its intention to terminate. Further, AGT submits that since the unlawful acts upon which it relies in this case were not curable, s. 4(d) on its face precludes AGT from ever terminating the TSA. It argues that these results would be commercially absurd, particularly given that CIBC has not pursued any legal remedies in relation to the Wood Pellet Detection Events or AGT's Termination Notice.

[60] Regarding the issue of commercial absurdity, AGT relies on the decision in *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 [*Resolute*], in which the Court held:

[143] Discerning commercial reasonableness entails, like all contractual interpretation, an objective analysis (see *Canadian Contractual Interpretation Law*, at p. 57). Courts should therefore read commercial contracts in a "positive and purposive manner", seeking to understand the structure of the agreement reached by the parties, the purpose of the transaction and the business context in which the contract was intended to operate (*Humphries*, at para. 15). As Lord Wilberforce said in *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570, and as quoted with approval by this Court in *Sattva*, at para. 47:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. ...In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[144] Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail (see *Humphries*, at para. 15). While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided (see *Canadian Contractual Interpretation Law*, at pp. 61-63). As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 61, "[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended

by rational commercial actors in making their bargain, absent some explanation to the contrary". See also *City of Toronto v. W.H. Hotel Ltd.*, [1966] S.C.R. 434, at p. 440.

[61] AGT submits that a reasonable interpretation of the Consent Agreement is that s. 4 provides rights to CIBC only in respect of "Default Events" under s. 15.2 of the TSA, including termination arising from such events. Section 15.2 refers to "Default Events" under s. 14.1(a), (b) and (c). Sections 14.1(a) and (b) involve failures by a party to pay money when due, while s. 14.1(c) states that a Default Event will occur when a party has "committed a material default or material breach in the performance of its obligations hereunder".

[62] AGT submits that the Consent Agreement does not contemplate AGT losing its *non-default* immediate termination rights (*i.e.*, under s. 15.5(a), (b) and (c)).

[63] AGT's argument is based at least in part on the fact that s. 4(d) of the Consent Agreement permits Fibreco or CIBC (or any person acting on its behalf) to cure any *event of default* by Fibreco capable of being cured. The words "event of default" and "events of default" are also found in s. 4(b) of the Consent Agreement. AGT seeks to draw a connection between the "events of default" in s. 4 of the Consent Agreement and the "Default Events" in the TSA.

[64] AGT submits that the choice in this case is between what it submits to be its more reasonable interpretation and what it contends is Fibreco's commercially absurd interpretation.

[65] At the end of the day, in my view, this issue turns on whether Fibreco's interpretation of s. 4 of the Consent Agreement is indeed commercially absurd. It is only if that threshold is met that the plain words of s. 4 can be disregarded or read down. As stated in *Resolute*, a party cannot avoid its contractual obligations simply because the bargain that it entered into was undesirable or unusual.

[66] It is my view that while Fibreco's interpretation of s. 4 may now be undesirable from AGT's perspective, it is not commercially absurd. It is reasonable to conclude that CIBC would have an interest in being given an opportunity to

intervene before AGT is entitled to terminate a long-term contract worth many millions of dollars in which it has taken an assignment as security.

[67] As in this case, it may be that CIBC will not always take legal steps in furtherance of its rights under the Consent Agreement. However, this proposition does not negate CIBC’s contractual right to have an opportunity to protect its security before termination if it sees fit to do so. In any event, in this case, it is clear from CIBC’s letter dated February 14, 2025, that it did not waive its rights.

[68] Regarding s. 4(d) of the Consent Agreement which appears to preclude AGT from terminating the TSA at all if the event of default is not curable, Fibreco submits that this subsection makes sound commercial sense when viewed in the context of CIBC’s rights under its lending agreement with Fibreco.

[69] Fibreco submits that non-curable defaults are intended to engage CIBC’s rights under its general security agreement to appoint a receiver or receiver manager to step into the shoes of Fibreco to run the business of the Terminal. In this regard, s. 5(b) of the Consent Agreement provides:

CIBC, may, at its option, by giving written notice (the “Assumption Notice”) to AGT, assume the rights and obligations of Fibreco under the TSA and its rights under the Letter of Credit or appoint a receiver, receiver-manager, or other qualified third party to act on its behalf to do so, provided it complies with the other material terms of the TSA.

[70] In such circumstances, CIBC, as lender, would want AGT to continue to ship through the Terminal, to continue paying amounts due under the TSA, and to continue to replenish the LOC—all of which would protect and preserve CIBC’s security interests as lender.

[71] Given this Court’s conclusion that construing s. 4 of the Consent Agreement in accordance with the plain meaning of its words would not lead to commercially absurd results, it is unnecessary for this analysis to proceed further, but it may be useful in any event to address the interpretation of s. 4 for which AGT contends.

[72] As stated, AGT’s argument is based at least in part on the fact that s. 4 of the Consent Agreement refers, in three places, to “events of default”. From this fact, AGT argues that the notice and consent requirements in s. 4 apply only to certain “Default Events” defined in the TSA.

[73] However, the Default Events described in s. 14.1 of the TSA include both curable events (failures to pay and material breaches in performance of a party’s obligations in subsections (a) to (c)) and non-curable events (events of bankruptcy and insolvency in subsections (d) and (e)).

[74] Further, s. 15.5 of the TSA allows for immediate termination by AGT not only under the “unlawful act” provision in s. 15.5(a) which is the subject of this action but also on the basis of the non-curable bankruptcy-related Default Events in s. 14.1(d) and (e). Section 15.5(d) provides:

... the Shipper shall have the right to terminate this Agreement immediately upon providing written notice to Fibreco that ...

(d) any of the Default Events set out in Sections 14.1(d) or 14.1(e) inclusive have taken place with respect to Fibreco.

[75] The result of the foregoing is that “Default Events” in the TSA include both curable and non-curable events, and both events that give rise to immediate termination rights under s. 15.5 of the TSA and those that do not.

[76] Given that Default Events are not limited only to curable events or events for which immediate termination is not otherwise permitted, there is no obvious principled reason, in my view, why the notice and consent provisions in s. 4 of the Consent Agreement ought to apply only to Default Events as they are defined in the TSA. In other words, there is nothing special or unique about Default Events that suggests that the notice and consent provisions in s. 4 ought to apply only to them.

[77] As stated, s. 4 of the Consent Agreement does not limit the types of termination to which the consent and notice provisions apply. Further, it makes sense that CIBC would have an interest in having an opportunity to intervene before AGT purports to terminate regardless of the basis for termination under the TSA.

[78] For these reasons, in my view, s. 4(a) and (c) of the Consent Agreement are not to be read down; rather, they are effective as written. By executing the Consent Agreement, as it was required to do by s. 20.8(d) of the TSA, AGT agreed not to terminate the TSA without CIBC's prior consent, and it agreed to provide CIBC with at least 90 days' notice of any intention to terminate the TSA.

[79] In relation to this issue, AGT also relies on an "Amendment Agreement" entered into by AGT and Fibreco in July 2018 (several months after the date of the Consent Agreement) wherein certain provisions in the TSA were expressly amended. Section 1.3 of that Amendment Agreement states: "except to the extent expressly amended by this Amendment, all remaining terms of the Terminal Services Agreement shall remain in full force and effect, unamended."

[80] In my view, s. 1.3 is a standard clause which simply confirms that subject to the amendments described in the Amendment Agreement, the TSA "remains in full force and effect, unamended". It does not preclude the possibility that additional obligations have previously been imposed on one or more of the parties.

