KING'S BENCH FOR SASKATCHEWAN

Citation: 2026 SKKB 5

Date: **2026 01 07**
File No.: QBG-RG-00535-2017
Judicial Centre: Regina

BETWEEN:

ALLIANCE SEED CORPORATION

PLAINTIFF

- and -

GUY FOURNIER and
THE UNIVERSITY OF SASKATCHEWAN

DEFENDANTS

Counsel:

Tristan N. Culham and Callie L. Schwartz	for the plaintiff
Nicholas Conlon	for the defendant, Guy Fournier
No one appearing	for the defendant, University of Saskatchewan

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FIAT
January 7, 2026

ROBERTSON J.

Contents Paras.

INTRODUCTION

[1] This decision addresses an application for judgment under Rule 3-26 of *The King's Bench Rules*, which allows the Court to order that judgment be entered where there is a default in defence to a statement of claim. The application is granted and judgment is entered. Liability is established by implied admission of the facts pled in the Statement of Claim.

[2] Proof of damages is required. The content of the Statement of Claim and materials filed in support of the application are sufficient to establish right to relief, including proof of damages. Relief is ordered in the form of: a declaration; general damages of $1,175,862.56; punitive damages of $50,000.00; and costs of the action calculated on Column 3 of the Tariff of Costs.

BACKGROUND

Plant Breeders' Rights Act

[3] The *Plant Breeders' Rights Act*, SC 1990, c 20 [*Act*], provides protection for plant breeders who develop new plant varieties, including prohibitions against unauthorized sale of certified seed. Section 5(1) of the *Act* gives the holder of the plant breeders' rights exclusive rights, including the right to sell the variety. Section 2(1) gives a broad definition for the word "sell", including advertising for sale:

> ***sell*** includes agree to sell, or offer, advertise, keep, expose, transmit, send, convey or deliver for sale, or agree to exchange or to dispose of to any person in any manner for a consideration. (*vente*)

[4] The purpose of the *Act* is to recognize, encourage and reward innovation through development of new plant varieties which are critical to food production. It was enacted by Parliament to conform with the 1991 Convention of the International Union for the Protection of New Varieties of Plants, of which Canada is a member.

[5] Section 41 of the *Act* provides civil remedies for infringement of a plant breeders' rights. Section 42 gives this Court jurisdiction:

> **CIVIL REMEDIES**
>
> **Infringement**
>
> **41 (1)** A person who infringes plant breeder's rights is liable to the holder thereof and to all persons claiming under the holder for all damages that are, by reason of the infringement, sustained by the holder or any of those persons and, unless otherwise expressly provided, the holder shall be made a party to any action for the recovery of those damages.

Relief in the event of infringement

(2) In an action for infringement of plant breeder's rights that is before a court of competent jurisdiction, the court or a judge thereof may make any interim or final order sought by any of the parties and deemed just by the court or judge, including provision for relief by way of injunction and recovery of damages and generally respecting proceedings in the action and, without limiting the generality of the foregoing, may make an order

(a) for restraint of such use, production or sale of the subject-matter of those rights as may constitute such an infringement and for punishment in the event of disobedience of the order for that restraint;

(b) for compensation of an aggrieved person;

(c) for and in respect of inspection or account; and

(d) with respect to the custody or disposition of any offending material, products, wares or articles.

Appeals

(3) An appeal lies from any order under subsection (2) under the same circumstances and to the same court as from other judgments or orders of the court in which the order is made.

Jurisdiction of provincial courts

42 (1) An action for infringement of plant breeder's rights may be brought in the court of record that, in the province in which the infringement is alleged to have occurred, has jurisdiction pecuniarily to the amount of the damages claimed and that, in relation to other courts of the province, holds its sittings nearest to the place of residence or place of business of the defendant.

Proof of jurisdiction

(2) The court in which an action is brought in accordance with subsection (1) shall decide the action and determine costs, and assumption of jurisdiction by the court is of itself sufficient proof of jurisdiction.

> **Section 43 not impaired**
>
> **(3)** Nothing in this section impairs the jurisdiction of the Federal Court under section 43.

[6] These monopoly protections are subject to what is known as "farmers' privilege". Farmers who lawfully purchase certified seed may sell the resulting grain crop and use the seed they harvest for re-seeding on their farmland. However, they may not sell that seed to other farmers in competition with the plant breeder or its licensed agents. (Seed used for re-seeding is usually treated to protect the seed and promote germination and growth.) Section 5.3 of the *Act* sets out the allowed use exemptions.

[7] In this case, the University of Saskatchewan's Crop Development Centre developed a new variety of durum wheat which it registered under the name of CDC Verona with certificate number 4101 issued by the Canadian Food Inspection Agency's Plant Breeders' Rights Office.

[8] The University of Saskatchewan licensed Patterson Grain to sell the certified seed. Patterson Grain in turn sub-licensed Alliance Seed Corporation [Alliance], which was then a subsidiary of Patterson Grain, to sell the certified seed. It is in that capacity that Alliance brought this action to enforce its exclusive right to sell the certified seed.

[9] Section 45 of the *Act* allows Alliance to bring the action in its name. The University of Saskatchewan was named as a party because of its interest as holder of the certificate and licensor of the certified seed. No relief is sought against the University of Saskatchewan. Section 45 of the *Act* bars any award of costs against the University of Saskatchewan.

[10] There is a related and similar action in which Alliance sued Gerard Fournier, father of Guy Fournier, and the University of Saskatchewan: QBG-RG-00842-2019. That Statement of Claim was filed March 29, 2019. (Affidavit of Guy Fournier sworn January 17, 2025, para. 25 & Exhibit F) On May 22, 2019, Gerard Fournier was noted for default of defence. On March 16, 2021, Acton J. granted Alliance's application for an order to produce documents similar to the order granted by Gabrielson J. against Guy Fournier in this action. On July 5, 2022, Layh J. ordered Gerard Fournier to provide replies to undertakings given at questioning on May 7, 2021. There has been no further action on this Court file.

