KING'S BENCH FOR SASKATCHEWAN

Citation: 2026 SKKB 19

Date: **2026 01 21**
File No.: KBG-SA-01070-2024
Judicial Centre: Saskatoon

BETWEEN:

THE BANK OF NOVA SCOTIA

PLAINTIFF

- and -

KAPELUCK AGRO LTD. and TERRANCE KAPELUCK

DEFENDANTS

Counsel:

Nicholas P. Conlon	for the plaintiff
William P. Langen	for the defendants

FIAT
JANUARY 21, 2026

McMURTRY J.

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[1] The plaintiff, Bank of Nova Scotia, claims against the defendant, Terrance Kapeluck, for money owing under a revolving line of credit granted to the defendant by the plaintiff. (The plaintiff's claim against Kapeluck Agro Ltd. is not in issue on this application).

[2] The defendant seeks dismissal of the plaintiff's claim arguing a full settlement was reached between the parties. The plaintiff agrees an agreement was reached to settle its claim. However, it submits the defendant subsequently breached the agreement, leaving no settlement for this Court to enforce.

[3] Both parties relied on GA-PD #9(7) (General Application Practice Directive) in requesting the chambers judge to decide the merits of this application. I agreed it was appropriate to do so because the facts are not in dispute and the merits can be decided upon review of the documents in evidence before me.

Background to the Application

[4] After the parties had filed pleadings, defendant's counsel wrote to plaintiff's counsel, on January 28, 2025, advising he was instructed "to make a settlement offer, to resolve this matter at this early stage" (Affidavit of Terrance Kapeluck, sworn September 15, 2025 [Kapeluck Affidavit], Exhibit A). Defendant's counsel set out the terms of its settlement offer, which included the following:

> My client will pay to your client the all-inclusive sum of $75,000.00 as full and final satisfaction of this claim, payable to your law firm in trust, within 30 days of acceptance of this offer ...
>
> (Kapeluck Affidavit)

[5] The plaintiff refused the offer, but the parties continued to negotiate thereafter over the amount the defendant would pay, and the plaintiff would accept, to settle the claim. On March 4, 2025, counsel for the defendant wrote to counsel for the plaintiff as follows:

> ... my client has instructed me to offer to pay your client the all-inclusive sum of $125,000.00. This offer is made on the same terms as outlined in my January 28, 2025 letter to you. ...
>
> (Kapeluck Affidavit, Exhibit F)

[6] The plaintiff accepted the offer of $125,000.00, by email dated March 6, 2025, adding "We look forward to receiving payment within 30 days of the date of this letter ...." (Kapeluck Affidavit, Exhibit G).

[7] On March 11, 2025, defendant's counsel sent draft Minutes of Settlement to the plaintiff, which included the following terms:

> 1. The Defendant ... shall pay to the Plaintiff ... the total sum of ... (**$125,000.00**) (the "**Settlement Proceeds**") as full and final satisfaction of the Plaintiff's claim in the Action.
>
> 2. The Settlement Proceeds shall be paid on or before April 5, 2025, by way of bank draft or solicitor's trust cheque payable to ...
>
> ...
>
> 9. These Minutes of Settlement shall be binding upon the parties hereto, ... and time shall, in all respects, be of the essence.
>
> (Emphasis in original)
>
> (Kapeluck Affidavit, Exhibit H)

[8] The plaintiff returned a signed copy of the draft Minutes of Settlement to the defendant, on March 14, 2025. However, on March 18, 2025, defendant's counsel requested an extension of the payment date to May 1, 2025, from April 5, 2025. The plaintiff agreed to the requested extension in an email dated March 26, 2025.

[9] The settlement proceeds did not arrive on May 1, 2025. Plaintiff's counsel wrote to defendant's counsel, the same day, seeking confirmation that the latter had the funds in trust. He received no such confirmation until May 9, 2025, when he received the following email from defendant's counsel:

> I received the settlement funds and can send a trust cheque to your office today <u>if your client will agree to the settlement on the same terms as before</u> and signed with the only change being funds payable by today or as soon as you can get instructions. Please advise and we will send funds and conclude this matter.
>
> (Emphasis added)
>
> (Kapeluck Affidavit, Exhibit O)

[10] Plaintiff's counsel responded that the plaintiff would no longer "accept the proposed settlement [because of] your client's failure to execute the settlement agreement and comply with its stipulated terms" (Kapeluck Affidavit, Exhibit P). The defendant then brought this application.