[81] Further, and in any event, s. 20.8(d) of the TSA contemplates the execution by the parties of the Consent Agreement. It cannot be that signing an agreement required by the TSA constitutes an amendment of the TSA.

[82] Moreover, AGT's argument on this point would mean that none of the notice provisions of the Consent Agreement are effective. However, AGT does not contend for that result; rather, it argues that the notice and consent provisions apply only to Default Events.

[83] The Amendment Agreement does not assist AGT in respect of this issue.

What are the consequences in this case of AGT's failure to fulfill its obligations under the Consent Agreement?

[84] Following the hearing of the application, I requested and received further submissions from the parties regarding the consequences that would ensue if the Court were to find that AGT failed to fulfill its obligations under s. 4.

[85] Fibreco submits that compliance with s. 4 of the Consent Agreement is a condition precedent to AGT’s termination of the TSA, and that the Termination Notice was therefore ineffective. AGT submits that the position taken by Fibreco under the Consent Agreement is not properly before the Court and, in the alternative, that AGT’s obligation to seek consent or to provide notice is owed only to CIBC. I will address these arguments in turn.

[86] I note that AGT has also advanced written submissions to the effect that s. 20.8(d) of the TSA “did not ... bind AGT to the terms of a future agreement ... from within the TSA”. In my view, this submission is not responsive to the Court’s invitation to advance further submissions or to Fibreco’s argument on this issue. As is evident from these reasons, my analysis is—and I understand Fibreco’s submissions to be—focussed on s. 4 of the Consent Agreement and not on s. 20.8(d) of the TSA.

Do the provisions of the Consent Agreement constitute conditions precedent to termination?

[87] Fibreco submits that a “termination provision in a contract that expressly stipulates a procedural or substantive requirement is generally interpreted as including a condition precedent to valid termination”, and that courts “require strict requirements for a termination right to be engaged, and for its invocation to be effective”. In this regard, Fibreco cites the decision in *Laing Construction Equipment Ltd. v. Casson*, 1973 CarswellBC 13, 19 C.B.R. (N.S.) 89 (C.A.) [*Laing Construction*], wherein a termination clause provided in part:

4 ...

“If the Contractor should be adjudged a bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency or if he should, except in cases recited in Article 35, refuse or fail to supply enough properly skilled workmen or proper materials after having received Seven (7) days' notice in writing from the Architect to supply additional workmen or materials, or if he should fail to make prompt payment to Subcontractors or for material or labour, or persistently disregard laws, ordinances or the instruction of the Architect, or otherwise be guilty of a substantial violation of the

provisions of the Contract, then the Owner, upon the certificate of the Architect that sufficient cause exists to justify such action, may, without prejudice to any other right or remedy he may have, by giving the Contractor written notice, terminate the employment of the Contractor...

[Emphasis added.]

[88] In this context, the Court held:

6 ... I am of the opinion that the learned trial Judge was correct in concluding that a certificate of the architect would be required, certifying that sufficient cause existed to justify termination before the right to terminate could become effective. In my view, the words of the article are open to no other interpretation.

[89] Similarly, in *Conwest Contracting Ltd. v. Crown and Mountain Creations Ltd.*, 2021 BCSC 2116 [*Conwest*], this Court held:

[194] As noted above, the Contract contains specific provisions which set out the process which must be followed for Crown [to] affect termination. These provisions describe a multi-step process, which can be summarized as follows:

- Conwest must fail to complete the work or otherwise fail to comply with the Contract;
- GeoPacific must provide a written statement to Conwest and Crown that there is sufficient cause for Crown to terminate the Contract;
- Crown must provide Conwest written notice that Conwest is in default of its obligations and allow Conwest five business days to rectify the default; and
- if Conwest fails to rectify the default in five business days, Crown is entitled to terminate the Contract.

[195] There is no evidence that GeoPacific provided the written statement required under the Contract, as described above. Accordingly, Crown did not provide proper notice of default per the terms of the Contract, thus failing to meet a clear condition precedent and rendering any purported termination under the terms of the Contract unlawful.

[90] Fibreco submits, and I agree, that these two cases demonstrate that the determination of whether a contractual term is a condition precedent is principally directed by the contractual language and the parties' objective intentions. When an agreement stipulates that termination rights are contingent on specific prerequisites

such as the provision of notice, the failure to fulfill those requirements results in the termination attempt being legally invalid.

[91] These principles are directly apposite to this case. I conclude, based on the language of s. 4 and on the authority of *Laing Construction* and *Conwest*, that the consent and notice requirements in s. 4 constitute conditions precedent to the termination of the TSA by AGT that AGT failed to meet.

Is the issue raised by Fibreco under the Consent Agreement properly before the Court?

[92] AGT submits that the issue of AGT's obligation to obtain consent and to provide notice under s. 4 of the Consent Agreement is not properly before the Court. However, Fibreco's Response to Civil Claim squarely raises AGT's failure to seek CIBC's prior consent or to give 90 days' notice under the Consent Agreement as a barrier to AGT's purported termination of the TSA.

[93] At Part 1, para. 18 of the Response to Civil Claim, Fibreco pleads:

AGT Canada's right to immediately terminate the TSA is subject to it complying with sections 15.5 and 20.8(d)(i) of the TSA ... and complying with paragraph 4 of the Consent Agreement ...

[94] At Part 3, para. 106 of the Response to Civil Claim, Fibreco pleads:

AGT Canada did not validly terminate the TSA in accordance with Article 20.8(d)(i) and the Consent Agreement, as:

[a] AGT Canada did not obtain the prior consent of the Financier, CIBC ...

[and]

[d] AGT Canada did not provide CIBC with not less than 90 days' notice of its intention to terminate the TSA.

[95] AGT further argues that "no cause of action has been pleaded in respect of the Consent Agreement; therefore, no relief pursuant to its terms is properly available." However, this argument misconceives the submission made by Fibreco on this application.

[96] Fibreco does not purport to advance a cause of action based on the Consent Agreement; rather, AGT's failure to comply with the terms of the Consent Agreement

is said to be a reason invalidating AGT’s purported termination of the TSA, in the same way that the owner’s failure to obtain an architect’s certificate in *Laing Construction* and Crown’s failure to obtain a written statement in *Conwest* invalidated the purported terminations in those cases.

[97] In my view, the position taken by Fibreco under the Consent Agreement is adequately pleaded and is therefore properly before the Court.

May Fibreco rely on AGT’s failure to obtain consent from or to provide notice to CIBC under the Consent Agreement?

[98] AGT submits that while the Consent Agreement contemplates CIBC having rights to consent to or receive notice of AGT’s intention to terminate, Fibreco has no similar rights. AGT submits that the express language of s. 4 of the Consent Agreement creates obligations only between AGT and CIBC, and that the very obligation said to be at issue—AGT’s obligation to seek consent or to provide notice—is owed only to CIBC.

[99] However, AGT has not provided any authority for the proposition that, in a tripartite agreement, one party cannot rely on a condition precedent that requires something to be done by the second party in relation to the third party. AGT, CIBC and Fibreco are all parties to the Consent Agreement. This is not a situation in which a third-party beneficiary is seeking to enforce rights set out in a contract to which it is not privy. For the reasons set out above, CIBC and Fibreco both have an interest in requiring AGT to obtain CIBC’s prior consent and to give 90 days’ notice to CIBC of its intention to terminate.