Materials filed for application

[11] The parties filed the following materials for this application, which Alliance's lawyers assembled and filed in a book of documents [Documents].

By Alliance as plaintiff-applicant:

- Statement of Claim issued March 3, 2017 (Documents, tab 1)
- Application Without Notice dated and filed September 24, 2024 (Documents, tab 2)
- Affidavit of Jody Karlowsky sworn August 8, 2024 and filed September 24, 2024 [Karlowsky Affidavit] (Documents, tab 3)
- Draft Order filed September 24, 2024 (Documents, tab 4)
- Brief of Law dated and filed September 24, 2024 (Documents, tab 5)

- Notice of Objection to Affidavit Evidence dated January 29, 2025 (Documents, tab 7)
- Supplementary Brief of Law dated and filed October 3, 2025
- Affidavit of Nikki Fessler sworn and filed October 16, 2025

By Guy Fournier [Mr. Fournier] as defendant-respondent:

- Affidavit of Guy Fournier sworn January 17 and filed January 21, 2025 [Fournier Affidavit] (Documents, tab 6)
- Brief of Law dated and filed October 2, 2025

History

[12] The Court file records the following events.

2008

April 1 — The University of Saskatchewan [University] makes licence agreement with Patterson Grain to sell certified seed (Karlowsky Affidavit, para. 7 & Exhibit B)

2009

January 30 — Patterson Grain make sub-licencing agreement with Alliance to sell certified seed (Karlowsky Affidavit, paras. 8-9 & Exhibit C)

2011

July 5	Canadian Food Inspection Agency's Plant Breeders' Rights Office issues Plant Breeders Certificate No. 4101 to University for CDC Verona durum wheat seed [Verona Seed] (Karlowsky Affidavit, para. 5 & Exhibit A)

2015

March	Alliance becomes aware that Mr. Fournier may be advertising and selling Verona Seed (Karlowsky Affidavit, para. 16)
March 26	Alliance lawyer letter to Mr. Fournier (Karlowsky Affidavit, para. 18 & Exhibit G)
December 14	Alliance lawyer second letter served on Mr. Fournier (Karlowsky Affidavit, para. 19 & Exhibit H)

2017

February 1	Alliance lawyer third letter to Mr. Fournier (Karlowsky Affidavit, para. 20 & Exhibit I)
March 3	The plaintiff, Alliance filed a Statement of Claim naming as defendants Mr. Fournier and the University. The claim alleged that Mr. Fournier, who farms in the Rural Municipality of Glen Bain No. 105 near Kincaid, Saskatchewan, infringed Alliance's plant breeders' rights by purchasing, growing or selling Verona Seed

April 17	Statement of Claim served on Mr. Fournier
May 10	Mr. Fournier noted for default of defence
2019	
April 9	Gabrielson J. orders Mr. Fournier to produce documents and attend for questioning on April 24, 2019 [Gabrielson Order]
April 16	Mr. Fournier served with the Gabrielson Order
April 24	Mr. Fournier fails to attend the scheduled questioning (nor did he produce documents)
2021	
February 8	Alliance lawyer fourth letter to Mr. Fournier (Karlowsky Affidavit, para. 25 & Exhibit K)
February 18	Alliance files contempt application for failure to comply with Gabrielson Order
March 16	Contempt application was heard by Acton J. The flyleaf endorsement records that T. Culham appeared for the plaintiff and no one appeared for Mr. Fournier. The flyleaf endorsement states:

> Order may issue for civil contempt and order to appear.
>
> Further order offender be subject to release from custody on payment of the sum of $10,000.

March 17	Acton J. approves the form of Warrant of Committal and Order for Costs
March 19	Mr. Fournier served with the issued Warrant of Committal, directing Mr. Fournier be brought to Court on March 25, 2021 and Order
March 25	Mr. Fournier fails to attend court. Mr. Fournier had not been arrested because the R.C.M.P. declined to do so
April 6	Robertson J. issues a fiat authorizing a new warrant of arrest, but directing that it not be executed while the Covid-19 public health travel restrictions were in effect
April 14	Robertson J. grants a without notice application by Mr. Fournier for leave to file and set a special date for hearing to allow him to purge his contempt. The warrant issuance is put on hold pending that hearing
April 27	Robertson J. hears Mr. Fournier's application. Mr. Fournier appeared and apologized for failing to comply with the Gabrielson Order. Alliance confirmed that Mr. Fournier had paid the $10,000 cost award made by Acton J. Robertson J. cancelled the warrant for Mr. Fournier's arrest and adjourned the question of sanctions for contempt to a later date to allow Mr. Fournier the opportunity to fully purge his contempt by complying with the Gabrielson Order

June 15	Mr. Fournier attends questioning (Karlowsky Affidavit, Exhibit D transcript)
June 22	Fiat by Robertson J. finding Mr. Fournier had now fully purged his contempt of the Gabrielson Order and awarding costs of $2,000 payable forthwith by Mr. Fournier to Alliance

2022

June 14	Robertson J. hears Appearance Day Notice by Alliance seeking order for Mr. Fournier to reply to undertakings. No one appears for Mr. Fournier. Application granted with $500 cost award
June 16	Order issued for reply to undertakings within ten days of service of order
July 8	Mr. Fournier provides responses to undertakings given at questioning on June 15, 2021: 13 of 24 undertakings are refused (Karlowsky Affidavit, Exhibit L)