Relevant Case Law

[11] In *Great Sandhills Terminal Marketing Centre Ltd. v J-Sons Inc.*, 2008 SKCA 16, the Court of Appeal discussed the requirements for reaching a binding agreement:

> [20] A fundamental requirement of Rule 184A is the existence of an agreement to settle. The obligation of establishing a mutual intention by the parties to be bound by essential terms agreed upon rests with the person advancing an agreement. Of particular note in the instant appeal, as a matter of construction, is whether the agreement advanced by the appellants is one wherein the parties agreed upon all essential terms or one that is conditional upon the execution of a future agreement incorporating an additional condition or term. In the latter event, an agreement might not be constituted, depending on the nature of the condition to be met. [Citations omitted]
>
> [21] The law of contracts applicable in circumstances where the parties to an action pursued a settlement thereof is succinctly articulated in *Fieguth v. Acklands Ltd.* (1989), 59 D.L.R. (4th) 114 (B.C.C.A.). In *Fieguth*, the plaintiff accepted a settlement offer pursuant to which the defendant would pay the plaintiff $5,000 and the plaintiff would release it from all claims. Counsel for the defendant forwarded to plaintiff's counsel a cheque for $4,000, being the $5,000 agreed upon, less taxes and other compulsory deductions, and a release containing excessive covenants and indemnities. The plaintiff maintained that the deductions breached the settlement agreement and ended it.
>
> [22] The trial judge in *Fieguth* accepted the argument to the extent he held that the letter enclosing the subject funds and the release form constituted a counter-offer. The British Columbia Court of Appeal set aside the judgment below based on reasons provided by McEachern C.J.B.C. After considering a number of cases where a settlement agreement was found not to exist by

virtue of steps taken by the defendant being held to be a counteroffer, including *Bradley v. Elford* [1987] B.C.J. No. 362 (C.A.) (QL) on which the plaintiff relied, McEachern C.J.B.C. articulated the governing principles at pp. 121-23:

> In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.
>
> The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.
>
> Thus, it seems to me that the plaintiff in this case could have taken the position that he would not suffer a deduction for tax or that he would not execute an overreaching release, or he could have taken the same position on the tax but only executed a general release or he could have taken some other position.
>
> The defendant on the other hand could have stood firm on the tax but relented on the release and the matter might have been worked out or either party could have applied for summary relief under s. 8 of the *Law and*

> *Equity Act*, R.S.B.C. 1979, c. 224, or Rule 10(1)(b), or either party may have commenced an action for breach of the settlement contract and utilized Rule 18A, *Rules of Court* (B.C.).
>
> . . .
>
> It should not be thought that every disagreement over documentation consequent upon a settlement, even if insisted upon, amounts to a repudiation of the settlement. Many such settlements are very complicated such as structured settlements, and the deal is usually struck before the documentation can be completed. In such cases the settlement will be binding if there is agreement on the essential terms. When disputes arise in this connection the question will seldom be one of repudiation as the test cited above is a strict one, but rather whether a final agreement has been reached which the parties intend to record in formal documentation, or whether the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete. Generally speaking, litigation is settled on the former rather than on the latter basis and, parties who reach a settlement should usually be held to their bargains. Subsequent disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar. It will be rare for conduct subsequent to a settlement agreement to amount to repudiation.

