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Docket: CI 19-01-20345
(Winnipeg Centre)
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Cited as: 2020 MBQB 188

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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| plaintiff, |) | |
| |) | <u>ALEXANDRE MIREAULT</u> |
| |) | for the plaintiff |
| - and - |) | |
| |) | |
| THE WINNING COMBINATION INC. |) | |
| |) | <u>PETER HALAMANDARIS</u> |
| defendant. |) | for the defendant |
| |) | |
| |) | JUDGMENT DELIVERED: |
| |) | December 18, 2020 |

PERLMUTTER A.C.J.Q.B.

INTRODUCTION

[1] The plaintiff, Agropur MSI, LLC (“Agropur”), moves for summary judgment against the defendant The Winning Combination Inc. (“TWC”) for the amount of \$400,030.00 USD for breaches of an alleged settlement agreement and amended settlement agreement, along with pre-judgment and post-judgment interest calculated at the rate of 18% per annum.

BACKGROUND

[2] Agropur claims these settlement agreements arose in the course of the parties' contractual relationship. In 2017, Agropur entered into a manufacturing and supply agreement (the "supply contract") with TWC, whereby Agropur would supply to TWC dairy-based nutrition supplements (the "products"). TWC says there was never any written contract. Rather, it sent purchase orders to Agropur and Agropur sent TWC order confirmations. TWC provided Agropur with the formula, flavouring, and labels for the products, and Agropur manufactured and packaged the products in accordance with TWC's instructions.

[3] In August 2017, Agropur and TWC also entered into a third party logistics services agreement (the "third party agreement"), whereby Agropur agreed to receive and process TWC's orders, transfer to and sort the products at the "fulfillment site" (Agropur's warehouse in Wisconsin), pack the products, and provide the packaged products to a carrier for delivery to TWC's customers.

[4] In its Amended Statement of Claim, Agropur alleges that in breach of the supply contract and the third party agreement, TWC failed to pay for all of the products and services Agropur provided to TWC. This summary judgment motion relates to amounts allegedly owing on account of settlements related to the supply contract, not the third party agreement.

[5] Carolyn Horihan, Agropur's Manager of Accounts Receivables, deposed that the terms and conditions of the supply contract included that TWC would pay any invoice or portion thereof in accordance with the terms set forth on the invoice

and TWC agreed to pay interest from the due date on any past–due amount at a rate of 18% per annum.

[6] On September 22, 27 and 28, 2017, and March 2, 2018, Agropur invoiced TWC the amount of \$951,199.72 USD. On the pertinent invoices, under “Shipping Information”, the “terms” state “Net 14 Days”. Ms Horihan deposed that TWC failed to make payment to Agropur in accordance with these invoices.

[7] Specific to the alleged settlement agreement, Ms Horihan deposed:

- On November 28, 2017, “in consideration for the compromise of all potential claims, the benefit of increased time to make payment of funds past due and other good and valuable consideration acknowledged by the parties, TWC agreed to make payment to Agropur in the sum of \$951,199.72, plus interest, by way of three equal installments of \$320,335.69 in November 2017, December 2017, and January 2018”.
- The settlement agreement “was negotiated and the terms fixed via phone call and email correspondence between Agropur and TWC”. Ms Horihan attached as an exhibit to her affidavit of October 30, 2019, an email dated November 28, 2017, between her and Mark Colley of TWC, with respect to the settlement agreement, which includes:

“I have been approved to accept your payment plan of 1/3 end of Month, 1/3 due 12/11/17, last 1/3 due 1/8/18.

I am showing a total due of \$961,007.08. If we divide that by 3 it equals \$320,335.69 for monthly payments.”

The amount of \$961,007.08 USD stated in this email included the amount of \$951,199.72 for the products and the amount of \$9,807.35 for amounts owed pursuant to the third party agreement.