2024

September 24	Alliance files Application Without Notice seeking order for judgment
September 25	Mr. Fournier's lawyer files letter with Court
October 15	Robertson J. directs local registrar to schedule hearing of application for judgment

December 5	Mr. Fournier's lawyer files Notice of Change of Representation
December 6	Robertson J. holds conference call with counsel to discuss Mr. Fournier's change of counsel. Local registrar directed to find new date for hearing of application for judgment
December 16	Robertson J. makes order for service and filing of materials and opportunity for cross-examination on Alliance's application for judgment
2025	
January 21	Mr. Fournier files Fournier Affidavit
January 29	Alliance files Notice of Objection to Affidavit Evidence against Fournier Affidavit
March 19	Robertson J. directs local registrar to schedule hearing
April 25	Local registrar schedules hearing for October 17
October 17	Robertson J. hears Alliance application, reserving decision

ISSUES

[13] The application raises the following issues:

1. Is the affidavit evidence filed admissible?

2. Should judgment be ordered?

3. If so, what relief should be ordered?

4. What costs, if any, should be ordered?

POSITION OF PARTIES

Alliance

[14] Alliance asks that judgment be entered in default of defence, as allowed by Rule 3-26 of *The King's Bench Rules*. Liability is established by virtue of the allegations made in the Statement of Claim, which should now be accepted as fact.

[15] The only remaining issue is relief, in particular calculation of damages. Alliance has provided a rationale for its calculation of damages in the Karlowsky Affidavit. The method is based on available evidence and necessarily employed some estimates. This was necessary because Mr. Fournier did not produce better information, which was within his knowledge or control, despite Alliance's attempts to obtain discovery. The estimate of damages of $1,306,513.95 is sufficiently reliable for an order of damages in that amount.

[16] The request for an award of $100,000 in aggravated or punitive damages is justified both to punish the wrongful actions of Mr. Fournier and to deter others who might be tempted to breach plant breeders' rights.

[17] The request for a permanent injunction is justified by the repeated past breaches by Mr. Fournier.

Mr. Fournier

[18] Mr. Fournier was sued in his personal capacity and his liability should be limited to proof of personal wrongdoing. Mr. Fournier is only liable for sale of seed in his personal capacity. Mr. Fournier's position is that he did not sell any certified seed. G.F. Farms Ltd. was responsible for all grain sales. Sale of certified seed by G.F. Farms Ltd. should not be attributed to Mr. Fournier. There is no basis to pierce the corporate veil.

[19] Mr. Fournier challenges the calculation of damages. There is no reliable evidence of actual sale of certified seed. The Statement of Claim refers only to 2015, so there should be no liability or damages for sale of certified seed in other years. Mr. Fournier is an unsophisticated farmer. He should not be punished for failing to keep accurate records. Although Mr. Fournier did refuse several undertakings, Alliance did not seek a Court order to compel compliance with those undertakings.

[20] Given the questionable personal liability and lack of reliable evidence of damages, the claim for damages should be dismissed or, at most, result in only nominal damages.

[21] No aggravated or punitive damages should be awarded. Mr. Fournier has already suffered financial loss from legal fees and awards of costs. The contempt was addressed, including by a significant costs award, and should not be considered in assessing damages.

[22] No permanent injunction should be granted. There is no evidence of continuing breach or likely future breach.

ANALYSIS

[23] I will address the issues in the order stated above.

Is the affidavit evidence filed admissible?

[24] Alliance filed a Notice of Objection to Affidavit Evidence on the Fournier Affidavit, in particular paragraphs 12, 13, 22, 23, 26, 28 in part, 29 and Exhibit G, 30, 31 and 34 – 39. The various grounds included abuse of process by direct contradiction of previous evidence given by Mr. Fournier or being information not previously disclosed, opinion, argument, hearsay, misleading, and irrelevant.

[25] The practice of the Court is to deal with such objections in a summary manner. See: *Alliance Crane Inc. v Sapergia*, 2025 SKKB 94 at para 23.

[26] In *Thomas v Input Capital Corp*., 2020 SKCA 67 at para 32, Tholl J.A. stated what the Court of Appeal expects of a judge dealing with objections to affidavit evidence:

> [32] In any Chambers application, it is necessary for the record to be clear with regard to the evidence that is admitted and that which is not. The reasons for this proposition, and the associated procedure, are succinctly described in *Wongstedt v Wongstedt*, 2017 SKCA 100, [2018] 4 WWR 82 [*Wongstedt*]:
>
> > [38] … Where objections are taken to affidavit evidence, the judge who hears them should briefly articulate which portions of a contested affidavit are not in conformance with *The Queen's Bench Rules* and what has been struck from the record. There are many ways this could be done effectively … but the key is to plainly identify what is or is not in evidence, giving a very short reason for striking any material that has been struck from

> the record (i.e., argument, speculation, opinion, irrelevant, rhetoric, hearsay, etc.). Indeed, a judge may simply strike out offending material by hand, noting the reason therefor, on the affidavit itself.
>
> [39] Regardless of how it is done, the parties, counsel and judges who hear subsequent applications (particularly, those requiring an applicant to establish a material change in circumstances) must know what evidence was properly before the court or what evidence was struck from the record. Lastly, the practice of clearly identifying evidence that has been struck and briefly stating why it was struck provides an appellate court with the foundation for meaningful review of that decision, if it should be appealed.

[27] I do strike paragraphs 12, 28, 29, and 34 – 39 on the basis of the stated grounds for objection.

[28] I do not strike paragraph 13 as opinion, argument and/or irrelevant. Those statements simply describe well-known events that make farming an uncertain enterprise. As a farmer, that knowledge would be within Mr. Fournier's personal experience. (Indeed, in Saskatchewan where many people are only a generation or two removed from the farm, what Mr. Fournier described is common knowledge. As such, I could take judicial notice of those facts.)

