KING'S BENCH FOR SASKATCHEWAN

Citation: **2026 SKKB 72**

Date: **2026 03 30**
Docket: QBG-SA-00679-2020
Judicial Centre: Saskatoon

BETWEEN:

JOCELYN LEBLANC and MARYLENE LEBLANC

Plaintiffs

- and -

KENNETH ALAN SCHWAERZLE and DEBRA DARLENE SCHWAERZLE

Defendants

Counsel:

Trent N. Adamus — for the plaintiffs
Robert G. Kennedy, K.C. and Braydon J. Goldstein — for the defendants

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JUDGMENT — CURRIE J.
March 30, 2026

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[1] In this action the plaintiffs, Jocelyn Leblanc and Marylene Leblanc, seek an order of specific performance against the defendants, Kenneth Alan Schwaerzle and Debra Darlene Schwaerzle. The plaintiffs seek specific performance of a contract that they say they have made with the defendants, by which the plaintiffs would purchase the defendants' chicken farming operation including land, equipment and a portion of

the defendants' chicken production quota.

[2] In the application that is before me, the defendants ask for summary judgment dismissing the claim.

Circumstances

[3] In the fall of 2019 the plaintiffs and the defendants began negotiations for the plaintiffs' potential purchase of the defendants' farming operation. Eventually the plaintiffs signed a letter of intent ("LOI") that was addressed to the defendants and dated November 28, 2019. The defendants signed the LOI on November 29, 2019.

[4] The provisions of the LOI are key to this action, and so I reproduce all of the contents of the LOI here:

> Dear Sir and Madame,
>
> Further to the various discussions and meetings held with yourself (hereinafter the "**Vendor**"), Jocelyn Leblanc and Marylène Leblanc (hereinafter the "**Purchaser**") hereby confirms its intention to buy the assets described in the following letter (the "**Assets**") in respect of your poultry farm business enterprise located at the property legally described as LSD 13 Sec 12 Twp 22 Rge 33 W1 Extension 0, Langenburg, Saskatchewan.
>
> 1. **Closing**. At the latest by March 6th, 2020 (the "**Closing Date**") or at any other given date set forth by and between the Purchaser and the Vendor. The Parties acknowledge and agree that the Closing Date is intended to occur between the Vendor's business cycles.
>
>   Such Assets to be acquired shall include, but not limited to:
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>   Surface Parcel #145449973, LSD 13 Sec 12 Twp 22 Rge 33 W 1 Extension 5 (the "**Land**")
>   All buildings located on the Land
>   Barns (2)
>   House (1)
>   Machinery and equipment

Computers
Chicken quota (61,000 units)

The Purchaser shall not be assuming any debt obligations of the Vendor and the Assets shall be acquired by the Purchaser free and clear of all liens and/or encumbrances.

Notwithstanding the forgoing [*sic*], the Parties agree that the Vendor's Bobcat tractor shall be excluded from the Assets.

2. **Price**. Subject to any adjustments contemplated herein, the sale of the Assets will be made for the aggregate sum of $7,829,000 (the "Purchase Price") to be paid to the Vendor on the Closing Date. The Parties agreement [*sic*] that the Purchase Price does not include GST or PST, if applicable. The Parties agree that the Purchase Price shall be allocated amongst the Assets as mutually agreed in the Asset Purchase Agreement (as defined later herein).

   Following execution of this Letter of intent, the Purchaser shall deposit $375,000.00 (the "**Deposit**") on November 30th, 2019 with the Vendor's counsel to be held as a deposit and applied to the Purchase Price on Closing Date.

   The deposit shall be refundable to the Purchaser in the event (i) the vendor breaches its obligation to close the proposed transaction or (ii) the Purchaser does not remove any conditions contemplated in the Asset Purchase Agreement (as defined later herein).

3. **Agreements.** The following agreement, in the form and content satisfactory to the legal counsels of the Parties, must be signed between them at the Closing date, namely:

   a. An Asset Purchase Agreement ("the "**Asset Purchase Agreement**") between the Vendor [and] the Purchaser, which will include, amongst others, the terms and conditions entered into by the parties and normally found in agreements of such nature as well as the representations and warranties usual to this type of transaction.

4. **Access to information and documentation.** The Vendor will allow the Purchaser, its mandatories, its legal and financial representatives to review and assess the due diligence material as requested by the Purchaser and to

complete the examination and inspection of the Assets. The Vendor's representatives will allow the Purchaser and its mandatories and representatives full access to and will furnish copies of all applicable books, ledgers, permits, certificates and licences and will supply in every other way their collaboration to the Purchaser, its mandatories and representatives to facilitate the due diligence to be effected.

5. **Undertaking of Vendor**. The Vendor will collaborate with the Purchaser in the obtaining of all permits, authorizations, licences, registrations, from any and all governmental authorities or any other person or persons, which may be necessary or advisable for the completion of the transactions contemplated herein[.]

6 **Conduct of business**. Up to the Closing Date, the Vendor undertakes to conduct the operations and the affairs of its business, including the Chicken Quota as they are currently conducted or planned to be conducted, with diligence and in the normal and usual way proper to the operations.