- The settlement agreement resolved amounts owed for the invoices of September 22, 27, 28, 2017 and March 2, 2018, totaling \$951,199.72 USD, with the March 2, 2018 invoice for products ordered via purchase orders on June 23, 2017 and July 18, 2017.
- On November 30, 2017, TWC made a payment of \$320,315.69, but TWC failed to make payments in December 2017 and January 2018, in breach of the settlement agreement. TWC made further payments to Agropur on April 25, 2018 of \$30,884.03, and on May 17, 2018, of \$40,000.00.

[8] Specific to the amended settlement agreement, Ms Horihan deposed:

- On July 18, 2018, Ms Horihan emailed TWC's Chief Executive Officer, Shazad Bukhari to advise payments owed pursuant to the settlement agreement were outstanding.
- TWC represented it had found a new buyer for the products and accordingly would be able to begin making payments. In "reliance on these representations, on or about August 8, 2018, in consideration for the compromise of all potential claims, the benefit of increased time to make payment of funds past due and other good and valuable consideration acknowledged by the parties, it was agreed that TWC

would make monthly payments of \$40,000.00 to settle the amounts it owed to Agropur pursuant to the [supply] contract and/or the Third Party Agreement” (the amended settlement agreement).

- On August 16, 2018, Ms Horihan emailed Mr. Bukhari with the payment structure for the amended settlement agreement, confirming monthly payments of \$40,000 would be made by TWC to Agropur beginning in August 2018, with a larger payment to be made in October 2018. Also on August 16, 2018, Mr. Bukhari agreed to the payment structure and the terms of the amended settlement agreement and stated a larger payment of \$225,000 would be made in October 2018.
- On August 24, 2018 and September 24, 2018, TWC made payments of \$40,000. Ms Horihan then requested updates on the larger payment to be made by TWC in October 2018, but TWC did not confirm when payment would be made. TWC made further payments of \$40,000, on October 31 and November 30, 2018. After TWC made these payments, the balance owing was \$400,030 USD, plus interest at the rate of 18% per annum.

[9] It is this amount that Agropur claims on this summary judgment motion.

[10] Agropur holds 3,412 two-pound packages and 15,518 four-pound packages of products for TWC at the fulfillment site. Ms Horihan deposed that Agropur made reasonable commercial efforts to sell these products, but was unsuccessful.

[11] On behalf of TWC, one or both of Mr. Bukhari and Mr. Colley affirmed/deposed to the following:

- At the end of August 2017, Agropur began to ship some product and issue invoices. Some of the product was shipped to TWC in Winnipeg and other product was shipped to TWC's customers in the USA.
- In November 2017, they had a telephone call with Ms Horihan concerning Agropur's request for payment of its invoices. In this conversation, Mr. Bukhari indicated TWC would attempt to make payments at the end of November, December and at the beginning of January. Mr. Bukhari indicated to Ms Horihan that payments were subject to TWC's ability to locate a buyer for the product.
- When they were discussing making payments, it never was discussed that this was some sort of settlement agreement. TWC simply agreed to make some payments so that the business relationship would continue. There never was a discussion about the parties giving up "claims". There never was a discussion about interest being paid.
- On May 17, 2018, they had a call with Ms Horihan. They discussed the amount that had been invoiced by Agropur and was unpaid. They also discussed that TWC was negotiating a large deal with Loblaws which TWC hoped to finalize in the near future. In the call, Mr. Bukhari agreed that TWC would make a good faith payment in May 2018. He also

indicated that once TWC received the large purchase order from Loblaws, it would make a larger payment to Agropur.

- In a phone call on August 8, 2018, they discussed with Ms Horihan the amount invoiced which remained unpaid and the pending Loblaws deal. The “upshot of the call was that [TWC] indicated that it would make good faith payments of \$40,000 per month commencing in August 2018 until October 2018. [Mr. Bukhari and Mr. Colley] indicated that [TWC] would make a larger payment from [TWC]’s line of credit once the Loblaws purchase order was received, and then continue to make monthly payments thereafter.”
- In their calls with Ms Horihan, there was no discussion about this being a binding settlement agreement or that there was a compromise of any alleged claims by either party.
- TWC made payments of \$40,000 from August to November 2018. The Loblaws deal did not materialize at that time.