[29] In *M.R.L.P. v Canada (Attorney General),* 2018 SKQB 248 at paras 8 and 13, Currie J. distinguished between opinion and "personal experience" in declining to strike paragraphs of affidavits to which similar objection was made. I followed that decision in similarly declining to strike affidavit evidence in *3sHealth v Canadian Union of Public Employees*, 2024 SKKB 31 at para 28, reversed in part on other grounds 2024 SKCA 106, and *Verdient Foods Inc. v United Food and Commercial Workers, Local 1400*, 2019 SKQB 288 at paras

15-18. See also: *R v Hamilton*, 2011 ONCA 399 at paras 237-240 and 259; and *Questor Technology Inc. v Stagg*, 2021 ABQB 636 at paras 56-60.

[30] I do not strike paragraph 22, which is as much a denial of personal liability based on the corporate shield defence than an assertion of fact. I will deal with that defence below.

[31] Mr. Fournier argued that the Investigation Report attached to the Karlowsky Affidavit as Exhibit F was inadmissible as hearsay. Mr. Fournier did not file any Notice of Objection to Affidavit Evidence. That is reason enough to dismiss his objection. Regardless, the form of the information/evidence goes to weight, not admissibility. I have considered the Investigation Report and find it relevant and persuasive in support of the allegation that Mr. Fournier advertised and offered Verona Seed for sale in 2015. In any event, that fact is sufficiently established by the implied admission of the Statement of Claim, in particular paragraph 11.

Should judgment be ordered?

[32] *The King's Bench Rules* in Rule 3-26 allows the Court to order judgment to be entered where there has been default of defence:

> **Judgment in other actions**
>
> **3-26**(1) In any other action on default of defence by one or more defendants, the plaintiff may apply without notice to the Court for an order for judgment.
>
> (2) On an application pursuant to subrule (1), the Court may order the judgment to be entered that the Court considers that the plaintiff is entitled to, with or without evidence of the truth of the statement of claim.

> (3) Evidence of the truth of the statement of the claim may be given orally, by affidavit or by any other means that the Court may direct.

[33] The Court's authority to enter judgment without evidence is discretionary. This is shown by the use of the permissive "may" in Rule 3-26. See also: *Canadian Lumber Yards Ltd. v Paulson*, 1922 CanLII 165, 15 Sask LR 400 at p 402 (Sask SC) [*Canadian Lumber Yards*]; *B.(D.) v Canada (Attorney General)*, 2000 SKQB 574 at para 11 [*B.(D.*)]; and *Richter v Capri Holdings Inc.*, 2001 SKQB 520 at para 17 [*Richter*].

[34] The applicant-plaintiff must still satisfy the burden of proof of their claim, including liability and damages. See: *B.(D.)* at para 16; *Richter* at para 20; and *Moen v Mackay*, 2024 SKKB 206 at paras 26-27 [*Moen*] In *Moen*, Sinclair J. wrote:

> [26] The defendants have been noted in default. As a result, the defendants are deemed to have admitted the allegations in the statement of claim: see *Toronto-Dominion Bank v Tellez*, 2018 SKQB 285, 40 CPC (8th) 145, and *Canada Life Assurance Co. v Lima*, [1926] 4 DLR 48 (Sask KB).
>
> [27] That said, I must still ensure that the deemed admitted facts in the claim constitute defamation. …

[35] Rule 13-18 of *The King's Bench Rules* provides that allegations of fact in the pleadings which are not denied are deemed to be admitted:

> **Pleadings: denial of facts**
>
> 13-18(1) All allegation of fact that are not denied or stated in the pleadings not to be admitted are deemed to be admitted.

[36] Failure to defend is usually taken as an implied admission of the allegations in the statement of claim. This implied admission may be sufficient to

prove the claim or at least establish liability. See: *Canada Life Assurance Co. v Lima*, 1926 CanLII 165 at paras 7-8, [1926] 3 WWR 127 (Sask QB) [*Canada Life Assurance*]; *Hill v Stephen Motor & Aero Co. Ltd.*, 1929 CanLII 128, [1929] 2 WWR 97 at p 98 (SKCA); *Pratts Wholesale Food Services Ltd. (Pratts Food Service) v 101256697 Saskatchewan Ltd. (Buddies Pizza)*, 2021 SKQB 133 at para 20; *Wagner v Lansdowne Equity Ventures Ltd*., 2009 SKQB 498 at para 25 [*Lansdowne*]; *Palen v Dagenais,* 2013 SKQB 39 at para 5; *C.M. v L.M.*, 2014 SKQB 102 at para 2; *Toronto-Dominion Bank v Tellez*, 2018 SKQB 285; *Houseman v Harrison*, 2020 SKQB 36 at para 15 [*Houseman*]; *ABC v XYZ*, 2020 SKQB 190 at paras 20-23; *Moen* at para 26; and *Blackbird Security Inc. v McIntyre*, 2025 SKKB 60 at paras 15-16 [*Blackbird*].