7. **Conditions**. The Purchase Price and the execution of Closing are in particular subject to the following conditions, to wit:

   a. the Purchaser will be satisfied to its entire discretion with the result of its due diligence and examination of all the Assets, to be completed or performed on or before January 17th, 2020;

   b. The obtaining by the Purchaser of loans to purchase the Assets to its entire satisfaction; such condition shall be satisfied no later than January 17th, 2020 by providing term sheet for financing commitments;

   c. The complete execution of the Asset Purchase Agreement. The Parties agree that the Purchaser shall provide a first draft of the Asset Purchase Agreement to the Vendor on or before January 31st, 2020;

   d. The approval in principal [*sic*] from CFS (Chicken Farmers of Saskatchewan) for the transfer of the Chicken Quota to the Purchaser.

8. **Employee.** The Parties acknowledge and agree that as part of the closing of the purchase of the Assets, the Purchaser shall make an offer of employment to the current employee of the Vendor on terms substantially similar to those

currently enjoyed by the employee.

9. **Lease.** The Parties acknowledge and agree that the Vendor's employee and his family currently reside in the home located on the Land and that the Purchaser, as part of the closing of the within transaction, shall take the Land subject to the tenancy.

10. **Confidentiality and exclusive rights.** The Vendor expressly agrees that subsequent to the acceptance of these presents, it will not open, engage in or pursue talks discussions or negotiations relating to the sale of the Assets, with any other party and that it will not disclose in any way, shape or form whatsoever, the nature of the present Letter of Intent or the fact that negotiations between the Vendor and Purchaser are being carried out (excepting its professional advisors), unless required to do so by Law. In the event that successful conclusion has not been reached with the due diligence review or the completion of final negotiations regarding any outstanding issues, then, the vendor, and/or the Purchaser have the ability to terminate negotiations as well as the exclusive period. Deposit and due diligence material will be immediately returned to the applicable parties.

11. **Applicable laws.** The foregoing Letter will be interpreted according to the laws of the Province of Saskatchewan which are applicable in such cases. The Parties attorn to, and irrevocably agree to be bound by and subject to, the exclusive jurisdiction of the Courts of the Province of Saskatchewan.

12. **Fees and disbursements.** The Vendor and the Purchaser recognize that each of them will be responsible to pay for its own expenses, fees, costs and disbursements relating to the present Letter of Intent and the asset purchase transaction.

13. **Effect of this Letter.** The present Letter is the declaration of the formal intent of the Purchaser to proceed to the sale of the Assets. Other than Section 10 of this Letter (Confidentiality and No Shop), nothing contained herein shall be construed to create any obligation or liability of any nature on the part of the Purchaser or the Vendor. Unless and until the Asset Purchase Agreement between the Purchaser and the Vendor has been executed and delivered, neither the Purchaser nor the Vendor will be under any

> obligation to the other with respect to the transaction contemplated herein except as contemplated in Section 10 of this Letter.
>
> 14. **Counterpart and Electronic Signature.** This Letter may be executed in several counterparts, each of which will be deemed to be an original and all of which will constitute one and the same instrument. An electronic or facsimile transmission of this Letter signed by any person named below will be sufficient to establish the signature of that person to constitute the consent in writing of that person to the Letter.
>
> The Parties agree to proceed to the due diligence period as promptly as possible.
>
> [Emphasis in original]

[5] As contemplated in clause 7(d) of the LOI, the parties signed the appropriate quota transfer form and on February 7, 2020 the plaintiffs submitted it to the Chicken Farmers of Saskatchewan ("CFS"), seeking approval in principle of the quota transfer. By way of a February 14, 2020 email the CFS advised the plaintiffs that the application for approval of the quota transfer was denied.

[6] The CFS explained that approval was denied because, under the parties' agreement, the defendants would be transferring all of their production facilities to the plaintiffs but would be transferring only some of their quota to the plaintiffs. Thus, under the agreement the defendants would retain a chicken production quota but would not have a production facility. The email itself said:

> …
>
> I regret to inform you that the transfer from L289 (TC Cluckers) to Jocelyn Leblanc and Marylene Leblanc has been denied by the CFS Board of Directors, due to the fact that the balance of quota remaining after the transfer and owned by **seller** (TC Cluckers – Ken and Debbie Schwaerzle L289) does not have a OFF SP approved production facility.
>
> …
>
> [Emphasis in original]

[7] Following receipt of the CFS's denial of approval of the quota transfer, the plaintiffs and the defendants tried to find a way to structure an agreement that could meet the approval of the CFS. While so doing, through their lawyers they continued to work on the terms of an Asset Purchase Agreement ("APA").

[8] As for structuring an agreement that would be acceptable to the CFS, by the end of April 2020 the parties were considering two possibilities. One possibility would have had the defendants transfer *all* of their quota to the plaintiffs, who would give the defendants an option to repurchase the "excess" quota (that is, the amount of quota that was not being transferred under the LOI) for a nominal amount once the defendants had put other production facilities in place.

[9] The other possibility under consideration would have had the defendants transfer *all* of their quota to the plaintiffs, who would hold the "excess" quota in a bare trust for the defendants.

[10] All of these discussions (conducted almost entirely in writing between the parties' lawyers) proceeded through to the end of April 2020, with the draft APA taking shape and with the parties considering a transaction that would address a transfer of all of the defendants' quota on either the option basis or the bare trust basis.

[11] On April 29, 2020 the defendants advised the plaintiffs that they were withdrawing from negotiations, so that there would be no sale to the plaintiffs. The plaintiffs then commenced this action.

[12] The plaintiffs assert that the LOI constitutes a binding contract for sale of the chicken farming operation. In the alternative (if the LOI alone lacks some material terms), they say that the LOI combined with subsequent agreement constitutes a binding contract. In the further alternative, the plaintiffs allege that the defendants owed them a duty to negotiate in good faith, and that the defendants breached that duty.