PARTIES’ POSITIONS

[12] It is Agropur’s position that in multiple correspondence sent by TWC, TWC acknowledged its debt to Agropur and subsequent payments from TWC confirm TWC’s indebtedness. Significantly, these payments match the amounts and dates agreed upon in the settlement agreements. According to Agropur, these settlement agreements allowed TWC to make payments on terms different than the supply contract while maintaining its business relationship with Agropur and

avoiding a potential lawsuit. In light of these facts, Agropur says a trial is not required to determine that the parties reached the settlement agreement and then the amended settlement agreement, and that TWC breached these settlement agreements. It is Agropur's position that TWC's ability to pay the larger payment of \$225,000 may have been contingent on securing the Loblaws (or some other) deal, but the existence of the amended settlement agreement was not contingent on such a deal. Agropur claims interest at 18% on the amount of \$400,030 USD, still owed by TWC following its breach of the amended settlement agreement in reliance on the interest rate stipulated in the supply contract.

[13] Agropur says that TWC's counterclaim is predicated on Agropur's purported failure to deliver the products, for which TWC has yet to pay. Agropur says that in accordance with the third party agreement these products were in fact received by TWC at the fulfillment site in Wisconsin from which they were to be shipped to TWC's clients, subject to payment having been made.

[14] TWC denies the existence of both the settlement and amended settlement agreements. It is TWC's position that neither party had any intention to create a legally binding contract in the form of the alleged settlement agreements, and, in any event, the alleged settlement agreements lack essential terms and are uncertain as to their terms. TWC also says there are credibility issues, such that the court is unable to make the necessary findings of fact on the basis of affidavit evidence and the related cross-examinations.

[15] TWC says there is disagreement about the terms of the purchase and sale, including when invoices were payable and with respect to Agropur's claim of 18% interest. TWC asserts that while Agropur concedes title to the product is with TWC, it will not release the product to TWC but wants judgment for the sale price. This is part of TWC's defence and counterclaim, which TWC argues is intertwined with Agropur's claim. TWC says that Agropur's decision to allege settlement agreements and proceed to summary judgment only on the settlement agreements is purely tactical, aimed at Agropur avoiding having to deal with TWC's defence and counterclaim. TWC also submits Agropur's summary judgment motion is inappropriate because it will not dispose of that part of the claim relating to funds allegedly owing under the third party agreement.

LAW

Summary Judgment

[16] The test for granting summary judgment is described as follows in ***Dakota Ojibway Child and Family Services et al. v. M.B.H.***, 2019 MBCA 91 (paras. 108-111):

At the hearing of the motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.

If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition"...or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must

establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted.

The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).

There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

[17] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada provided the following regarding when there will be no genuine issue requiring a trial (para. 49-51):

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

See also *Shirritt-Beaumont v. Frontier School Division*, 2020 MBCA 31, para. 15.

Settlement Agreement

[18] An agreement to settle a claim is a contract. Three elements are required: the mutual intention to contract; agreement on all essential terms; and sufficiently certain terms. These elements are to be considered from the viewpoint of an objective reasonable bystander in the context of all material facts, such as written or oral communications and conduct in the context of normal business practice and common sense. (*Norwich Union Life Insurance Company (Canada) v. MGM Insurance Group Inc., et al.*, 2003 MBQB 282 (para. 18); *Chittle v. Estate of Chittle*, 2018 ONSC 4139 (paras. 48, 60); and *Caisse Populaire Group Financier Ltée v. 390 Assiniboine Ave Inc.*, 2020 MBQB 31 (para. 43).)