[100] AGT postulates a distinction between “indirect” and “direct” rights, stating that “Fibreco’s rights are necessarily dependent on an assessment of CIBC’s rights”, and that CIBC would have to be a party to the action “to the extent that Fibreco sought damages for an alleged breach by AGT of the Consent Agreement”. However, no authority is advanced in support of this distinction between direct and indirect rights, and, in any event, this position again misconceives the argument advanced by Fibreco.

[101] As discussed above, Fibreco does not purport to advance a cause of action based on the Consent Agreement; rather, AGT's failure to comply with the terms of the Consent Agreement is said to be a reason invalidating AGT's purported termination of the TSA.

Conclusion regarding the notice and consent requirements in the Consent Agreement

[102] For the reasons stated, I conclude that AGT failed to comply with the terms of the Consent Agreement, and that this failure invalidates its purported termination of the TSA.

Unlawful acts

[103] The conclusion that I have reached above regarding AGT's failure to comply with the consent and notice provisions in the Consent Agreement entirely disposes of AGT's claim for a declaration that the TSA was duly terminated. Due to this failure, AGT's purported termination of the TSA was invalid.

[104] However, in case it may be relevant to the quantification of damages, or in case I am incorrect regarding the application of the Consent Agreement, I will address the second broad issue raised at this summary trial: whether AGT was otherwise entitled to terminate the TSA under s. 15.5(a).

[105] As stated above, s. 15.5(a) of the TSA provides:

In the circumstances set out below, the Shipper shall have the right to terminate this Agreement immediately upon providing written notice to Fibreco that:

(a) Fibreco has committed an unlawful act that has or could have, in the Shipper's reasonable opinion, a material negative effect on the Shipper;

[106] AGT alleges that Fibreco committed an unlawful act by allowing wood pellets to be present in grain loaded onto ships, and by failing to meet its obligation to

comply with cleanout procedures required by the CGC Order. The following sub-issues arise from these allegations and will be addressed in turn:

- a) To what extent, if any, is AGT constrained from relying on specific unlawful acts or negative effects because of the words used in the Termination Notice?
- b) Is AGT constrained from relying on the Wood Pellet Detection Events in 2023 because of the effluxion of time?
- c) Was the presence of wood pellets in grain an unlawful act?
- d) Was the alleged failure to comply with cleaning protocols an unlawful act?
- e) If there was an unlawful act, did it or could it have, in AGT's reasonable opinion, a material negative effect on AGT?

The contents of the Termination Notice

[107] This issue requires the Court to assess to what extent the terminating party is required to be precise and comprehensive about the grounds for termination, and to what extent it is now entitled to allege grounds for termination in litigation that are not in the Termination Notice. There are two specific issues to be addressed.

[108] First, the Termination Notice states that Fibreco's alleged failure to comply with the *Grain Act* and the CGC Order "has in AGT's reasonable opinion *had* a material negative effect on AGT". This wording may be contrasted with the words of s. 15.5(a) which provides for immediate termination where Fibreco has committed an unlawful act that *has or could have*, in the Shipper's reasonable opinion, a material negative effect on the Shipper. The question is whether AGT is confined to justifying its termination by way of past material negative effects, or whether it is entitled to rely on its opinion, assuming it is reasonable, of potential future effects.

[109] Second, the Termination Notice refers to Fibreco's "failure to comply with Section 104(d) of the *Canada Grain Act* and corresponding Order number 2024-49 ... dated May 29, 2024." The CGC Order which is referred to here was effective only

between August 1, 2024, and July 31, 2025. Therefore, three of the five Wood Pellet Detection Events fell before the applicable time period for the CGC Order.

[110] Fibreco submits that the Termination Notice must be read as referring only to the last two Wood Pellet Detection Events, involving the Girasole River and the Star Topaz, since those are the only events that fall within the temporal scope of the CGC Order to which the Termination Notice refers.

[111] Both of these issues may be dealt with by reference to the same principles.

[112] The recent decision of this Court in *Zhao v. Purewal*, 2023 BCSC 1750 is of assistance. In that case, Justice Morley held:

[97] The general proposition is that if a contracting party gives an incorrect reason for termination when communicating its election, it does not lose the right to terminate if it can subsequently identify a correct justification, regardless of whether it was aware of this justification at the time of the election: *Taylor v. Oakes* (1922), 127 L.T. 267 (C.A.) at p. 269. While ideally a non-defaulting party that wants to ensure the contract is terminated should, as soon as possible, indicate that it views the contract as at an end and why, innocent promisees will not usually be held to such a high standard. This is in recognition of the reality that the understanding of reasons for termination will evolve between the moment of acceptance of repudiation and trial. It would often be quite unfair to restrict the terminating party to the causes it originally communicated. The principle in *Taylor v. Oakes* is clearly part of the common law in Canada: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 174-175, Cromwell J. (concurring).

[Emphasis added.]

[113] However, this principle is not unqualified. Justice Morley also held:

[96] ...

a) ...

b) If the election is (objectively interpreted) ambiguous or wrong about the cause, then the terminating party is presumed to have the right to "shift grounds" up to trial.

c) c) However, if the ambiguity or error about cause leads the non-terminating party to change its position to its detriment, this presumption no longer holds.

d) d) If an error or ambiguity in the election has caused the non-terminating party to change its position, the court must decide whether upholding termination on the changed grounds is fair and reasonable, taking into account commercial reality. This inevitably involves

balancing the legitimate interests of the terminating party in flexibly being able to advance causes for termination with the legitimate interests of the terminated party in timely notice of what is at stake so that it can arrange its affairs accordingly.

[Emphasis added.]

[114] It is clear from the authorities that whether notice has been given—and whether the purpose of notice has been achieved—is a contextually driven substantive inquiry: *Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2018 BCCA 172 at para. 42. This Court held in *TNL Paving Ltd. v. British Columbia (Ministry of Transportation and Highways)*, [1999] B.C.J. No. 1708, 1999 CanLII 5186 (S.C.) at para. 334 that “[t]he form of the notice is not the governing factor, rather the issue is whether the notice contains enough information to satisfy the purpose for which notice is required”.

[115] The authorities described above, read together, suggest that the terminating party is presumed to have the right to “shift grounds” up to trial unless the non-terminating party requires an accurate statement of cause so that it can take appropriate steps—for example to cure the breach—or unless the ambiguity or error about cause leads the non-terminating party to change its position to its detriment.

[116] In cases where the recipient of a notice provision requires certain information in order to take steps arising from the notice, the notice requirements will be more exacting. Therefore, for example, in *Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Limited*, 2017 ONSC 5071 at para. 33, it was held that delay notice provisions in a construction subcontract provided a mechanism for the sender of the notice to recover its costs of delay if it was not the cause of the delay, and it served to notify the recipient of a delay claim within a specified timeframe so that it could take steps to investigate and mitigate the delay and the associated costs.

[117] As a further example, with regard to curable defaults under the TSA, s. 14.1 requires the non-defaulting party to provide notice “specifying the default”. This requirement makes sense, as the defaulting party is entitled to know in those circumstances precisely what default it is required to cure.

[118] In the case at bar, there was no opportunity to cure. The purpose of the Termination Notice was to notify Fibreco that AGT was purporting to terminate the TSA immediately pursuant to s. 15.5(a). In my view, based on the principles and the case law described above, the invocation of this subsection is all that was necessary. AGT’s decision to refer to the CGC Order and to misstate the words of the subsection was perhaps ill-advised, but legally irrelevant.