[13] The defendants respond that in the LOI the parties agreed that they would enter into a contract, but that a binding contract for sale ultimately was not made because its existence was subject to two conditions, neither of which was met. They point to clauses 7(c) and 7(d) of the LOI, which set out the condition that the APA be executed and the condition that the CFS approve in principle the transfer of the defendants' quota to the plaintiffs. The defendants also assert that there was no contract because there was no agreement on some essential terms, specifically how to implement a transfer of the quota. Further, the defendants deny that they had a duty to negotiate in good faith after the CFS had denied approval, but in any event they say that they did negotiate in good faith.

Issues

[14] The first question to be determined is whether summary judgment is appropriate with respect to any issue in this case. If summary judgment is not appropriate with respect to an issue, then that issue will be left for determination at trial. If summary judgment is appropriate with respect to an issue, then that issue must be determined here.

[15] The other questions start with the plaintiffs' assertion that there exists a binding contract for the sale of the chicken farming operation (a contract that can be the subject of an order for specific performance), and with the defendants' submission of specific reasons for concluding that a binding contract does not exist. The other questions include also the question of a duty to negotiate in good faith.

[16] On this basis, the issues are:

(a) Whether summary judgment is appropriate in this case.

(b) Whether a binding contract for sale does not exist because of the unfulfilled condition requiring the approval of the Chicken Farmers

of Saskatchewan.

(c) Whether a binding contract for sale does not exist because of the unfulfilled condition requiring execution of the Asset Purchase Agreement.

(d) Whether a binding contract for sale does not exist because some material terms were not agreed.

(e) Whether the defendants had a duty to negotiate in good faith, and if so whether they met that duty.

Law governing summary judgment

[17] Rule 7-5 of *The King's Bench Rules* describes the circumstances in which a summary judgment may be granted:

> **7-5**(1) The Court may grant summary judgment if:
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> (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.
>
> (2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:
>
> (a) shall consider the evidence submitted by the parties; and
>
> (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
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> (i) weighing the evidence;
>
> (ii) evaluating the credibility of a deponent;
>
> (iii) drawing any reasonable inference from the evidence.

> (3) For the purposes of exercising any of the powers set out in subrule (2), a judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> (4) If the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.
>
> (5) If the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.
>
> (6) If the Court is satisfied there are one or more genuine issues requiring a trial, the Court may nevertheless grant summary judgment with respect to any matters or issues the Court decides can and should be decided without further evidence.
>
> (7) If an application for summary judgment is dismissed, either in whole or in part, a judge may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the ordinary way.
>
> (8) If an application for summary judgment is dismissed, the applicant may not make a further application pursuant to rule 7-2 without leave of the Court.

[18] The court's application of Rule 7-5 is addressed in *Hryniak v Mauldin*, 2014 SCC 7. At para. 66 Justice Karakatsanis observed that summary judgment may be granted:

> (a) where the judge determines, based only on the evidence that is before the court, that there is no genuine issue requiring a trial; or
>
> (b) if there is a genuine issue requiring a trial:
>
> (i) where the issue can be resolved through the court's Rule 7-5(2) fact-finding powers; and
>
> (ii) where it is in the interests of justice to exercise the Rule 7-5(2)

fact-finding powers and to grant judgment.

[19] In *Tchozewski v Lamontagne*, 2014 SKQB 71, Justice Barrington-Foote provided more detail, saying at para. 30:

> [30] The central question posed on a Rule 7-2 application, accordingly, is whether summary judgment will achieve what Karakatsanis J. calls (at para. 28) the "principal goal", and Popescul C.J.Q.B calls "the overarching consideration" (at para. 49, *Pervez* [2013 SKQB 377]): that is, a fair process that results in a just adjudication of the dispute before the court. The answer to this question calls for an analysis of the affidavit and other evidence presented and the issues raised by the application, in the context of the litigation as a whole. In *Hyrniak*, Karakatsanis J. breaks that analysis down into discrete steps and key principles – a "roadmap" – based on the various elements of the summary judgment rules. In brief, the key elements of that roadmap, in the context of a Rule 7-2 application, are as follows:
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> 1. The court must first decide if there appears to be a genuine issue requiring a trial within the meaning of Rule 7-5(1)(a)), based solely on the evidence before the court, and without using the powers provided by Rule 7-5(2)(b) to weigh the evidence, evaluate credibility and draw inferences. (*Hryniak*, para. 66)
>
> 2. There will be no genuine issue requiring a trial if the judge is able to reach a fair and just determination on the merits based on the affidavit and other evidence. That will be so if the summary judgment process:
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>   (a) allows the judge to make the necessary findings of fact;
>
>   (b) allows the judge to apply the law to the facts; and
>
>   (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial. (*Hryniak*, para. 49)
>
> 3. The issue is not whether the summary judgment process is as thorough or the evidence is as complete as at trial. It is whether the judge is confident he or she can find the facts and apply the relevant legal principles so as to fairly resolve the dispute. If the judge has that confidence, proceeding to trial is

generally not proportionate, timely or cost effective. A process that does not give the judge confidence in his or her conclusions, on the other hand, is never proportionate. (*Hryniak*, paras. 50 and 57)

4. If there appears to be a genuine issue requiring a trial, the court should next determine if a trial can be avoided by using Rule 7-5(2)(b) powers to weigh evidence, evaluate credibility and draw inferences, and whether it is in the interests of justice that those powers be exercised only at trial. (*Hryniak*, para. 56)

