

## The Dirt on the Sale of Goods: *Pine Valley Enterprises Inc. v Earthco Soil Mixtures Inc.*<sup>1</sup>

Carrie Ritchie, Zaia Daniel & Nikki Pangilinan of Macdonald Sager LLP

What is the difference between topsoil and *top-notch* soil? The former refers to the identity of the goods, and the latter refers to the quality. There is a difference, and the exact wording matters under the *Sale of Goods Act*<sup>2</sup> ("SGA"), especially when a vendor tries to exclude the implied condition that goods must correspond with the description under Section 14 of the SGA.

### Sale of Goods Act

Section 14 of the SGA states that where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

### It All Soils Down to This

In *Pine Valley Enterprises v Earthco Soil Mixtures Inc.*, the SGA was dragged through the mud to help determine who is liable in a situation where a purchaser ("Pine Valley") receives topsoil that is significantly different from what was bargained for, and whether exclusionary clauses related to quality sufficiently apply to exclude the implied conditions of Section 14 of the SGA.

In this case, Pine Valley contracted to receive "R Topsoil" from Earthco. Earthco provided Pine Valley with sample testing showing that the compound "R Topsoil" complied with Pine Valley's requirements. Once the purchase was finalized, Pine Valley took possession of the material. However, Pine Valley did not test the topsoil before accepting delivery and later discovered that the topsoil delivered contained a compounds and materials that differed significantly from the content of the "R Topsoil."

At trial, the court held that Earthco's exclusionary clause was enforceable and dismissed Pine Valley's action for damages for the incorrect type of topsoil received. Although the court agreed that Pine Valley did not receive the soil it bargained for, it found that the exclusionary clauses in the agreement disclaiming Earthco's responsibility for the quality of the material sufficiently exempted Earthco from liability under Section 14 of the SGA. To this point, the trial judge referenced Section 53 of the SGA, which permits parties, by express agreement, to escape liability implied by law.

Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the

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<sup>1</sup> *Pine Valley Enterprises Inc. v Earthco Soil Mixtures Inc.*, 2022 ONCA 265 (CanLII) [*Pine Valley*].

<sup>2</sup> *Sale of Goods Act*, RSO 1990, c. S.1 [SGA].

course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

However, what level of specificity is required to exclude a statutory condition of the SGA?

On appeal, the court found that the trial judge incorrectly assumed a factual matrix that deviated from and gave a different meaning to the actual words in the contract. The exclusionary clause stated that Earthco would "not be responsible for the *quality* of the material once it [left Earthco's] facility."<sup>3</sup>

The distinction between identity and quality is vital in a sale by description. A breach of the identity condition will occur if the goods delivered are of equivalent quality but do not correspond to the description promised. On that basis, Pine Valley expected "R Topsoil," a product identified in testing provided by Earthco, yet it received a product other than the one bargained for.

[10] Nothing in the language of the exclusionary clauses refers clearly, directly, or explicitly to any statutory conditions, let alone to one about the identity of what was sold. The express language of the exclusionary clauses disclaims responsibility only for quality, not for identity. Although the language of a contract must be read in light of its factual matrix, the factual matrix cannot be used to overwhelm the text and insert into the contract an explicit exclusion of liability for breach of the statutory condition in s. 14 of the SGA concerning the identity of the goods that the trial judge found Earthco had promised would be supplied.<sup>4</sup>

The Court of Appeal, relying on established precedent, stated that within a general framework of freedom of contract, the SGA's requirement of explicit, clear, and direct language to exclude a statutory condition implied into a sale agreement is essential to the legislative scheme.

### Takeaway

Where there is the opportunity for vagueness in an agreement, the SGA perhaps offers some consumer protections. Although the specific material, in this case, deals with topsoil for the creation of a dry pond to capture excess water, it has more significant implications for companies and consumers dealing in goods that are variable in their composition (*i.e.*, plastics, raw materials). While we live in a time where buyer beware and disclaimers on the efficacy of products are the norm, the case implies much more of a seller beware circumstance and a hint at consumer protection. The protections of the SGA are not meant to overpower the freedom of contract framework; instead, the protections call for vigilance on the seller's part to use explicit, clear, and direct language to exclude the implied conditions, whether the buyer is a sophisticated party or the average consumer.

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<sup>3</sup> *Pine Valley*, at para 17.

<sup>4</sup> *Pine Valley*, at para 10.