[37] In *Lansdowne*, Currie J. wrote at paras. 25-26:

> [25] Lansdowne was noted for default. That means that its liability to Ms. Wagner, as set out in the statement of claim, is beyond dispute. Only the amount of the damages is in issue. This principle has been long recognized, as demonstrated by the remarks of Chief Justice Haultain in *Hill v. Stephen Motor & Aero Company, Limited*, [1929] 2 W.W.R. 97 (Sask. C.A.) at page 98:
>
> > I do not consider it necessary to consider the grounds upon which the judgment is based, because, in my opinion, the defendant, by allowing judgment to go against him by default in pleading, admitted the causes of action stated in the statement of claim and the right of the plaintiff to *some* damages in respect of them.
> >
> > Judgment by default is an implied admission of the action, that is, the admission by the defendant of the plaintiff's right to the relief claimed in the statement of claim.
> >
> > All the plaintiff has to prove, or the defendant is permitted to controvert is the *amount* of the *damages*; for the cause of action itself, as stated in the plaintiff's

> claim, and the right to some damages in respect of it, is admitted by the defendant, by his suffering judgment to pass against him by default. *Chitty's Archbold's Practice* (14th ed.) p. 1336. [Emphasis in original]

[26] Lansdowne's right to contest the amount of the damages does not necessarily include a right to discovery and pre-trial conference. In some cases, such as *Noble v. Hills* (1985), 41 Sask. R. 276 (Q.B.), those steps are not necessary and all that is needed is to conduct a hearing. Whether anything more is required will depend on the circumstances of the case.

[38] In *Blackbird*, Mitchell J. wrote:

> [14] Rule 3-26(1) of *The King's Bench Rules* provides in part that "on default of defence by one or more defendants the plaintiff may apply without notice to the Court for an order for judgment" [emphasis added].
>
> [15] In Saskatchewan for almost a century now, the law holds that, should a defendant fail to defend a claim commenced against it, they have conceded liability. See: *Hill v Stephen Motor & Aero Co., Ltd.*, [1929] 3 DLR 676 (CanLII) (Sask CA) [*Hill*]. The default in pleading means that the defendant has admitted the causes of action stated in the statement of claim and the right of the plaintiff to some damages in respect of them: *Hill* at para 2. It is an "implied admission…by the defendant of the plaintiff's right to the relief claimed in the statement of claim": *Hill* at paras 3 and 10.
>
> [16] Not surprisingly, this principle of law has been followed and endorsed by many judges of this Court since then. More recent examples include: *ABC v XYZ*, 2020 SKQB 190 at paras 20-23; *Houseman v Harrison*, 2020 SKQB 36 at para 15; *C.M. v L.M.*, 2014 SKQB 102 at para 2, 443 Sask R 11; and *Wagner v Lansdowne Equity Ventures Ltd.*, 2009 SKQB 498 at para 25, 363 Sask R 1.
>
> . . .
>
> [18] Accordingly, the only issues to be decided now are the appropriate amount of damages to which Blackbird is entitled because of the defendants' illegal conduct, and costs.

[39] The Court will only refuse to accept this implied admission in exceptional circumstances. See: *Canadian Lumber Yards*; *Canada Life Assurance*; *Hudson's Bay Company v Burwash*, 1931 CanLII 205 at para 4, [1932] 1 WWR 127 (SKSC) [*Burwash*]; and *Noble v Hills*, 1985 CanLII 2861, 41 Sask R 276 (SKKB). In *Burwash* at para 4, MacLean J. wrote:

> [4] It is not necessary to reiterate what was said in the decisions referred to. In the absence of exceptional circumstances, there are no grounds for exercising discretion requiring further evidence of the truth of the statement of claim.

[40] In this case, I find that liability is established by the Statement of Claim. The claim against Mr. Fournier is sufficiently pled to establish his liability. There are no exceptional circumstances requiring further evidence. However, entitlement to relief, in particular damages, must still be established.

[41] While not necessary to my finding of liability, I could reach the same conclusion from the materials filed in support of the application. In doing so, I would draw adverse inferences from Mr. Fournier's failure to file a statement of defence, his failure to respond to undertakings, and his failure to fully respond to evidence supporting the claim filed in support of this application. These failures also cause me to doubt his credibility.

[42] I also take note of his evasive and contradictory answers during questioning. One example of inconsistent and contradictory information provided by Mr. Fournier is the planting of durum wheat. In questioning on June 15, 2021, Mr. Fournier said he had no memory or records of what seed he purchased, planted or harvested in 2013 – 2016, in particular durum wheat. (Karlowsky Affidavit, Exhibit D transcript at pp. 38-40) Mr. Fournier did not subsequently correct his answer, as he might have done by affidavit in

compliance with Rule 5-31. Yet in his affidavit sworn January 17, 2025, Mr. Fournier states durum yields for 2013 – 15 crop years “Based on my memory from those years”. (Documents, tab 6: Fournier Affidavit, para. 35).

[43] With respect to the defences raised in the Fournier Affidavit and argument, they can be summarily dismissed on the basis that they were not pled in a statement of defence. Even so, I will briefly comment on three of the supposed defences.

[44] Mr. Fournier argued that the claim lacked particularity. I find the pleadings sufficient to support the claim. If Mr. Fournier was in doubt, his recourse was to make a demand for particulars. He did not do so. Further, Alliance’s efforts at discovery, in particular the questioning, could have left no doubt in Mr. Fournier’s mind as to the basis for the claim.

[45] I reject the defence of the corporate shield put forward by Mr. Fournier. In *Yaiguaje v Chevron Corporation*, 2018 ONCA 472 at para 70, Hourigan J.A. in the majority judgment commented on the limits to the corporate shield as a defence to personal liability:

> [70] The *Transamerica* [*Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, [1996] O.J. No. 1568 (Gen. Div.), affd [1997] O.J. No. 3754, 74 A.C.W.S. (3d) 207 (C.A.)] test is consistent with the principle reflected in the various business corporation statutes in Canada that corporate separateness is the rule. Where the corporate form is being abused to the point that the corporation is not a truly separate corporation and is being used to facilitate fraudulent or improper conduct, the law recognizes an exception to this rule. It is important that courts be rigorous in their application of the *Transamerica* test because the rule is provided for in statute and stakeholders of corporations have a right to

> believe that, absent extraordinary circumstances, they may deal with the corporation as a natural person.