[119] Moreover, Fibreco has not suggested that it would have conducted itself in a different way had the Termination Notice been worded otherwise, for example by including reference to the earlier exemption orders or by correctly reciting the words “could have” from s. 15.5(a).

[120] Fibreco relies on an admission made on discovery by Mr. Al-Katib that the Termination Notice applied only to “whatever failures that Fibreco did that would have happened during the term of [the CGC Order]” but I am unable to find that this admission is binding on AGT. Whether the contents of the Termination Notice preclude AGT from raising certain grounds for the termination are matters which flow from the Court’s application of the relevant legal principles and the case law, of which Mr. Al-Katib could not be expected to have knowledge or expertise.

[121] Accordingly, AGT is not barred by the contents of the Termination Notice from relying on potential future material effects on AGT resulting from any unlawful acts committed by Fibreco, and it is not precluded by the Termination Notice from arguing that the Wood Pellet Detection Events in 2023 and 2024 were unlawful acts.

[122] This conclusion does not necessarily mean that AGT is entitled to rely on those earlier events as unlawful acts. Fibreco’s argument regarding the effluxion of time and its impact on AGT’s right to terminate based on the 2023 and 2024 Wood Pellet Detection Events will be addressed below.

Termination rights affected by the effluxion of time

[123] In *Cellular Baby Cell Phones Accessories Specialist Ltd. v. Fido Solutions Inc.*, 2017 BCCA 50 [*Cellular Baby*], the Court of Appeal held that where a contract

confers a right of “immediate” termination upon the occurrence of a defined event, that right must be exercised within a reasonable time. A party cannot sit on a known termination right for months or years while continuing to benefit from the agreement, only to invoke that right later when commercially convenient.

[124] At para. 57 of *Cellular Baby*, the Court cited with approval from *A & G Investment Inc. v. 0915630 B.C. Ltd.*, 2014 BCCA 425, wherein it was held:

[38] An election between inconsistent rights must, however, be made promptly and communicated to the other side. Parties cannot adopt a “wait-and-see” approach to fundamental breach, as their election simultaneously determines the position of the counterparty to the contract. Either the contract is not repudiated and the rights and obligations under it still exist, or the contract is rescinded because of an accepted repudiation and then very different rights come into being in respect of a cause of action. In either case, parties must have prompt notice of their position...

[125] AGT submits that the case at bar is distinguishable from *Cellular Baby* and the authorities cited in it because of the two-part test for immediate termination set out in s. 15.5(a) of the TSA. It submits that although three of the Wood Pellet Detection Events took place in 2023, AGT’s “reasonable opinion” which is a prerequisite to the invocation of s. 15.5(a) was not formed until December 2024 after the Girasole River event.

[126] In my view, even assuming this was so, it was not reasonable for AGT to wait two years to determine whether the 2023 events were sufficient in AGT’s reasonable opinion to meet the second part of the test in s. 15.5(a). The reasonable opinion required under s. 15.5(a) is not whether Fibreco’s conduct *generally* has or could have a material negative effect. It is whether the unlawful act *in question* has or could have that effect. It is reasonable to expect that the opinion would be formed soon after an unlawful act occurred.

[127] Therefore, in my view, it is not open to AGT to invoke the 2023 Wood Pellet Detection Events as unlawful acts. It can rely only on the Wood Pellet Detection Events involving the Girasole River and the Star Topaz in December 2024 and January 2025, respectively. However, it remains possible, as will be discussed

below, that the 2023 events and Fibreco’s conduct from the beginning of the parties’ relationship will inform the reasonableness of the opinion formed by AGT in 2024 and 2025 in relation to the last two Wood Pellet Detection Events.

Did the presence of wood pellets in grain shipments constitute “unlawful acts”?

[128] In the Termination Notice, AGT relies on s. 104(d) of the *Grain Act*:

Prohibitions respecting elevator operations

104 No operator of a licensed elevator shall

...

(d) except with the permission of the Commission, mix with any grain in the elevator any material other than grain.

[129] AGT submits that the words of this section are plain: no material other than grain is permitted to be mixed with grain in an elevator except with “the permission of the Commission”. The *Grain Act* regulations make a distinction between “foreign material” and “extraneous material” that might be found in grain. Broadly speaking, foreign material is material that may occur naturally in the grain production process, and includes such items as twigs, pebbles, and non-gradable residue from other grains. Extraneous materials include such materials as glass, metal, wood, or plastic that are normally avoidable through grain production and handling.

[130] While the regulations allow for (and therefore grant “permission”) to have certain amounts of “foreign” material in grain, it is uncontested in this proceeding that wood pellets are “extraneous”, not “foreign” material. The regulations do not grant permission to grain facility operators to have any extraneous material mixed with grain in an elevator.

[131] It is my view that allowing wood pellets to be present in grain shipments is an unlawful act contrary to s. 104(d) of the *Grain Act*, and that the Wood Pellet Detection Events in 2024 and 2025 were unlawful acts upon which AGT can rely in

this case, subject to four arguments advanced by Fibreco which will be addressed below:

- a) It had “permission” to mix wood pellets with grain pursuant to s. 104(d) of the *Grain Act*.
- b) The Wood Pellet Detection Events involved “only minuscule quantities of wood pellet detection, measured in grams, not kilograms, let alone tonnes”.
- c) The detection of some wood pellets in grain at the Terminal was not unexpected, and the CGC Order provides for a process to be followed when wood pellets are detected. That process, Fibreco submits, was followed.
- d) The presence of wood pellets in grain shipments were “Curable Events” under the TSA and ought to have given rise to notice requirements and cure periods which were not provided.

Did Fibreco have “permission” under s. 104(d) of the Grain Act?

[132] Fibreco relies on the fact that when the impugned shipments were inspected and wood pellets were found, certificates were ultimately issued by the Chief Grain Inspector for all of those shipments except for the one involving the Star Topaz. For that shipment, a certificate was issued by an independent certifier for a combined load taken on by the vessel at the Terminal and at another facility.

[133] Fibreco argues that the certificates constituted “permission” within the meaning of s. 104(d). It argues that if the Chief Grain Inspector ultimately decided that the grain was suitable for certification, then the obvious inference to be drawn is that the Chief Grain Inspector had given permission to Fibreco, retrospectively, to have wood pellets in the grain loaded onto the AGT vessels.

[134] However, AGT submits that this argument is “contrary to the plain meaning of ‘permission’, which requires authority being granted to take an action *before* it is taken”.

[135] Further, AGT submits that the Chief Grain Inspector did not have the authority to grant “permission” under s. 104(d). Under s. 104(d), permission can be granted *only* by “the Commission”. Section 3 of the *Grain Act* defines the “Commission” to consist of “three commissioners to be appointed by the Governor in Council to hold office, during good behaviour, for a renewable term of up to seven years”.

[136] By contrast, the certificates for the shipments at issue in this case were signed by the Chief Grain Inspector, a “weigher”, and a third person who signed above the words “verified by”. None of the commissioners signed the certificates and there is no evidence that the Commission’s authority under s. 104(d) was delegated to the Chief Grain Inspector.

[137] Finally, and in any event, with respect to the Star Topaz, the only certificate issued by the Chief Grain Inspector designated the lentils loaded at the Terminal as “condemned”.