5. In deciding whether there is a genuine issue requiring trial, and whether it is in the interests of justice to use the powers provided by Rule 7-5(2)(b) to avoid a trial, the court must consider the nature of the evidence and issues. It must also consider proportionality in the context of the litigation as a whole. The relevant factors may include, but are not limited to:

    (a) the complexity of the claim;

    (b) the amount at issue;

    (c) the importance of the issues;

    (d) the relative cost and speed of a summary judgment application, as compared to trial;

    (e) whether better evidence will be available at trial than on the application, and the nature and extent of the conflict in the evidence, including:

        (i) whether there is competing evidence from multiple witnesses, the evaluation of which would benefit from cross-examination;

        (ii) whether credibility determinations are at the heart of the issues to be determined; and

        (iii) whether credibility determinations are made more difficult by the shortage of reliable documentary yardsticks.

    (f) whether the court is able to fairly evaluate the evidence, including the extent to which it would assist the court to have evidence presented by way of a trial narrative, to hear and observe witnesses and to have the assistance of counsel in reviewing

the facts and the law within the conventional trial process;

(g) whether summary judgment would resolve all claims against all parties, or whether a trial will be necessary in any event, raising, among other things, the possibility of duplicative proceedings or inconsistent findings of fact; and

(h) whether the application could dispose of an important claim against a key party, thereby reducing cost and delay. (Rule 1-3, *Hryniak, supra*, paras. 58, 60 and 66, and *Pervez*, para. 48)

6. The court also has the discretion to permit a party to present oral evidence pursuant to Rule 7-5(3) if it would allow the court to reach a fair and just adjudication on the merits and is the proportionate course of action. (*Hryniak*, para. 63)

Whether summary judgment is appropriate in this case

[20] The parties have filed extensive affidavit evidence that presents the above history in greater detail. The evidence includes the relevant documents. This evidence appears to provide all of the facts that are relevant to the issues. Furthermore, on the face of the evidence there appears to be no contradiction in the recitation of events, and there appears to be no gap in that recitation.

[21] The plaintiffs assert, however, that the court cannot justly and fairly determine any of issues (b) through (e) without hearing the oral testimony of the parties at a trial. In so asserting, the plaintiffs make two arguments.

[22] First, they say that credibility is in issue on all of those issues. Specifically, the plaintiffs say that credibility is in issue on the matter of why the parties did what they did. Consequently, they argue, oral testimony at trial is required in order to present the court with the full picture of what happened.

[23] In so arguing, the plaintiffs are faced with the evidence of the plaintiff

Jocelyn Leblanc at para. 24 of her affidavit:

> 24. After February 14, 2020, there were several correspondences between Ms. Dube and Mr. Grieve [the lawyers for the plaintiffs and for the defendants, respectively] as well as two draft asset purchase agreements completed, details of which are accurately depicted in paragraphs 13. through 20. of the Affidavit of Ken [Schwaerzle] sworn July 27, 2021.

[24] Despite this statement as to the apparent completeness of the evidence, on this application the plaintiffs argue that there is more evidence to be presented to relate what happened, so that a trial is needed.

[25] I do not accept this argument. Effectively, the argument amounts to the plaintiffs saying that they have not complied with the requirement that, on this summary judgment application, they put their best foot forward by filing all relevant evidence on the application. The plaintiffs having chosen to hold back some evidence is not a reason for concluding that there exists a genuine issue requiring a trial.

[26] On this point, I add that I would not have been persuaded by the argument in any event. The determination of issues (b) through (e) will be based on the facts that are in evidence already. I see no conflict in the evidence that gives rise to a need to address the credibility of witnesses. The relevant facts are clear. The determination requires an analysis of those facts, along with interpretation of the documents.

[27] The plaintiffs' second argument is that the court cannot determine whether there was a contract for sale without hearing the oral testimony of the parties. In so saying, the plaintiffs refer to the remarks of Justice Rowe in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22:

> [35] A contract is formed where there is "an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration": *Scotsburn Co-operative Services Ltd. v. W. T. Goodwin Ltd.*, [1985] 1

> S.C.R. 54, at p. 63. The common law holds to an objective theory of contract formation. This means that, in determining whether the parties' conduct met the conditions for contract formation, the court is to examine "how each party's conduct would appear to a reasonable person in the position of the other party": *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, at para. 33.
>
> [36] For present purposes, it will suffice to focus on the requirement of intention to create legal relations. As G. H. L. Fridman explains, "the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": *The Law of Contract in Canada* (6th ed. 2011), at p. 15; see also S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 105. This requirement can be understood as an aspect of valid offer and acceptance, in the sense that a valid offer and acceptance must objectively manifest an intention to be legally bound: *Crystal Square*, at paras. 49-50.
>
> [37] The test for an intention to create legal relations is objective. The question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound: *Kernwood Ltd. v. Renegade Capital Corp.* (1997), 97 O.A.C. 3; *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, at p. 607. In answering this question, courts are not limited to the four corners of the purported agreement, but may consider the surrounding circumstances: *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99, 34 B.C.L.R. (6th) 248, at para. 17; *Crystal Square*, at para. 37.