ANALYSIS

[19] For the reasons that follow, I am satisfied based on the evidence that the issues raised by the parties require a trial. There remain material issues of fact and genuine issues of credibility in dispute regarding the parties' mutual intention to create a legally binding contract in the form of the settlement agreements, the essential terms, and the certainty of the terms. With Agropur asserting the parties reached a binding settlement and TWC asserting it never agreed to the essential terms of a settlement, credibility issues naturally arise (*Chittle*, para. 84). Having regard to the evidence and the issues raised by the parties, even with the fact-

finding powers in Rule 20.03(2), I am not confident that I can find the necessary facts to resolve these issues (*Dakota*, para. 82).

[20] As pointed out by TWC, the amount claimed pursuant to the settlement agreements is the same amount that Agropur alleges TWC was required to pay under the supply contract. In addition, Agropur claims interest on the balance owing under the settlement at the rate of 18% per annum which it also claims is the interest rate on past due amounts under the supply contract. As such, there remains the question of what was the consideration with respect to the settlement agreements? How are the settlement agreements any different than Agropur's claim that it is owed for its invoices under the supply contract?

[21] Mr. Bukhari testified on cross-examination on his affidavit that it was possible that Agropur might have sued TWC for the amounts for which it was waiting for payments and TWC wished to preserve the relationship with Agropur from the start to the finish of this matter. Agropur's counsel asserted it is for this reason they negotiated the settlement agreements to help TWC avoid a lawsuit and allow it time to make payments. However, there is no evidence around the time of the settlement agreements that Agropur had agreed it would not commence a claim.

[22] The email Ms Horihan deposed that she sent on November 28, 2017, to Mr. Colley with respect to the settlement agreement stated Ms Horihan has "been approved to accept your payment plan..." Mr. Colley described this as an agreement for repayment. There is nothing in this email or in other evidence that

differs from the evidence of Mr. Bukhari and Mr. Colley that in their preceding telephone conversation with Ms Horihan no one suggested that this was some sort of settlement agreement. Mr. Bukhari and Mr. Colley deposed TWC simply agreed to make some payments so that the business relationship would continue. Mr. Bukhari deposed there was never a discussion that either of the parties were giving up "claims" as suggested in Ms Horihan's affidavit and there was never a discussion about interest being paid. Mr. Colley deposed that in the conference calls with Ms Horihan of May 17, 2018 and August 8, 2018 (the date of the alleged amended settlement agreement), there was no discussion about there being some kind of binding settlement agreement and compromise of claims.

[23] The communications leading up to the alleged amended settlement agreement consistently refer to the payments as good faith payments. As well, they lend support to TWC's evidence that TWC would make a larger payment once the Loblaws purchase order was received. The following are examples of these communications:

- In Ms Horihan email to Mr. Bukhari and Mr. Colley of July 18, 2018, she states "I thought the agreement from our call in May was to make good faith payments every two weeks. I have not seen a good faith payment since the end of May."
- On July 19, 2018, Mr. Bukhari sent an email reply to Ms Horihan indicating "We all recall agreeing to and making a good faith payment in May, 2018 and this was completed. None of us recall suggesting or

agreeing to making payments every two weeks during the call or thereafter other than paying out the Loblaws shipments upon receipt of PO (using the bank line of credit)".

- On July 31, 2018, Ms Horihan sent an email to Mr. Bukhari and Mr. Colley which included the statements "We will need to discuss and confirm bi-weekly good faith payments to insure Agropur receives a payment starting this week for at least \$40,000.00." and "To summarize Agropur will need to receive two payments (each payment will be at least \$40,000.00) in August, Sept, and October. At the end of October your deal with Loblaws should be completed and product should be shipping. We feel confident that once you have completed the deal with Loblaws and products starts (*sic*) to ship Agropur will receive larger payments."
- On August 7, 2018, Ms Horihan sent an email to Mr. Bukhari and Mr. Colley proposing a phone call with the statement "We need to get this resolved ASAP and have a good faith payment plan set up".
- After the August 8, 2018 phone call with Ms Horihan, Mr. Bukhari sent an email to Ms Horihan that "As discussed, we confirm that, commencing in August 2018, we will make monthly payments of \$40,000... till October 2018. At that point we'll make a larger payment which corresponds directly to the amount of product shipped to Loblaws based on their purchase order."