[46] The claim was brought against Mr. Fournier personally. The alleged acts required a human actor. Leaving aside the fact that no such defence was pled, Mr. Fournier cannot contravene a public statute and then hide behind a corporation he controls as sole shareholder. (Karlowsky Affidavit, Exhibit D transcript at p. 14, lines 23-25, and p. 15, lines 1-4) Mr. Fournier and his corporation may both be liable.

[47] I also reject the defence that the claim was confined to 2015. The Statement of Claim in paragraph 11 is careful not to confine the claim to that year, stating:

> 11. On various dates not all known to the Plaintiffs, but which includes at least 2015, the Defendant, Guy Fournier, has infringed the Plaintiff's rights, including plant breeder's rights, … respecting CDC Verona …

[48] The Karlowsky Affidavit in paragraph 16 alleged that Mr. Fournier had infringed Alliance's rights "since at least 2016". The Karlowsky Affidavit goes on to estimate production for 2013 – 2016, based on available records.

[49] In conclusion, I find that Alliance has proved its claim and is entitled to relief, including damages. I will therefore go on to address the issue of relief.

If judgment is ordered, what relief should be ordered?

[50] The *Act*, in ss. 41 and 42 reproduced above, provide remedies for infringement of plant breeders' rights, including award of damages as compensation, injunction, and orders for inspection or accounting and for custody or disposition of any offending material. Relief is not confined to these

specified remedies. This is made clear by the words "without limiting the generality of the foregoing" in s. 41(2).

[51] In *Brinkworth v Walzack*, 2017 SKQB 268 at para 13, Sherman J. held that Rule 3-26 of *The Queen's Bench Rules*, in contrast with Rules 3-23 and 3-24, expressly contemplates default judgment for relief beyond judgment for a liquidated demand or pecuniary damages.

[52] In *Houseman* at paras 70-71, Elson J. granted a permanent injunction in granting judgment under Rule 3-26 of *The Queen's Bench Rules*.

Declaration

[53] *The King's Bench Act*, SS 2023, c 28 at s 3-3 authorizes judges to make binding declarations of right:

> **Declaratory judgments and orders**
>
> **3-3** A judge may make binding declarations of right whether or not any consequential relief is or can be claimed, and no action or matter is open to objection on the ground that a mere declaratory judgment or order is sought.

[54] Declaratory relief is discretionary. I am fully satisfied that the requested declaration should be granted. The facts pled in the Statement of Claim establish that Mr. Fournier contravened the *Act* by advertising and selling CDC Verona certified seed in 2013, 2014, 2015 and 2016.

Permanent injunction

[55] Alliance, in its Brief of Law at para. 88, requests a permanent injunction with the following terms:

> Guy Fournier is hereby permanently restrained from continuing to do any act or cause any act to be done that infringes Alliance Seed Corporation's plant breeder rights, contrary to the *Plant Breeders' Rights Act*, SC 1990, c 20.

[56] The *Act* in s. 42(2) expressly provides "for relief by way of injunction". *The King's Bench Rules* in Rule 6-48 authorizes injunctive relief against a wrongful act or breach of contract.

[57] Both parties referred me to Justice Sherman's decision in *Tompson v Gerow-Scissons*, 2019 SKQB 163 at paras 7-8 for factors to consider in deciding whether to grant a permanent injunction:

> [7] It has been stated that "The very first *principle* of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy." See *London and Blackwell Railway Company v Cross* (1886), 31 Ch D 354 (CA). This principle applies to each of the above noted forms of injunction.
>
> [8] A permanent injunction is only granted after the court has made a final determination that a legal wrong has occurred. In *NunatuKavut Community Council Inc. v Nalcor Energy*, 2014 NLCA 46, 358 Nfld & PEIR 123, the Newfoundland Court of Appeal succinctly summarized the considerations and tests to apply in an action for a permanent injunction as follows:
>
> > [72] I will conclude this analysis by saying that the proper approach to determining whether a perpetual injunction should be granted as a remedy for a claimed private law wrong is to answer the following questions:
> >
> > (i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);
> >
> > (ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is

> appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction? (If not, the injunction claim should be dismissed);
>
> (iii) Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy);
>
> (iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's prima facie entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);
>
> (v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?
>
> (vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[58] I decline to make a permanent injunction, because the other relief granted should be sufficient and there is no indication that Mr. Fournier is continuing or intends to continue to infringe the plant breeders' rights by advertising and selling Verona Seed. The success of this action shows that it is

an adequate remedy. This judgment should also deter both Mr. Fournier and others who might be tempted to engage in similar wrongful acts.

General damages

[59] Section 41(1) of the *Act* expressly provides for recovery of "all damages that are, by reason of the infringement, sustained" by the plaintiff. Section 41(2) authorizes the Court to make an order for "recovery of damages" and in s. 41(2) "for compensation of an aggrieved person".

[60] The goal of a damages award is to compensate the plaintiff for the loss it sustained as a consequence of the defendant's unlawful acts, including any loss of trade actually suffered and any harm to the plaintiff's business or goodwill. That latter concern arises where the action involves sale of "bootleg" product.

[61] Alliance stated it could find no prior cases applying s. 41 of the *Act* in assessment of damages. Alliance referred to cases applying similar relief provisions in the *Patent Act*, RSC 1985, c P-4, in particular ss. 54 and 55 of that Act:

> **Infringement**
>
> **Jurisdiction of courts**
>
> **54 (1)** An action for the infringement of a patent may be brought in that court of record that, in the province in which the infringement is said to have occurred, has jurisdiction, pecuniarily, to the amount of the damages claimed and that, with relation to the other courts of the province, holds its sittings nearest to the place of residence or of business of the defendant, and that court shall decide the case and determine the costs, and assumption of jurisdiction by the court is of itself sufficient proof of jurisdiction.