[28] The plaintiffs say, specifically, that the court needs to hear the oral testimony of the parties as to whether they intended to be bound by a contract. As a matter of law, though, the determination of whether there has been a meeting of the minds (including an intention to be bound) does not depend on why each party did what she or he did, which is a subjective evaluation. Rather, the determination depends on an objective evaluation. It depends on whether, when all of the circumstances are considered, an objective reasonable bystander would conclude that there had been a meeting of the minds on all essential parts of the contract. Again, as Justice Rowe said

at para. 37:

> … The question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound …

[29] The plaintiffs also cite the following remarks of Justice Dawson in *Martel v Mohr*, 2011 SKQB 161 at para 40:

> [40] As *Bawitko* [(1991), 79 DLR (4th) 97, 53 OAC 314 (ONCA)] states, there are three separate principles contained within the basic notion that an "agreement to agree" is unenforceable. The first proposition is that there is no enforceable contract where essential terms of the agreement have not been agreed to, but have been left to the parties for future agreement. The second proposition is that there is no enforceable contract where the provisions of what has been agreed to are insufficiently certain. The third proposition is there is no enforceable contract where the parties intend that a preliminary agreement is not to create binding contractual relations until a subsequent formal document is executed. In examining all of the situations, the parties' subsequent conduct is an important factor. Conduct takes on great importance in assessing whether an arrangement goes beyond an unenforceable agreement to become a binding contract. It is clear that the courts have a strong inclination to find a binding contract if the parties acted as if they thought they had one. Subsequent conduct reinforcing a conclusion that there was a binding contract has been relied upon by many courts including decisions in *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253 (SCC); *Canada Square Corp. et al. v. VS Services Ltd. et al.* (1982), 34 O.R. (2d) 250 (Ont. CA) and *Imperial Oil Limited v. Young* (1998), 167 Nfld & P.E.I.R. 280 (CA), 21 R.P.R. (3d) 65.
>
> [Emphasis added]

[30] Again, though, the conduct of the parties here is established in the affidavit evidence. How the parties acted is established in the affidavit evidence. No more evidence is needed. Already the court has before it all of the evidence that is relevant to a determination of whether the parties formed a binding contract for sale.

[31] There is no factual conflict that requires a trial for resolution. There is no gap in the evidence that requires a trial for resolution. There is no genuine issue requiring a trial. The evidence that is before me permits me to make a fair and just determination of issues (b) through (e) on a summary basis.

[32] Summary judgment is appropriate in this case, on all of the issues.

Whether a binding contract for sale does not exist because of the unfulfilled condition requiring the approval of the Chicken Farmers of Saskatchewan

[33] The condition requiring the approval of the CFS is in article 7(d) of the LOI:

> 7. **Conditions.** The Purchase Price and the execution of Closing are in particular subject to the following conditions, to wit:
>
> …
>
> d. The approval in principal [*sic*] from CFS (Chicken Farmers of Saskatchewan) for the transfer of the Chicken Quota to the Purchaser.

[34] The defendants say that this condition is a condition precedent to the existence of a binding contract for sale. The condition precedent, they observe, was established as being unfulfilled when the CFS denied approval of the quota transfer.

[35] In *Wenkoff v Wenkoff Estate*, 2021 SKCA 5 at para 41, Chief Justice Richards discussed the distinction between "a 'true' condition precedent, i.e., a condition that cannot be waived by either party, and a condition for the benefit of one party that can be waived by that party." At para. 42 he observed that:

> [42] … As a general rule, the party benefitting from a condition in a contract can waive the non-performance of that condition by the other party. But, this right of unilateral waiver is qualified by the doctrine of what the Supreme Court has called "true" conditions precedent. …

[36] To explain a true condition precedent, at para. 43 Chief Justice Richards quoted Justice Judson at pages 583-584 of *Turney v Zhilka*, 1959 CanLII 12, [1959] SCR 578 (SCC):

> [43] …
>
> … The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party – the Village council. This is a true condition precedent – an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur. …

[37] The law recognizes, in some circumstances, a nuance in the identification of conditions precedent. This nuance was discussed by Justice Popescul (as he then was) in *Ceapro Inc v Saskatchewan*, 2008 SKQB 237. At para. 162 he said:

> [162] In *Wiebe v. Bobsien* (1985), 20 D.L.R. (4th) 475 (B.C.C.A.), Lambert J.A. divided condition precedent clauses into three separate categories, depending on whether they were subjective, objective or hybrid. Although he was writing in the dissent, his analysis on the tripartite condition precedent categories was subsequently adopted by a unanimous panel of the British Columbia Court of Appeal in *Mark 7 Development Ltd. v. Peace Holdings Ltd.* (1991), 53 B.C.L.R. (2d) 217 (C.A.), appeal to the SCC refused [1991] S.C.C.A. No. 220, [1991] 3 S.C.R. ix. Lambert J.A.'s analysis was summarized by him, at pages 477-478, as follows:
>
> > Each "condition precedent" case must be considered on its own facts. As Mr. Justice Bouck indicated, some conditions precedent are so imprecise, or depend so entirely on the subjective state of mind of the purchaser, that the contract process must still be regarded as at the offer stage. An example would be "subject to the approval of the president of the corporate purchaser." In other cases, the condition precedent is clear, precise and objective. In those cases, a contract is completed; neither party can withdraw; but