[12] In *Di Millo v 2099232 Ontario Inc.*, 2018 ONCA 1051, the Ontario Court of Appeal explained the purpose of a "time is of the essence" clause in an agreement:

> [31] A "time is of the essence" clause is engaged where a time limit is stipulated in a contract. The phrase "time is of the essence" means that a time limit in an agreement is essential such that breach of the time limit will permit the innocent party to terminate the contract.
>
> [32] *Garner's Dictionary of Legal Usage,* 3d ed. (Oxford: Oxford University Press, 2011) explains "time is of the essence" as follows, at p. 895:

> When a contractual stipulation relating to the time of performance is "of the essence" of a contract, a party's failure to meet that stipulation automatically justifies the other party's rescinding the contract – no matter how trivial the failure. If, on the other hand, time is not of the essence, then the failure to comply with a stipulation about time will justify rescission only if there is substantial failure in performance.

[33] Similarly, Geoff Hall explains that "[t]he phrase ["time is of the essence"] is meant to evoke the notion that failure to observe stipulations in a contract as to when certain events are to occur will entitle the other party to rescind the contract": Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis, 2016), at p. 379.

[34] Geoff Hall explains how "time is of the essence" clauses are somewhat unusual from the perspective of contractual interpretation at p. 380:

> From the broader perspective of contractual interpretation, time-is-of-the-essence clauses are an interesting phenomenon in that they operate somewhat independently of the principles of contractual interpretation generally. Unlike most other contractual provisions, the meaning of such clauses does not particularly turn on the intentions of the parties. Rather, the mere invocation of the phrase imports a series of rules of law which are imposed on the parties.

These rules of law include, for example, the rule that only a party who is ready to perform can rely upon a "time is of the essence" clause to terminate the contract for the other party's non-compliance with the provision: Hall, at p. 382.

[35] These descriptions of "time is of the essence" clauses highlight that a "time is of the essence" clause does not serve to impose a time limit but rather dictates the consequences that flow from failing to comply with a time limit stipulated in an agreement.

[13] In *1473587 Ontario Inc. v Jackson*, 2005 CanLII 4578, 74 OR (3d) 539 (ONSC) [*Jackson*], a purchaser of land neglected to pay a deposit within five days of execution of the agreement, as stipulated in the agreement. Rutherford J. held the

vendors could treat the agreement as discharged.

[14] The agreement in *Jackson* had provisions making time of the essence, as in the agreement reached between these parties. The relevant provisions in *Jackson* read:

> [4] …
>
> > 21. This offer, when accepted, shall constitute a binding contract of purchase and sale, and time in all respects shall be of the essence of this Agreement.
> >
> > 22. Time shall be of the essence of this Agreement, but no extension of time for the making of any payment or the doing of any acts hereunder shall be deemed to be a waiver or modification of or affect this provision.

[15] Rutherford J. held that clauses 21 and 22 were an expression of "clear intent ... by the parties [to make] time of the essence in all respects" (*Jackson* at para 17). He explained:

> [19] How more clearly could contacting parties make conditions as to the timing of performance essential than by simply saying, time in all respects shall be of the essence of this agreement? In my opinion, the provisions in clauses 21 and 22 of this agreement, drawn as it was by a professional agent of Loblaw and entered into by sophisticated people of business acumen, clearly signaled that any breach of any of the obligations in the agreement calling for performance at a specified time amounted to the breach of an essential element of the contract. That being the case, the law is clear that such breach may be treated by the other party as discharging the agreement and relieving against performance by that other party.
>
> [20] The holding of parties to their bargain in this respect perhaps met its zenith in *Union Eagle Ltd. v. Golden Achievement Ltd.*, [1997] A.C. 514, [1997] 2 All E.R. 215 (P.C.) in which completion of the purchase of a $4.2 million flat was to take place on or before September 30, 1991 and before 5:00 p.m. that day. The purchaser's agent arrived at 5:10 pm. and the vendor rescinded the contract at 5:11 pm. Citing the practicalities of business as the reason for restraining equity

from relieving against clear contractual terms, Lord Hoffman wrote at para. 9:

> ... in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.

He concluded his opinion with this advice at para. 18, which I think entirely apposite to the case before me:

> The fact is that the purchaser was late. Any suggestion that relief can be obtained on the ground that he was only slightly late is bound to lead to arguments over how late is too late, which can be resolved only by litigation. For five years the vendor has not known whether he is entitled to resell the flat or not. It has been sterilised by a caution pending a final decision in this case. In his dissenting judgment, Godfrey J.A. said that the case "cries out for the intervention of equity". Their Lordships think that, on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene.