[138] In my view, AGT’s argument that the Chief Grain Inspector did not have authority to grant permission under s. 104(d) is correct. For the reasons set out, I am unable to accept Fibreco’s submission that it was given permission under s. 104(d) by way of certificates issued by the Chief Grain Inspector, after wood pellets were found in the impugned shipments.

Were wood pellets found only in “miniscule” or de minimis amounts?

[139] Fibreco argues that the presence of wood pellets in grain during the Wood Pellet Detection Events could not be unlawful acts because the wood pellets were found only in “trace amounts”. It argues that it would be unreasonable or disproportionate to conclude that the finding of miniscule quantities of wood pellets are a “strict liability event” that automatically results in the immediate termination of the 20-year agreement valued at tens of millions of dollars.

[140] In response, AGT points out that sampling occurs based on one-kilogram samples taken from 2,000 tonne increments. It submits that on the basis of simple

mathematics, the Court may conclude that the five contaminated shipments contained more than 27,000 pounds of wood pellets.

[141] To put the point another way, 2,000 tonnes are equal to two million kilograms. If one wood pellet is found in a representative one-kilogram sample from a 2,000 metric tonne increment, it can be expected that there are two million wood pellets in the increment. The actual number may be more or less, but the expected number is statistically the most likely. In my view, AGT's argument on this issue is persuasive.

[142] Further, the fact that wood pellets were detected in the shipments destined for both the Girasole River and Star Topaz is additional support for the proposition that the detection of wood pellets in these shipments was not a matter of remote chance or that the overall amounts were "trace". As stated above, the lentils loaded onto these two vessels were stored together before loading. The fact that wood pellets were detected during the loading of both vessels reinforces the proposition that the sampling process was properly representative, and that wood pellets were probably present in material amounts in the increments in which they were detected.

[143] In further response to Fibreco's arguments which minimize the significance of the wood pellet incidents, AGT points out that it sent a total of 37 shipments through the Terminal and wood pellet contamination was detected in five of them. The proportion of shipments with Wood Pellet Detection Events to the shipments without such events cannot reasonably be characterized as miniscule.

[144] Finally, in answer to Fibreco's argument that it would be disproportionate or unreasonable to make the finding of wood pellets a "strict liability event" that automatically results in the immediate termination of the 20-year agreement valued at tens of millions of dollars, it must be emphasized that s. 15.5(a) of the TSA contains a two-part test: it requires an unlawful act, but it also requires that the unlawful act has, or could have, in AGT's reasonable opinion, a material negative effect on AGT.

[145] If a contamination event occurred only once and in trace amounts, it is unlikely that AGT could meet the second part of that test. Therefore, it is incorrect to say that the finding of wood pellets, no matter how scant or infrequent, is a strict liability event that will necessarily result in the immediate termination of the TSA.

[146] For these reasons, I do not accept Fibreco’s argument that the Wood Pellet Detection Events did not constitute unlawful acts because wood pellets were found in the grain only in “trace amounts”.

Was the presence of wood pellets expected, and should it have led to a process under the CGC Order as opposed to being an unlawful act?

[147] Fibreco argues that the CGC Order anticipates that some mixing of wood pellets and grains would occur. In support of this argument, it cites one of the recitals in the CGC Order which states in part:

With the support of Commission personnel, Fibreco Export Inc. has developed an authorized CGC “clean out” procedure, which is intended to mitigate the risk of commingling grain and wood pellets that may result from using the same equipment.

[Emphasis added.]

[148] Fibreco submits that the CGC Order’s use of the word “mitigate” rather than “eliminate” in this recital reinforces the notion that comingling is not unexpected.

[149] Further, Fibreco argues that the CGC Order mandates a certain process to be followed when wood pellets are found in grain. It emphasizes that none of the Wood Pellet Detection Events in this case resulted in any significant consequences or penalties being imposed upon Fibreco.

[150] It submits that each incident was “assessed and addressed by the CGC in real time and resulted in full certification for export without sanction”. It submits that the CGC has never notified or determined that Fibreco is in breach of any exemption orders or in contravention of the *Grain Act* or its regulations, and that the CGC has never issued Fibreco a fine, infraction, or other penalty related to the shipment of wood pellets or alleged cross-contamination with agriproducts. Fibreco observes that

the CGC Order and other exemption orders granted to Fibreco were renewed, occasionally with some adjustments, after each Wood Pellet Detection Event.

[151] It asks the Court to consider, hypothetically, what would have happened if the CGC caused Fibreco to discharge, clean and reload one of the contaminated loads, as it had the authority to do under the CGC Order. It submits:

For example, pursuant to section 4 of Order 2024-49, after the detection of wood pellets by the CGC Inspector, the CGC could have directed Fibreco to remove the lentil loads from the Girasole River and Star Topaz, treat the lentils to remove any wood pellets, and reload the lentils on the vessels following which the Commission would proceed to certify the cargo. Had that occurred, there would be no “unlawful act”.

[152] To summarize, Fibreco’s argument on this issue has two parts. Fibreco submits that the detection of wood pellets in grain at the Terminal was not unexpected, and that the CGC Order provides for a process to be followed when wood pellets are detected. That process, it submits, was followed in this case. Fibreco further submits that given the lack of any penalties or violation notices imposed by the Chief Grain Inspector, it cannot be said that the Wood Pellet Detection Events constituted unlawful acts.

[153] In my view, however, these arguments are unpersuasive.

[154] In answer to Fibreco’s argument that finding some wood pellets was not unexpected, it cannot be that the CGC Order’s acknowledgement of the possibility of wood pellets in the grain negates the clear words of s. 104(d) of the *Grain Act*.

[155] In answer to Fibreco’s argument that hypothetically, the grain could have been unloaded, cleaned and reloaded at the Chief Grain Inspector’s direction, the words of s. 104(d) prohibit the mixing of grain with any material other than grain *in the elevator*. If events had transpired as described by Fibreco, it may be that the *effect* of the unlawful act would have been negated, but the existence of the unlawful act would be in my view unaffected.

[156] Regarding Fibreco’s argument based on the lack of any direct regulatory or punitive consequences flowing from the Wood Pellet Detection Events, AGT cites the decision in *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 wherein the Court of Appeal held:

[181] Further, it is trite that the mere fact that someone is not prosecuted for an illegal act does not mean that they have not committed an illegal act.

[182] The fact that regulators have not prosecuted a person for breaches of the governing statute does not make it plain and obvious that a civil claim based on breaches of the statute is bound to fail...

[157] In my view, this passage is apposite to this case and dispositive of Fibreco’s argument that no regulatory penalties or other such consequences have been imposed on it. Whether an unlawful act has occurred is for the Court to decide, based on the proven facts and the words of the relevant statute or order.

Did the presence of wood pellets in grain constitute a “Curable Event”?

[158] Fibreco argues that any breach by it of s. 104(d) of the *Grain Act* was not an unlawful act under s. 15.5(a) of the TSA but rather a Default Event under s. 14.1 and a Curable Event under s. 15.1.

[159] Section 14.1(c) of the TSA provides that an event of default (defined as a “Default Event”) will exist with respect to a party if such party:

(c) has committed a material default or material breach in the performance of its obligations hereunder, notice has been given to such party by the other party specifying the default, and such party does not remedy such default or breach in accordance with Article 15;

[160] Section 15.1 provides that a “Curable Event” is “any Default Event under Sections 14.1(a), 14.1(b) or 14.1(c) or any Force Majeure event that occurs in circumstances under which the party in default of this Agreement or declaring the Force Majeure ... is capable of remedying such event....”