Jurisdiction of Federal Court

(2) Nothing in this section impairs the jurisdiction of the Federal Court under section 20 of the *Federal Courts Act* or otherwise.

Liability for patent infringement

55 (1) A person who infringes a patent is liable to the patentee and to all persons claiming under the patentee for all damage sustained by the patentee or by any such person, after the grant of the patent, by reason of the infringement.

Liability damage before patent is granted

(2) A person is liable to pay reasonable compensation to a patentee and to all persons claiming under the patentee for any damage sustained by the patentee or by any of those persons by reason of any act on the part of that person, after the specification contained in the application for the patent became open to public inspection, in English or French, under section 10 and before the grant of the patent, that would have constituted an infringement of the patent if the patent had been granted on the day the specification became open to public inspection, in English or French, under that section.

Patentee to be a party

(3) Unless otherwise expressly provided, the patentee shall be or be made a party to any proceeding under subsection (1) or (2).

Deemed action for infringement

(4) For the purposes of this section and sections 54 and 55.01 to 59, any proceeding under subsection (2) is deemed to be an action for the infringement of a patent and the act on which that proceeding is based is deemed to be an act of infringement of the patent.

[62] I agree that the provisions are similar and that cases applying those provisions in assessing damages for patent infringement may provide useful guidance in assessing damages for infringement of plant breeders' rights.

[63] In *Beloit Canada Ltd. v Valmet-Dominion Inc.*, 1997 CanLII 6342, 214 NR 85 at para 98 (Westlaw) (FCA), the Federal Court of Appeal held that the Federal Court had jurisdiction to award the remedy of accounting for profits in an action for patent infringement:

> In our view, the time has come to put the issue to rest in this Court. For the reasons that follow, we are all of the view that this Court does have and has always had jurisdiction to award the remedy of accounting of profits and that that jurisdiction is found in paragraph 57(1)(b) of the Act and in sections 3 and 20 of the *Federal Court Act*.

[64] In *Monsanto Canada Inc. v Schmeiser*, 2004 SCC 34 at para 100, McLachlin C.J. and Fish J., writing for the majority, explained that the *Patent Act* permitted two alternative methods for compensation: damages; and accounting of profits:

> 100 The *Patent Act* permits two alternative types of remedy: damages and an accounting of profits. Damages represent the inventor's loss, which may include the patent holder's lost profits from sales or lost royalty payments. An accounting of profits, by contrast, is measured by the profits made by the infringer, rather than the amount lost by the inventor. Here, damages are not available, in view of Monsanto's election to seek an accounting of profits.

[65] The plaintiff in a patent infringement action may seek compensatory relief by either proof of damages or accounting of profits, however, the Court retains its discretion to refuse the remedy. See: *Apotex Inc. v Bayer Inc.*, 2018 FCA 32 at para 67; and *Nova Chemicals Corp. v Dow Chemical Co.*, 2022 SCC 43 at para 109.

[66] In *Louis Vuitton Malletier S.A. v Torf*, 2024 FC 1152, the Federal Court of Canada granted summary judgment for violations of the *Trademarks Act*, RSC 1985, c T-13, and the *Copyright Act*, RSC 1985, c C-42 based on the

defendants' sale of counterfeit merchandise. McHaffie J., at paras. 86-92 reviewed principles developed by that Court for assessing damages. Those principles recognize the difficulty, if not impossibility, of determining exact amounts.

[67] To overcome this difficulty, McHaffie J. wrote at para. 88 that "This Court has developed an approach of attempting to estimate the harm suffered by a plaintiff based on a lump-sum global damages assessment, …". Under this method, a standard amount is multiplied against each instance of infringement or inventory turnover to calculate the lump-sum damage award. McHaffie J. went on at para. 91 to caution that "In adopting such multipliers, caution and common sense must be applied to ensure that multiplication of a standard amount based on assertions of "instances of infringement" does not undermine the very principle of damages being compensatory or the requirement that a plaintiff prove their damages".

[68] I accept that plaintiffs in an action for infringement of plant breeders' rights under the *Act* face the same difficulty in quantifying damages. Difficulty in quantifying damages is not a reason to deny damages, provided the plaintiff can provide sufficiently reliable methods for quantifying damages. This Court, like the Federal Court, should be open to different approaches to quantifying damages.

[69] Alliance, in its Statement of Claim, identified both a claim for accounting for unlawful profit in paragraphs 18 and 21(d) and for general damages in paragraph 21(c). I find that a plaintiff in an action for infringement for plant breeders' rights may, on proof of liability, seek compensatory relief

either through accounting for unlawful profit or by proof of general damages, subject to the Court's discretion to refuse either remedy.

[70] Alliance now seeks an award of damages of $1,306,513.95. That sum is calculated based on what Alliance calls "the Missing Grain Formula": "Missing Grain = D Produced – (D sold + D Stored + D Seeded)", with D referring to seed. The calculations are set out in detail in the Karlowsky Affidavit, paras. 33 – 57 and are summarized in Alliance's Brief of Law at paras. 42 - 66.

[71] The Missing Grain Formula used the acres, production and storage reported to the Saskatchewan Crop Insurance Corporation. (Karlowsky Affidavit, para. 36 & Exhibit N) The calculation method, while using objective data, necessarily involves some estimation, given the lack of reliable records of grain production and sales from Mr. Fournier or G.F. Farms Ltd.