> performance is held in suspense until the parties know whether the objective condition precedent is fulfilled. An example would be "subject to John Smith being elected as Mayor in the municipal election on 15 October of this year."
>
> But there is a third class of condition precedent. Into that class fall the types of conditions which are partly subjective and partly objective. An example would be "subject to planning department approval of the attached plan of subdivision". This looks objective, but it differs from a truly objective condition in that someone has to solicit the approval of the planning department. Perhaps some persuasion of the planning department will be required. Can the purchaser prevent the condition from being fulfilled by refusing to present the plan of subdivision to the planning department? This type of case has been dealt with by implying a term that the purchaser will take all reasonable steps to cause the plan to be presented to the planning department, and will, at the proper time and in the proper way, take all reasonable steps to have the plan approved by the planning department.
>
> [Emphasis added]

[38] The plaintiffs assert that the condition requiring the CFS's approval in principle is a hybrid condition precedent. I agree. Article 7(d) makes the existence of a contract for sale conditional on that approval being obtained. Applying Justice Lambert's analysis, the defendants were required to take all reasonable steps to cause the sale of the quota to be presented to the CFS, and they were required to take all reasonable steps to have that proposed sale approved by the CFS.

[39] The defendants did so. They did their part in completing the quota transfer form, which put the plaintiffs in a position to submit the request to the CFS.

[40] Under this principle of law, the defendants were required to take these reasonable steps in pursuance of approval of *the sale that was contemplated in the LOI*. They were not required to take steps in pursuance of a different sale. The sale that was contemplated in the LOI was a sale that included transfer of about three-quarters of the

defendants' quota. The defendants took all required reasonable steps to assist in obtaining the CFS's approval of that sale. They were not required to take steps aimed at obtaining the CFS's approval for the transfer of all of their quota (which would be a different sale), or for any other transaction.

[41] Indeed, this is precisely what the parties expressed in the LOI. At article 5 of the LOI they agreed that the defendants would collaborate with the plaintiffs in obtaining permits and such "which may be necessary or advisable for the completion of the transactions contemplated herein" (emphasis added).

[42] The CFS denied approval of the transfer of the quota. Consequently, the condition in article 7(d) was not met. The parties had agreed, in the LOI, that there would be no sale without that approval. As a consequence, there is no binding contract for sale.

Whether a binding contract for sale does not exist because of the unfulfilled condition requiring execution of the Asset Purchase Agreement

[43] In *Tether v Tether*, 2008 SKCA 126 at para 62, Justice Wilkinson summarized the requirements for a finding that a binding contract exists:

> [62] In summary, there can be three distinct lines of inquiry. Firstly, was there a "meeting of the minds", or *consensus ad idem*, that was manifest to the reasonable observer. Secondly, was there consensus on all the essential terms of the agreement, for if a material term is not resolved, and is left vague and imprecise, without the tools to refine it, the agreement is illusory and the parties are simply asking the court to make an agreement for them. Thirdly, did the parties make their agreement conditional upon, and subject to, execution of a formal document.
>
> [Emphasis added]

[44] The defendants say that the parties here explicitly made their agreement "conditional upon, and subject to, execution of a formal document". They point to

articles 3, 7 and 13 of the LOI:

> 3. **Agreements.** The following agreement, in the form and content satisfactory to the legal counsels of the Parties, must be signed between them at the Closing date, namely:
>
> a. An Asset Purchase Agreement ("the "**Asset Purchase Agreement**") between the Vendor [and] the Purchaser, which will include, amongst others, the terms and conditions entered into by the parties and normally found in agreements of such nature as well as the representations and warranties usual to this type of transaction.
>
> …
>
> 7. **Conditions.** The Purchase Price and the execution of Closing are in particular subject to the following conditions, to wit:
>
> …
>
> c. The complete execution of the Asset Purchase Agreement. The Parties agree that the Purchaser shall provide a first draft of the Asset Purchase Agreement to the Vendor on or before January 31st, 2020;
>
> …
>
> 13. **Effect of this Letter.** The present Letter is the declaration of the formal intent of the Purchaser to proceed to the sale of the Assets. Other than Section 10 of this Letter (Confidentiality and No Shop), nothing contained herein shall be construed to create any obligation or liability of any nature on the part of the Purchaser or the Vendor. Unless and until the Asset Purchase Agreement between the Purchaser and the Vendor has been executed and delivered, neither the Purchaser nor the Vendor will be under any obligation to the other with respect to the transaction contemplated herein except as contemplated in Section 10 of this Letter.
>
> [Emphasis added]

[45] With reference to the words of Justice Wilkinson, the question is whether the parties made the sale conditional upon, and subject to, execution of the APA. The

answer is found by construing the LOI, as discussed by Justice Jackson in *Harle v 10109442 Saskatchewan Ltd.*, 2014 SKCA 6 at paras 57-60:

> [57] Further, it is not an accurate statement of the law to phrase the issue on enforceability in terms of whether there is "an agreement to agree." A finding that the agreement is certain addresses that issue. In my view, however, the trial judge uses the phrase "agreement to agree" as a substitute for the notion that the agreement is subject to a further agreement and that enforceability depends on the execution of another agreement.
>
> [58] The correct legal question is whether the requirement to have a written lease in place prior to closing is a condition that had to be fulfilled in order for the contract to be enforceable. The leading authority on the resolution of this question is *Calvan Consolidated Oil & Gas v. Manning*, [1959] S.C.R. 253.
>
> [59] In *Calvan*, the parties' agreement contained this clause: "[t]he terms of the operating agreement will be mutually agreed upon; and if agreement cannot be reached on any particular clause, then the clause in question will be arbitrated by a single arbitrator, pursuant to *The Arbitration Act of Alberta*" (p. 256, emphasis added). After concluding that the contract was not uncertain, the Court had to decide whether the offer and acceptance constituted an immediately binding contract notwithstanding the provision for a formal agreement to follow.
>
> [60] In answering this question, Judson J. for the Court stated two questions must be considered: first, whether the reference to a subsequent formal agreement indicates an intention not to be bound until the formal agreement is executed, and, second, what terms may be incorporated in the formal agreement by the arbitrator. He went on to support the conclusion of the Court of Appeal, which had overturned the trial court, and found that the parties intended to be bound before execution of the formal document:
>
> > ... My opinion is that the parties were bound immediately on the execution of the informal agreement, that the acceptance was unconditional and that all that was necessary to be done by the parties or possibly by the arbitrator was to embody the precise terms, and no more, of the informal agreement in a formal agreement. This is not a case of acceptance qualified by such expressed conditions as "subject to the preparation and approval of a formal