[161] Section 15.2 provides that “if a Curable Event associated with a Default Event under ss. 14.1(a)(b) or (c) is not remedied within 45 days of the Causing Party receiving written notice from the Notifying Party, the Notifying Party may, while such

Default Event is continuing, terminate the TSA by giving an additional 30 days' written notice to the Causing Party, and if the Default Event is cured during that additional 30 days' notice, the notice of termination shall be null and void."

[162] Section 15.2 states in part:

For illustrative purposes only, examples of Curable Events that are associated with breaches of this Agreement include ...

(b) failure by any party to observe, perform or comply in all material respects with any provision of this Agreement (excluding failure to pay) ...

[163] Section 20.3 of the TSA provides:

Each party hereto shall ... comply with all Applicable Laws, rules, regulations and decrees, directives and orders of any Governmental Authority that are applicable to it or to any of its property (including, for greater certainty, the Agriproducts Facility).

[164] As a result of ss. 15.2 and 20.3 read together, a breach of the CGC Order or the *Grain Act* constitutes a breach of the TSA. However, that proposition does not preclude such a breach from also being an unlawful act. Whether it is also an unlawful act requires the Court to distinguish between Curable Events associated with Default Events which provide the defaulting party with an opportunity to cure, and unlawful acts which may give rise to immediate termination if the conditions in s. 15.5(a) are satisfied.

[165] In my view, there are at least three reasons why the presence of wood pellets in grain constitutes an unlawful act under s. 15.5(a) of the TSA and not a Curable Event under s. 15.1.

[166] First, I have found that allowing wood pellets to be present in grain shipments is contrary to s. 104(d) of the *Grain Act*. By contrast, a defalcation like a failure to pay money may be a breach of the TSA but it is not contrary to a statute or order.

[167] Second, in my view, Fibreco's breach of s. 104(d) of the *Grain Act* cannot be cured because at least some of the harm—for example, reputational harm—occurs immediately upon the detection of wood pellets in the grain. By contrast, with regard

to other breaches such as a failure to pay money, it is likely that Fibreco could cure its default and bring itself into compliance without any harm being incurred.

[168] Third, the very nature of an unlawful act—that is, an act contrary to statute—implies that it is not curable. Fibreco submits that it responded to each incident promptly and effectively, and that it in effect cured any breach that might have occurred. For example, it submits:

After the related wood pellet incidents for the Girasole River and Star Topaz in December 2024 and early January 2025, Fibreco undertook a detailed investigation and located the source of the wood pellet commingling. It then developed an improved clean out procedure which was reviewed by and approved by the CGC before AGT issued the Termination Notice.

[169] To this argument, AGT responds, persuasively in my view, that the law is a threshold: where it is crossed, reversing course does not mean it was not crossed in the first place. Efforts to not breach in the future are not equivalent to “curing” the original breach. Fibreco’s efforts to do better may cure the underlying cause of the unlawful act but they do not “undo” the act itself.

Conclusion regarding whether any of the Wood Pellet Detection Events constituted “unlawful acts”

[170] I conclude that the presence of wood pellets in grain shipments in this case constituted unlawful acts under s. 15.5(a) of the TSA. For the reasons stated above, AGT is entitled to rely upon only upon the Wood Pellet Detection Events involving the Girasole River in December 2024 and the Star Topaz in January 2025 as justification for its termination of the TSA.

Was the alleged failure to comply with cleaning protocols an “unlawful act”?

[171] In case I am incorrect about whether AGT has established an unlawful act by means of Fibreco’s breach of s. 104(d) of the *Grain Act*, I will address this issue. For the reasons that follow, it is my view that the alleged failure to comply with cleaning protocols would not, even if factually proven, be a stand-alone unlawful act upon which AGT would have been entitled to terminate the TSA under s. 15.5(a).

[172] Regarding this issue, there are at least two subsidiary questions, one of which is legal and the second of which requires findings of fact: (1) is the alleged failure to comply with cleaning protocols an unlawful act under s. 15.5(a) or a default under s. 15.2; and (2) did Fibreco adhere to the cleaning protocol after January 2023?

Was lack of adherence to cleaning protocols an unlawful act under 15.5(a)?

[173] It is alleged that Fibreco breached the CGC Order, which in part states:

1. Fibreco Export Inc. may receive and discharge wood pellets at their licensed terminal elevator at Vancouver, BC, subject to the following conditions...
 - b. Fibreco Export Inc. must, upon receipt and discharge of wood pellets at their licensed terminal elevator at Vancouver, BC, use the CGC authorized cleanout procedure...

[174] Assuming for the purpose of this sub-issue that Fibreco breached this requirement to use the “CGC authorized cleanout procedure”, it is my view that this failure was a Default Event under s. 14.1 and a Curable Event under s. 15.1, and not an unlawful act under s. 15.5(a).

[175] Even though the use of the CGC authorized cleanout procedure is dealt with in the CGC Order, there is a difference in kind between the alleged failure to comply with the cleaning protocols and the violation of s. 104(d) described above. This difference is at least partly demonstrated by para. 2 of the CGC Order:

2. In the event that one or more of the conditions set out in subparagraphs 1. a., b., c. of this order are not met, the Commission may stipulate a reasonable period for compliance or terminate this order and notify Fibreco Export Inc. in writing of its decision.

[176] Under this paragraph, if Fibreco is found not to have been compliant with its cleaning protocols (pursuant to paragraph 1.b of the CGC Order), the CGC may “stipulate a reasonable period of compliance”. In my view, this provision indicates that, at least from the perspective of the CGC, any breach of s. 1.b is curable, and that an unlawful act does not occur immediately upon a failure to comply with the cleaning protocol.

[177] By comparison, there are no such words in relation to the finding of wood pellets, either in the CGC Order or in s. 104(d) of the *Grain Act*. Rather, the CGC Order sets out potential *consequences* of finding wood pellets, including a review by the CGC of the certification options, the removal of the grain and wood pellets from the vessel holds in question, and treatment and resampling of the grain.

[178] Since a failure to comply with the applicable cleaning protocols would constitute a Curable Event under s. 15.1 of the TSA, AGT was obliged to comply with the notice requirements and to provide an opportunity to cure as set out in s. 15.2 which states:

If a Curable Event associated with a Default Event under Sections 14.1(a), 14.1(b) or 14.1(c) is not remedied within 45 days of the Causing Party receiving written notice from the Notifying Party, the Notifying Party may, while such Default Event is continuing, terminate this Agreement by giving an additional 30 days' written notice to the Causing Party, during which additional 30 days' period, for certainty, any such Default Event may be cured, in which case such notice of termination shall be null and void.

[179] As no such notice was given and no opportunity to cure was given, AGT is not entitled to rely on any failure by Fibreco to comply with cleaning protocols to justify its termination of the TSA.

Did Fibreco adhere to the protocol set up after January 2023?

[180] The parties advanced much evidence and made extensive submissions regarding which cleaning protocols Fibreco was subject to at various times and whether Fibreco adhered to them. The parties raised issues regarding the admissibility of two expert reports proffered by AGT and what purported to be reply evidence proffered by Fibreco.

[181] As indicated, the conflicting and unclear evidence makes it difficult and potentially unjust to find the necessary facts in relation to this issue on the affidavit materials before the Court.