[16] Rutherford J. held that the provision asserting “time shall be of the essence of this Agreement” was an essential element of the agreement, the breach of which discharged the agreement. Of further note, he found he could grant a summary dismissal of the purchaser’s action:

> [23] In my view, the law applicable to this case is clear, as it ought to be. When Loblaw, albeit through inadvertence, failed to pay the deposit cheque within the time specified, it breached

> a term which the parties had agreed was essential to the contract. That made it a fundamental breach entitling the Vendors to treat the contract as discharged and releasing them from their obligations under it. The Vendors were under no obligation to assert their right to treat the contract as ended any earlier than they did. They did nothing to injure Loblaw or lead it to act against its interests by not asserting their right on the first day of default, and did nothing which in law or fact could fairly be construed as having waived or extended the time provision. By pure happenstance, another party came along at precisely the same time as Loblaw fell into breach, and the Vendors had to know what their right was in terms of dealing with the new party. The law entitled them to that in such circumstances.
>
> [24] As a pure question of law, Loblaw's claim against the defendants, based entirely on the agreement of purchase and sale of September 18, 2003, cannot succeed. On the undisputed facts, that agreement was discharged as a result of the breach of an essential term thereof by Loblaw, a breach that the Vendors did not waive, did not accept and which they were entitled to treat and did treat as discharging the agreement and ending any and all obligation they had under it.

[17] The plaintiff argues that an agreement to extend the original payment deadline does not alter the agreement's stipulation that time is of the essence, a conclusion reached in *Salama Enterprises (1988) Inc. v Grewal*, 1992 CanLII 4035, 90 DLR (4th) 146 (BCCA) [*Salama*].

[18] In *Salama*, the Court of Appeal adopted the following statement from the earlier decision of *Landbank Minerals Ltd. v Wesgeo Enterprises Ltd.*, 1981 CanLII 1209 at para 29, [1981] 5 WWR 524 (ABQB):

> [29] I think that, where time is of the essence of an agreement and there is an extension of time for performance of an obligation under the agreement to a specified date, the effect of the extension on the essentiality of time must be determined in the context of the circumstances of the case. If there are circumstances which make it unjust or inequitable for a party to insist that time is of the essence, the court may refuse to give effect to this provision in the agreement. In the absence of such circumstances, however, the extension of time simply results in

> the substitution of a later date for the one stipulated in the agreement. I do not think that it in any way affects the provision in the agreement that time is of the essence.

Decision

[19] Throughout their negotiations, the parties proposed two elements for a settlement: the price to be paid by the defendant to the plaintiff and the date at which such payment had to be made. The parties eventually agreed, on March 6, 2025, on payment of $125,000 by the defendant to the plaintiff, which payment was to be made within 30 days.

[20] The Minutes of Settlement drafted by the defendant specified the 30 days ended on April 5, 2025. Thereafter, by agreement, the deadline was extended to May 1, 2025. No further extension was requested before May 1, 2025, and there is no evidence of waiver of the deadline by the plaintiff. Consequently, when the defendant failed to meet the May 1, 2025 deadline, the plaintiff was entitled to treat the agreement as at an end. The defendant recognized that a new agreement was necessary when he wrote to plaintiff's counsel, on May 9, 2025, seeking a new agreement:

> I received the settlement funds and can send a trust cheque to your office today <u>if your client will agree to the settlement on the same terms as before</u> and signed with the only change being funds payable by today or as soon as you can get instructions. Please advise and we will send funds and conclude this matter.
>
> [Emphasis added]
>
> (Kapeluck Affidavit, Exhibit O)

[21] I find that the provision setting time for payment was essential to forming the agreement between the parties. It was not a term related to performance, or formal completion of the agreement. The plaintiff was entitled to consider the breach of the time for payment provision to be a breach of the agreement, releasing it from further obligation under the agreement.

[22] The application is dismissed, with costs.

J.

J.E. McMURTRY