> contract", "subject to contract" or "subject to the preparation of a formal contract, its execution by the parties and approval by their solicitors". Here we have an unqualified acceptance with a formal contract to follow.
>
> Whether the parties intend to hold themselves bound until the execution of a formal agreement is a question of construction and I have no doubt in this case ... (pp. 260-61, emphasis added)
>
> Judson J. then referred to *Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284 at 288-289: "[i]t appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through" (p. 261, emphasis added). All subsequent cases are examples of cases that fall on one side or the other of the line drawn by the Court in *Hatzfeldt-Wildenburg*.
>
> [Emphasis added by Justice Jackson]

[46] The question of construction here is readily answered. Article 3 of the LOI addresses what would happen when the parties got to closing. At closing, the parties would have to execute the APA. This article could be understood to mean only that the agreement that had been reached prior to the closing date had to be fully documented in the executed APA. In this sense, then, article 3 could be construed to mean that execution of the APA was a required part of the closing process, but not to mean that there was no agreement for sale if the APA were not executed.

[47] Thus article 3, read alone, could be construed as "a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through" (*Harle*, para 60).

[48] The overriding construction of the LOI, however, arises with respect to articles 7 and 13.

[49] Article 7 sets out conditions that must be fulfilled for there to be a binding contract of sale. One of these, article 7(c), requires execution of the APA. In this way, the parties chose to emphasize the significance of an executed APA. This emphasis, in article 7(c), expressed the parties' intention that there would not be a binding contract for sale without an executed APA.

[50] The parties further emphasized the point in article 13 of the LOI. Article 13 confirms that neither of the parties would have any obligation to the other with respect to the sale unless and until the APA had been executed. There can be no clearer statement of the parties' intention than the wording that was used by the parties in article 13:

> … Unless and until the Asset Purchase Agreement between the Purchaser and the Vendor has been executed and delivered, neither the Purchaser nor the Vendor will be under any obligation to the other with respect to the transaction contemplated herein …

[51] The APA that was contemplated in the LOI (including the transfer of quota as described in the LOI) could not be executed because the CFS denied approval of the quota transfer. At that point, execution of the APA that was contemplated in the LOI was out of the hands of the parties. Once the CFS had denied approval, there was nothing that either the plaintiffs or the defendants could have done to get the parties to the point of executing the APA that was contemplated in the LOI.

[52] The APA was not executed. For this reason there is not a binding contract for sale.

Whether a binding contract for sale does not exist because some material terms were not agreed

[53] In this context I repeat the remarks of Justice Wilkinson in *Tether* at para 62:

> [62] In summary, there can be three distinct lines of inquiry. Firstly, was there a "meeting of the minds", or *consensus ad idem*, that was manifest to the reasonable observer. Secondly, was there consensus on all the essential terms of the agreement, for if a material term is not resolved, and is left vague and imprecise, without the tools to refine it, the agreement is illusory and the parties are simply asking the court to make an agreement for them. Thirdly, did the parties make their agreement conditional upon, and subject to, execution of a formal document.
>
> [Emphasis added]

[54] I have concluded, already, that the parties intended there to be no binding contract if the CFS did not approve the transfer of quota in principle, or if the formal APA were not executed and delivered. I have concluded that there is no binding contract because the CFS did not approve the transfer and because the APA was not executed.

[55] The defendants identify an additional reason for concluding that there is no binding contract. This is the lack of agreement on material terms.

[56] The plaintiffs assert that the LOI includes all of the material terms of an agreement, so that it constitutes a binding contract. They point to the inclusion in the LOI of references to:

- description of the Assets;
- purchase price;
- deposit amount;
- closing date;
- transition of a key employee;
- tenancy of an employee; and
- exclusion of a specific piece of equipment.

[57] The plaintiffs add, in the alternative, that the LOI can be read in combination with the parties' subsequent agreement to constitute a binding contract that includes agreement on all material terms. In this regard they refer to the draft APA and associated email exchanges between counsel during the last two weeks of April 2020.

[58] Without question, the parties had made considerable progress towards agreeing on the terms of an APA by the end of April. In contrast to the six-page LOI, the most recent draft of the APA ran to 36 pages.

[59] There can be no denying, however, that a material part of the proposed sale was a transfer of chicken quota to the plaintiffs. Without a chicken quota, the plaintiffs would not be able to operate the chicken farm.

[60] In the LOI the parties had agreed on a sale and transfer of chicken quota, but that specific sale and transfer proved impossible when the CFS denied approval. Thus the parties were left trying to negotiate a new arrangement by which chicken quota would be transferred to the plaintiffs. Those negotiations did not reach the point of agreeing on a new arrangement.