[182] In any event, I have concluded that even if AGT were to establish on the evidence that Fibreco failed to comply with cleaning protocols, Fibreco's failure was

a Curable Event requiring AGT to adhere to notice and cure provisions, rather than an unlawful act that could justify immediate termination.

[183] Given that conclusion, it is not necessary for this Court to determine whether Fibreco breached its obligations to comply with the applicable cleaning protocols, or whether the two expert reports proffered by AGT or the reply evidence proffered by Fibreco are admissible, and I decline to do so.

If there was an unlawful act, did it or could it have, in AGT’s reasonable opinion, a material negative effect on AGT?

[184] I have concluded that the presence of wood pellets in grain shipments in 2024 and 2025 constituted unlawful acts under s. 15.5(a) of the TSA upon which AGT can rely, but as discussed, an “unlawful act” is not sufficient, on its own, to give rise to a right of immediate termination. The unlawful act must be one that “has or could have, in the Shipper’s reasonable opinion, a material negative effect on the Shipper.”

[185] AGT submits, in my view correctly, that the section has two components. In order for termination to be justified under s. 15.5(a), the Court must find that AGT subjectively held the opinion that the unlawful act had or could have a material negative effect on it, and that this opinion was objectively reasonable.

[186] Fibreco submits that AGT cannot establish that the two Wood Pellet Detection Events in 2024 and 2025 had a material negative effect on AGT because the evidence, including that of Mr. Al-Katib, unequivocally demonstrates that:

- a) AGT did not provide discounted prices to customers with respect to any of the impugned shipments.
- b) Final certificates were issued and relied on by AGT with respect to all five shipments—four by the Chief Grain Inspector and one by SGS, an independent certifier.
- c) All the shipments were graded equally or better than required by AGT’s sales contracts.

- d) None of the certificates indicated that there were extraneous materials found in the shipments.
- e) AGT did not notify any of the customers that wood pellets had been detected.
- f) AGT did not pursue Fibreco for any costs in relation to the impugned shipments.

[187] All of these points are proven on the evidence but, in my view, there were other, particularly reputational effects, not accounted for in Fibreco's submissions.

[188] Further, as I have concluded above, AGT is not confined to relying on past events, despite the way in which the Termination Notice was worded. The Court must ask: did AGT form a reasonable opinion that the two unlawful acts "could have" a material negative effect on it?

[189] AGT submits that Mr. Al-Katib's evidence, that AGT believed that the repeated Fibreco contamination incidents were causing it reputational harm, is uncontradicted, and that given communications it received from the Chief Grain Inspector and others, its belief was a reasonable one.

[190] Further, AGT submits that the reasonableness of AGT's opinion that contamination events at the Terminal could have a material negative effect on it must be assessed in the context of Fibreco's challenges experienced while developing and operating the mixed-use port facility.

[191] As discussed above, prior to 2014, Fibreco's operations had been limited to the handling of wood pellets and wood chips. Its dealings with AGT and its entry into the TSA represented its first foray into the handling of agriproducts. The venture was not without complexities: while a dual-use facility is not unique under the regulatory scheme, the Terminal was the only facility on the west coast handling both grain and extraneous material.

[192] AGT submits that any risk that might have resulted from the fact that Fibreco was handling grain and extraneous material was exacerbated by the silo collapse

during the construction of the Agriproducts Facility in 2020. Before the collapse, separate facilities for grain and wood pellets were contemplated. However, when the silos were rebuilt after the collapse, Fibreco elected to redesign aspects of the Terminal and ultimately had no dedicated grain loading or storage facilities.

[193] Moreover, Mr. Al-Katib deposes that his concern about Fibreco's operations and its ability to avoid wood pellet contamination of the grain was heightened by events subsequent to the first three Wood Pellet Detection Events.

[194] First, in January 2023, one of AGT's customers cancelled a vessel that was scheduled to load at the Terminal because of the Wood Pellet Detection Event involving the Aljazi.

[195] Second, following the Wood Pellet Detection Events in January 2023, the Chief Grain Inspector, Mr. Bunkowsky, expressed to representatives of AGT that those events were "serious" and a "big fucking deal".

[196] Third, following those events in 2023, representatives of Fibreco repeatedly expressed the view, both to AGT and to Mr. Bunkowsky, that they should be allowed "trace amounts" of wood pellets in grain shipped from the Terminal. They continued to express those views until and after the Wood Pellet Detection Events in December 2024 and January 2025: in an email dated January 8, 2025, immediately after the Wood Pellet Detection Event involving the Star Topaz, Jasmel Singh Litt, the president of Fibreco, wrote to AGT stating that it would be "in our best interests to go to CGC to have this section of the act amended to have an acceptable tolerance when it comes to wood pellets".

[197] Further, Mr. Al-Katib deposes that after the Star Topaz incident, Mr. Bunkowsky told him, like he did in 2023, that he perceived the wood pellet contamination as a "serious issue".

[198] Mr. Al-Katib deposed that AGT made the decision to terminate based on his view that "AGT's reputation with its customers and its regulator were at risk":

Based on the repeated incidents of wood pellet contamination in AGT's Agriproducts, the feedback I had received from Mr. Bunkowsky that these incidents represented a serious issue, the lack of information from Fibreco regarding the shared systems for grain and wood pellets, and the lack of assurance that Fibreco was compliant with CGC Orders, I formed the view that AGT's reputation with its customers and its regulator were at risk, and that AGT would bear significant financial risk on subsequent shipments through Fibreco. I also considered that Fibreco could not assure AGT that further contamination incidents would not occur, given that it was seeking an allowance from the CGC for "trace amounts" of wood pellets, which Mr. Bunkowsky had told me would never be granted. As the ultimate decision maker for AGT, I decided to terminate the TSA to avoid reputational and financial harm to the company.

[199] On discovery, he testified as follows:

... I decided to terminate the TSA to avoid reputational and financial harm, yeah, it was current and future. So I couldn't be assured that the *laissez faire* attitude of Fibreco that they could not guarantee nil and the regulator telling us they would not accept anything but nil was the big deciding factor. We could not have a ticking time bomb every time we put a vessel on the berth at Fibreco, wondering if there was going to come a wood pellet contamination and whether we were going to incur millions of dollars of loss now or when a vessel arrived at destination. We couldn't keep taking that risk. It was not prudent for our company to do that.

[200] Fibreco asserts that AGT's position is opportunistic and contrived, and that the true reason for AGT's termination of the TSA was that AGT realized too late that it had made an improvident financial bargain. However, in my view, that argument is not established on the evidence.

[201] Mr. Al-Katib's evidence demonstrates that he subjectively held the view that the two Wood Pellet Detection Events in 2024 and 2025 could have a material negative effect on Fibreco. Further, I find that his view was objectively reasonable in light of the history of AGT's dealings with Fibreco with respect to the Terminal, the discussions between AGT and the Chief Grain Inspector, and the previous Wood Pellet Detection Events.

[202] Mr. Bunkowsky had repeatedly expressed his concerns about the Wood Pellet Detection Events. It was reasonable, in my view, for Mr. Al-Katib to think that his concerns would have a material negative impact on AGT.

[203] Fibreco argues that there were reasons other than the two Wood Pellet Detection Events in 2024 and 2025 that motivated the termination.