[72] The final step in the quantification of damages is summarized in a table found in the Karlowsky Affidavit at paragraph 56 and Alliance's Brief of Law at paragraph 65. That table multiplies the levy or royalty Alliance should have received from sale of each bushel of Verona Seed against the missing grain to calculate the actual loss sustained by Alliance. (Karlowsky Affidavit, para. 55)

Year	Levy amount per bushel	Missing Grain	Calculated Actual Loss
2013	$4.50	43,733 bu [bushels]	$196,798.50
2014	$3.75	72,537 bu	$272,013.75
2015	$3.30	161,319 bu	$532,352.70

2016	$3.30	92,530 bu	$305,349.00
Total:			$1,306,513.95

[73] Any gaps in data are attributable to Mr. Fournier, who says he either did not keep records or destroyed the records he had made. (See, for example, Karlowsky Affidavit, Exhibit D transcript at p. 80) I find that the failure to produce those records, including any destruction if it occurred, was intended to conceal his unlawful infringement of plant breeders' rights.

[74] Mr. Fournier was put on notice of Alliance's claim long before issuance of the Statement of Claim through the letters from its lawyers, beginning in March 2015. (Karlowsky Affidavit, para. 18 & Exhibit G) That letter (and subsequent letters) included a demand for production of sale records. Those records were never produced, despite the requirements of the discovery process and Court orders.

[75] I doubt Mr. Fournier's explanation for not having records. Farmers, like other business persons, understand the importance of records to the success of their business. And unlike some other business, the agricultural industry is relatively closed and concentrated, with the result that there are only so many grain buyers. Those sophisticated companies also keep records, which should have been obtainable, even if Mr. Fournier had destroyed his records.

[76] I note that Mr. Fournier's refusals to 12 undertakings were to contact his accountant for information and one refusal was to contact agencies from which he may have obtained hail insurance for documents they might have in relation to his farm operation.

[77] This withholding of relevant information is consistent with his general lack of cooperation in the litigation process, which caused delay and resulted in a finding of contempt. (Karlowsky Affidavit, paras. 19-21, 23, 24, 26-28, 30-32 and 34 & Exhibit J) Mr. Fournier should not benefit from his lack of cooperation.

[78] Alliance has used the best available data for its calculations. I accept the Missing Grain Formula as sound and agree with the application of the levy to determine actual loss. At the same time, the Court must be careful in awarding damages based on a best estimate of loss.

[79] As stated above, I do accept that farming is an uncertain enterprise. Crop yield projections are sometimes exceeded and sometimes not met. It is truly said that "There is many a slip 'twixt cup and lip". Alliance argued that there was no evidence of crop loss from such hazards. But Alliance's claim covers four crop years, increasing the likelihood of some such event or events having occurred during that period.

[80] I exercise my discretion to award a lower amount of damages by reducing the calculated total by 10%: $1,306,513.95 - $130,651.39 = $1,175,862.56. In doing so, I recognize that I may somewhat arbitrarily favour the defendant and risk allowing a wrongdoer to profit from his wrongful acts.

[81] I award general damages of $1,175,862.56.

[82] Alliance in its Statement of Claim sought interest, presumably on any damage award, but did not propose calculation of interest in its oral or written argument. If still sought, Alliance has leave to make further application on the question of interest.

Aggravated or punitive damages

[83] Alliance requests additional damages in the form of aggravated or punitive damages in the amount of $100,000.00. The purpose of such an award is to both provide specific and general deterrence against infringement of plant breeders' rights and denunciation of Mr. Fournier's wrongful acts.

[84] In *Whiten v Pilot Insurance Co.*, 2002 SCC 18 [*Whiten*], Binnie J. for the majority wrote at para. 94 that "Punitive damages are very much the exception rather than the rule … imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." (Emphasis in original) The judgment went on to caution that any award of punitive damages must be reasonably proportionate to the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant.

[85] Having regard to the factors set out in *Whiten*, I am satisfied that an award for punitive damages is appropriate in this case. Parliament has decided, for reasons stated earlier, that plant breeders' rights deserve protection of the law. As this case shows, plant breeders are vulnerable to infringement, which is difficult to detect and prove. In this case, the infringement continued over four years. As previously stated, Mr. Fournier was uncooperative in the litigation process. In mentioning this last factor, I am conscious not to impose double punishment for the contempt, which was separately sanctioned earlier.

[86] For these and other reasons, I exercise my discretion to award punitive damages in the amount of $50,000.00, in addition to the general damage award.

What costs, if any, should be awarded?

[87] Alliance sought costs on a solicitor-client basis.

[88] In *Hope v Gourlay*, 2015 SKCA 27 at para 47, Chief Justice Richards for the Court of Appeal repeated the caution that solicitor-client costs are awarded in rare and exceptional cases only. I am not satisfied that this is one of those exceptional and rare cases.

[89] Rule 11-1 of *The King's Bench Rules* provides guidance for award of costs. This was a complex and difficult action which merits an award of costs on Column 3 of the Tariff of Costs.

Summary of judgment

[90] Alliance is granted judgment against Mr. Fournier for infringing its plant breeders' rights under the *Plant Breeders' Rights Act* with the following relief ordered:

1. Declaration that Guy Fournier contravened the *Plant Breeders' Rights Act* by advertising and selling CDC Verona certified seed in 2013, 2014, 2015 and 2016;

2. General damages of $1,175,862.56;

3. Punitive damages of $50,000.00;

4. Costs of the action calculated on Column 3 of the Tariff of Costs, excepting those applications where costs were specifically ordered previously.

[91] Before taking out judgment, Alliance may arrange with the local registrar to return to Court to address the issue of interest, assuming Alliance still seeks interest and is unable to reach agreement with Mr. Fournier on its calculation.

[92] Finally, I thank counsel for their assistance through their able and informative submissions.

J.
D.N. ROBERTSON