[61] Despite the parties' efforts to find an arrangement to replace the arrangement that was contemplated in the LOI, they did not ever reach agreement on the material term of how much quota would be transferred, and for what price, and in what manner.

[62] The plaintiffs, however, point to the conduct of the parties even after the CFS had denied approval. Specifically, they point to:

- the defendants having introduced the plaintiffs to trading partners;
- counsel having spent considerable time on an APA and bare

trust/nominee agreement;

- the plaintiffs having obtained adequate financing;
- the plaintiffs having obtained insurance coverage;
- the plaintiffs having applied for a provincial sale tax number;

[63] In this regard the plaintiffs cite the remarks of Justice Dawson in *Martel* at para 40:

> [40] … Conduct takes on great importance in assessing whether an arrangement goes beyond an unenforceable agreement to become a binding contract. It is clear that the courts have a strong inclination to find a binding contract if the parties acted as if they thought they had one. …

[64] The conduct of the parties, pointed to by the plaintiffs, does not establish that they were carrying on as though they intended to be bound by the terms of a contract of sale that was in place. Rather, their conduct establishes that they were hoping to be able to negotiate a new sale arrangement, one that would include a quota transfer that would be approved by the CFS. In continuing their negotiations after February 14, 2020, the parties were not complying with an existing contract for sale. They were in pursuit of a potential contract for sale, one that differed from the sale that was contemplated in the LOI.

[65] The objective, reasonable bystander referred to by Justice Rowe in *Ethiopian Orthodox* would conclude that the parties' first effort at making a contract for sale (as contemplated in the LOI) failed when the CFS denied approval, and that thereafter the parties tried to negotiate a different contract for sale, but they were unable to do so.

[66] As the parties did not have agreement on the material term of how to deal with the quota, there was no binding contract for sale. The LOI itself expressly was not

a binding contract for sale. The LOI, combined with the parties' subsequent negotiations and conduct, did not constitute a binding contract for sale.

Whether the defendants had a duty to negotiate in good faith, and if so whether they met that duty

[67] In an earlier application in this action, Justice Clackson summarized the law relating to the duty to negotiate in good faith (*Leblanc v Schwaerzle* (17 March 2022), Saskatoon QBG-SA-00679-2020 (SKQB)). In his unreported decision he said at para. 42:

> [42] At para. 171 of *Purenergy* [2019 SKQB 126], Krogan J. observed that while the Supreme Court in *Bhasin v Hyrnew*, 2014 SCC 71, [2014] 3 SCR 494, recognized an obligation to perform contractual obligations in good faith there has been no recognition in Canadian law of a duty of good faith in pre-contractual negotiations. …

[68] This statement of the law was reinforced by the British Columbia Supreme Court in *Ralmax Properties Ltd. v Pt. Ellice Properties Ltd.*, 2025 BCSC 814, where Justice Power said at paras. 221-222:

> [221] In my view, the law is clear that the duty of good faith in contractual relations only applies when a contract is found to exist. Specifically, *Bhasin v. Hrynew*, 2014 SCC 71 [*Bhasin*] provides that the duty of good faith in contractual relations applies to the performance of a contract. In *Bhasin*, Justice Cromwell stated that:
>
> > [63] The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.
> >
> > ...
> >
> > [Emphasis added [by Justice Power]]

> [222] As the defendants assert, "while the law imposes a duty of good faith and honest contractual performance subsequent to contract formation, a duty to negotiate in good faith has not been recognized in Canadian law absent an underlying contractual obligation." This proposition is clearly and overwhelmingly supported by the case law.
>
> [My emphasis]

[69] Having stated the law, Justice Clackson recognized at para. 43 that the parties here had an obligation, in the context of the LOI, to negotiate in good faith the terms of the APA that was contemplated by the LOI. The evidence that is before me establishes that they did so, right up to the moment of the CFS's denial of approval of the quota transfer.

[70] As I have concluded above, that denial put an end to the prospect of the parties being able to negotiate the APA for completion of the sale that was contemplated in the LOI. The CFS denial ended the parties' obligations to engage in further negotiations in furtherance of the sale that was contemplated in the LOI, because the denial ended the possibility of that specific sale occurring. The negotiations in which the parties engaged after the denial were in pursuit of a different sale, a different contract than the contract that was contemplated in the LOI. Specifically, they tried to come to terms on a sale that would be approved by the CFS, as opposed to the sale that was contemplated in the LOI.

[71] Thus, after the February 14, 2020 denial by the CFS, the parties were simply negotiating a possible contract. That negotiation was not in the context of an existing contract, because the effect of the LOI had ended aside from the residual confidentiality provisions. The parties were starting over in trying to negotiate a contract, and neither of them had a duty to negotiate in good faith in that circumstance.

[72] There was no breach of a duty to negotiate on the part of the defendants.

Costs

[73] As the successful parties in this action, the defendants are entitled to an award of the costs of the action. This action, including this summary judgment application, is among neither the simplest of actions nor the most complex of actions. Therefore, I order the plaintiffs to pay to the defendants one set of costs of the action under Column 2 of the Tariff of Costs.

Conclusion

[74] The defendants' application for summary judgment is granted. There is no binding contract as alleged by the plaintiffs in their statement of claim. Consequently, there can be no order for specific performance of a contract. Therefore, the plaintiff's action is dismissed.

[75] The plaintiffs are ordered to pay to the defendants one set of costs of the action under Column 2 of the Tariff of Costs.

"G.M. Currie" J.
G.M. CURRIE