[24] These emails support Mr. Bukhari's evidence that the "upshot" of the August 8, 2018 phone call with Ms Horihan was that TWC indicated it would make good faith payments of \$40,000 per month commencing in August 2018 until October 2018, it would make a larger payment once the Loblaws purchase order was received, and then continue to make monthly payments. TWC's counsel argued good faith payments mean doing something the party does not have an obligation to pay. In the circumstances, it is my view the description of the payments as good faith payments in the communications between the parties raises a genuine issue requiring a trial about the intention to enter a settlement agreement and the terms of any such settlement. These emails demonstrate TWC communicated to Agropur that its success in making payments would be impacted by its ability to locate a buyer for the product, at this point, a purchase order from Loblaws which in my view also raises a genuine issue requiring a trial about the terms of any settlement agreement being sufficiently certain. The following emails exchanged after the alleged August 8, 2018 amended settlement agreement also reflect similar communications:

- On August 16, 2018, Ms Horihan emailed Mr. Bukhari, "...I need a more detailed payment plan. I know you have committed to \$40,000.00 by month end of August and September with larger payment coming in October. We need more details on the larger payment in October. You should have PO from Loblaws to give you a better idea of payment".

- On this same date, Mr. Bukhari emailed Ms Horihan "We don't know the exact amount of the Loblaw PO till arrives late next month. Should we calculate a rough number?"
- In an email later this same day, Mr. Bukhari estimated this payment to be \$225,000.
- Ms Horihan then emailed Mr. Bukhari "Making sure I am correct here, you will pay \$40,000.00 monthly through November/December when the Loblaws order ships. Then once the order ships you will pay Agropur that amount of that shipment and then continue monthly payments of at least \$40,000.00".
- Mr. Bukhari replied by email "Correct \$40k monthly before and after the \$225K includes the \$40K so for the month we make the \$225K it will be a standalone payment".
- On September 24, 2018, Ms Horihan emailed Mr. Bukhari, "...Please confirm when we can expect the larger payment since it was agreed you would be able to as soon as you invoiced your customer(s)".

[25] In my view, this evidence all raises genuine issues requiring a trial about the communications and conduct of the parties, from the viewpoint of an objective reasonable bystander in the context of all material facts, reflecting the requisite meeting of the minds about settlement, agreement on all essential terms, and sufficiently certain terms.

[26] Ms. Horihan deposed that with respect to the alleged settlement agreement of November 28, 2017, TWC agreed to make payment to Agropur "...in consideration for the compromise of all potential claims...". Near identical language was used in Ms Horihan's description of the amended settlement agreement. However, in the communications around the timeframe of these alleged settlement agreements there is no evidence as to the meaning of "the compromise of all potential claims". TWC's counsel asked rhetorically whether this extends to TWC's counterclaim? As argued by TWC's counsel, some of the allegations about settlement are being made in a context where there is dispute about the terms and conditions of sale such that it would be reasonable to expect the obligations of the parties and what they were giving up would have been made clear. As discussed further below, TWC relies on its description of the terms and conditions of sale as part of its defence and counterclaim. In these circumstances, the absence of evidence as to the meaning of "the compromise of all potential claims" as part of the alleged settlement also raises a genuine issue requiring a trial.

[27] For the reasons discussed below, I also find that in the circumstances summary judgment would not provide a fair and just adjudication because of the significant relevance of the supply contract and the third party agreement to the parties' dispute and the considerable conflict in the salient evidence regarding the related question of whether Agropur delivered the products as required. Again,

even with the fact-finding powers in Rule 20.03(2), I am not confident I can find the necessary facts so as to resolve this question.