[204] Mr. Al-Katib conceded on discovery that AGT’s internal discussions about terminating the TSA began in September 2024, and that AGT made a new contract with another facility operator on December 23, 2024. Mr. Al-Katib also conceded that settlement discussions to revolve the disputes between AGT and Fibreco had stalled in the fall of 2024, that the relationship between Fibreco and AGT had consequently deteriorated, and that these were factors that contributed to his decision to terminate.

[205] Further, in discovery, Mr. Al-Katib testified that “there was a documented cleanout procedure.... So - I concluded that it may have come from the cleanout procedure not being followed”. As discussed above, AGT was not entitled to rely on Fibreco’s alleged failure to follow the cleanout procedure, even if proven, to justify immediate termination of the TSA under s. 15.5(a).

[206] It is evident, in my view, that AGT contemplated termination of the TSA prior to the Wood Pellet Detection Event involving the Girasole River on December 15, 2024, and again before the Wood Pellet Detection Event involving the Star Topaz on January 7, 2025. Further, I find that AGT considered reasons in addition to the two unlawful acts when deciding to deliver the Termination Notice.

[207] However, there is no requirement that the unlawful acts must have been the only, or even the dominant, considerations relevant to AGT’s decision to terminate.

[208] AGT has been able to prove two unlawful acts, and I have found that AGT formed a reasonable opinion that the unlawful acts had or could have a material negative effect on AGT. Therefore, it has met the requirements for termination under s. 15.5(a). Whether Mr. Al-Katib was motivated by factors outside of the TSA, or whether he had an intention to terminate before the unlawful acts occurred, is not legally relevant to this analysis.

Conclusion regarding unlawful acts

[209] While AGT's purported termination of the TSA was invalid because of its failure to obtain CIBC's prior consent or to provide CIBC with notice of its intention to terminate, I conclude that AGT would have been otherwise entitled to terminate the TSA under s. 15.5(a) because Fibreco committed an unlawful act by allowing wood pellets to be present in grain loaded onto the Girasole River in December 2024 and the Star Topaz in January 2025, and because those unlawful acts had or could have, in AGT's reasonable opinion, a material negative effect on AGT.

Remedy

[210] As I have concluded that AGT's termination of the TSA was invalid, I must determine whether Fibreco is entitled to specific performance or damages in lieu of specific performance, or common law damages.

[211] No submissions were made at the hearing of this summary trial regarding the assessment or quantification of damages. Those issues will be dealt with separately and subsequently in this action.

[212] Fibreco seeks permanent injunctions and orders for specific performance enjoining AGT from breaching the exclusivity provision of the TSA and compelling AGT to comply with its contractual obligation to replenish the LOC. As a practical matter, the result of the first of these orders would be a mandatory injunction requiring AGT to ship agriproducts from western Canada through the Terminal.

[213] As is well known, specific performance is a discretionary remedy. It may be awarded in circumstances where damages would not provide an adequate remedy. The adequacy of damages is a highly fact specific inquiry for the court: *Orogenic Gold Corp. v. Mill*, 2023 BCSC 832 at para. 88.

[214] The availability of specific performance in this case, in my view, turns on that fact specific inquiry.

[215] In its submissions, Fibreco makes repeated statements regarding the predicted consequences if specific performance is not ordered. It submits that the Court's timely intervention is required "to ensure Fibreco's financial survival", and that its "financial viability... depend[s] on AGT's performance of its obligations under the TSA, including the Letter of Credit".

[216] In support of these statements, Fibreco relies on the evidence of Mr. Litt, who deposes that Fibreco is suffering from structural cash shortfall issues caused by its loss of the revenue stream from AGT under the TSA. He deposes that a forecast created by Fibreco "conclusively demonstrates that, with the Annual Fixed Fee payments by AGT secured by a replenished BNS Letter of Credit, Fibreco will be unable to repay the TEP Loan at maturity on December 31, 2025, or demonstrate to its Lenders an ability to service quarterly payments thereafter."

[217] He deposes that the forecasted outcomes "make clear that Fibreco faces imminent covenant breaches, payment default, and foreclosure risk at the end of 2025 because of AGT's refusal to make the Annual Fixed Fee payments and replenish the BNS Letter of Credit", and that

[a]s no refinancing or replacement facility is possible in the circumstances, the maturity date marks a hard deadline, in other words a "debt cliff", after which Fibreco will have no means to repay its loans or avoid creditor enforcement.

[218] If these factual claims were accepted by the Court, Fibreco would have a reasonable entitlement to specific performance, based on the well-established principle that interference with the ability to carry on a trade or going business concern establishes irreparable harm.

[219] In *Powerscreen of Canada (Western) Ltd. v. Powerscreen International Distribution Limited*, 2003 BCSC 1353 at para. 74, the Court ordered specific performance on the basis that the alternative would be "dissolution of the enterprise".

[220] Similarly, in *Golden Globe Pizza Inc. v. Domino's Pizza of Canada Ltd.*, 2015 BCSC 356 at para. 18, the uncontested evidence was that absent a specific performance order, the plaintiff would “certainly be forced to shutter and close its operations”. In cases where the alternative would be the closing or dissolution of a business, specific performance is often the appropriate remedy.

[221] However, in this case, it is my view that the facts that would entitle Fibreco to specific performance have not been established. In this regard, the cross-examination of Mr. Litt was particularly revealing.

[222] He conceded that Fibreco’s forecast upon which he relied when giving his evidence assumed Fibreco would be entirely unsuccessful in obtaining new customers for its terminal, resulting in zero grain volume through the Terminal for all of 2026 and 2027, notwithstanding that Mr. Litt stated that finding new customers would be his focus going forward.

[223] Mr. Litt acknowledged that when he made his affidavit, he had not explored options such as alternative financing, mezzanine debt or an equity injection. There had been no approach made to lenders other than Farm Credit or CIBC.

[224] Further, and in any event, he conceded that he had no idea what the present lending syndicate might have on offer for after December 31, 2025.

[225] As Mr. Litt also acknowledged, Fibreco could sell the land upon which the Terminal sits to the Vancouver Fraser Port Authority, use the proceeds to pay off the credit facility, and lease the land back from the Port.

[226] Perhaps most compellingly, Mr. Litt also conceded that the Fibreco shareholders had told him, in the worst-case scenario, that they were prepared to pay off the CIBC debt. They did so in a board of directors meeting on February 6, 2025, approximately one week after the Termination Notice was issued.

[227] For all of these reasons, Fibreco has not established that this Court’s refusal of injunctive relief in this case would result in the “dissolution of the enterprise” or the

“shuttering” of the business. For these reasons, this case is distinguishable from the cases cited above.

[228] I conclude that Fibreco’s loss arising from the invalid termination of the TSA is a financial loss, and that damages are an adequate remedy. Accordingly, Fibreco’s claim to specific performance must be dismissed.

Conclusions and costs

[229] AGT’s purported termination of the TSA was invalid, as a result of its failure to comply with the notice and consent provisions in s. 4 of the Consent Agreement.

[230] But for this notice and consent issue, AGT would have been entitled to terminate the TSA under s. 15.5(a).

[231] Fibreco’s claim to specific performance of the TSA is dismissed.

[232] Fibreco is entitled to advance a claim for damages in this proceeding arising from AGT’s failure to comply with the notice and consent provisions in the Consent Agreement and from its purported termination of the TSA. I shall remain seized of this action, including the damages claim.

[233] This Court’s decision regarding the appropriate costs award on this summary trial application shall await the determination of damages and the final resolution of this action.

“Loo J.”