[28] Ms Horihan deposed the terms and conditions of the supply contract included that TWC agreed to pay any invoice or portion thereof in accordance with the terms set forth on the invoice, which were "Net 14 Days", and TWC agreed to pay interest from the due date on any past-due amount at a rate of 18% per annum. While Ms Horihan deposed these terms and conditions were referenced on the invoices as a link, there is no evidence that Mr. Bukhari saw or TWC agreed to these terms and conditions. Mr. Bukhari deposed there was never any written contract executed which governed the purchase and sale of the product. On August 4, 2017, Agropur sent TWC order confirmations for two purchase orders which also attached "Agropur General Terms & Conditions of Purchase". Mr. Bukhari deposed this is the first time that TWC saw any terms from Agropur, even though they defined "buyer" as Agropur Cooperative or any of its affiliates and Agropur was not buying anything from TWC. While it is Agropur's position these terms and conditions do not apply, TWC's counsel points out these were the only terms and conditions provided to TWC and indicate that all invoices for purchase of goods or services are payable within 60 days after delivered to the buyer. Mr. Bukhari deposed that all of the purchase orders indicated that the payment terms were net 15, which, in the industry, means that payment would be due 15 days after the product was delivered to TWC or its customers. Whether due 60, 15, or 14 days after delivered, in my view, a genuine issue requiring a trial

is raised about Agropur claiming the full amount of the price of the products when they have not all been physically delivered to TWC or its customers.

[29] Agropur asserts that in accordance with the third party agreement these products were in fact received by TWC at the fulfillment site in Wisconsin from which they were to be shipped to TWC's customers, subject to payment having been made. In argument, Agropur's counsel asked rhetorically, when does a supplier give product that has not been paid for? However, TWC points to the following email dated July 17, 2017, from Agropur to TWC as evidence that once in the fulfillment site, the products were to be owned by TWC:

...Ownership of the goods manufactured by Agropur would commence after they are manufactured and clear labs and are deemed acceptable to sell to TWC. This would happen and they would then transfer to the distribution area and be your goods. You would be billed for their manufacture at that time. They would then be deemed "sold" to TWC, yet now housed within our distribution area.

[30] As argued by TWC, while Agropur concedes title to the product is with TWC (having been transferred to the distribution area), it will not release the product (which has since expired) to TWC and wants judgment for the sale price. TWC's counsel says Agropur is attempting to manufacture settlement agreements that allowed it to retain the product, which has since expired, and receive the full purchase price.

[31] In light of the evidence I have discussed, it is my view there is a genuine issue requiring a trial about whether delivery of the products to Agropur's Wisconsin warehouse (the fulfillment site) constituted delivery for the purpose of requiring payment of the full amount of the price of the products and the right of

Agropur to not release or permit delivery of the products to TWC or its customers until there was payment. This is a question that underlies at least part of TWC's defence and counterclaim. As such, I agree with TWC's counsel that TWC's counterclaim is intertwined with Agropur's claim and that by proceeding only to enforce the settlement agreements, Agropur unfairly and unjustly avoids addressing TWC's defences relating to the sale terms of the product and the breach of the third party agreement. Also, as argued by TWC's counsel, given Agropur's position that it is not seeking funds claimed pursuant to the third party agreement on its summary judgment motion, but will pursue this separately if required, if judgment is obtained on this motion it is not the end of Agropur's claim. In my view, in the circumstances, this approach also raises proportionality concerns.

[32] In summary, the nature and number of disputed material facts and genuine issues that I cannot confidently resolve, the prospect that significant credibility findings will be required notwithstanding the cross-examinations that have already taken place on the affidavits, and the record as a whole lead me to find that a fair and just adjudication of the issues requires a trial.

CONCLUSION

[33] In conclusion, having found genuine issues requiring a trial that I cannot resolve, Agropur's summary judgment motion is dismissed. If costs cannot be agreed to, I will receive written submissions.

A.C.J.