

CANADA / JUDGMENT

Guertin (Antoine) Ltée v. Chamberland Co. Ltd.

[1971] SCR 385

COURT

Supreme Court of Canada

DECIDED

6 October 1970

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Guertin (Antoine) Ltée v. Chamberland Co. Ltd.

Collection

Supreme Court Judgments

Date

1970-10-06

Report

[1971] SCR 385

Judges

Fauteux, Joseph Honoré Gérard; Abbott, Douglas Charles; Martland, Ronald; Ritchie, Roland Almon; Pigeon, Louis-Philippe

On appeal from

Quebec

Subjects

Sale

Decision Content

Supreme Court of Canada

Guertin (Antoine) Ltée v. Chamberland Co. Ltd., [1971] S.C.R. 385

Date: 1970-10-06

Antoine Guertin Ltée, Meunerie Antoine Guertin Ltée and Antoine Guertin (Defendants)
Appelants;

and

Chamberland Co. Ltd. and Jean-Paul Chamberland (Plaintiffs) Respondents.

1970: May 4, 5; 1970: October 6.

Present: Fauteux C.J. and Abbott, Martland, Ritchie and Pigeon JJ.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Sale—Livestock feed—Adulteration—Inferior quality—Fraudulent manufacturing procedures—Conspiracy to defraud—Damages—Liability.

The respondent was a livestock feed salesman. The goods were made up and shipped by the appellant on his instructions. These were basically of two types: balanced feed mixtures and ordinary feed. The first bore appellant's trade marks. Most of the respondent's business was in grains and other ordinary feed. The labels on the bags were respondent's, and he told the appellant what goods were to be put under each label. Much of this grain was adulterated and of inferior quality. Criminal proceedings were brought against the respondent's company, under the Feeding Stuffs Act, and the respondent pleaded guilty. Business declined, and the respondent and his company found they had to cease operations. They brought an action for damages against the appellant and his two companies, alleging that goods had been delivered to them which were not of the type and composition agreed to and specified, and fraudulently so. They claimed compensation for loss of reputation, goodwill and income. The trial judge concluded that the appellants were solely responsible for the prejudice. This judgment was upheld by a majority in the Court of Appeal. The defendants appealed to this Court.

Held: The appeal should be allowed.

In view of the evidence provided by the documents and the pleas of guilty, it is impossible to avoid the conclusion not only that fraudulent acts were committed at the request of the respondent, but that these were not isolated cases but operations repeated frequently and systematically over a period of several years. The appellant must be considered the chief culprit, not only because he was the instigator of and accomplice in the adulteration scheme, but also because he derived the greatest benefit from it. However, the respondent is not entitled to a legal remedy for damages arising out of fraudulent activities in which he participated. As to contractual liability, a contract with a fraudulent object, in this case delivery to a third party of merchandise which is fraudulently described and labelled, is absolutely void as offending public order. As to delictual liability, since those were fraudulent activities carried out at the request of the respondent and with his full knowledge, the maxim *volenti non fit injuria* must be applied. The responsibility cannot be divided, and the condemnation upheld only for that part of the damages that can be attributed to the delivery of balanced mixtures of inferior quality and, perhaps, to the delivery of ordinary feed of a quality inferior to what was ordered other than as part of the fraudulent activities in which the respondent participated. On the whole, the cause of the damage to the respondent's personal reputation and of the loss of his company's goodwill was the merchandise fraudulently sold under his label.

APPEAL from a majority judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], upholding a judgment of Lacroix J. Appeal allowed.

Henri Lizotte, Q.C., for the defendants, appellants.

Léo R. Leblanc, Q.C., and J. Jean, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

PIGEON J.—Jean-Paul Chamberland is a livestock feed salesman. From 1937 to 1947 he carried on this business on salary and commission as an employee of a Quebec company, Drolet Inc. He had a substantial clientele, representing a third of his employer's total business; so that shortly after he left, his employer was forced to go out of business. Chamberland Co. Ltd. was formed in 1946 by Jean-Paul Chamberland and his two brothers, but he soon bought back their shares, so that for the entire period we are concerned with it was his own business, under his sole management. It appears that in 1948 the company dealt in "war surplus goods", but at the end of that year Chamberland began to deal with the appellant Guertin, and hence with the two Guertin companies which were under the latter's management. In view of the fact that for all practical purposes the Chamberland company was the instrument of Jean-Paul Chamberland, I shall treat them as one in what follows; and—for the same reason—I shall do likewise for Antoine Guertin and his two companies.

At that time, as Chamberland explained in testimony given at the start of a protracted hearing, competition was fierce and not always clean: the market was swamped with what he called "dockage," i.e. screenings from grain cleaned on the docks for export. This is the context in which must be read the letter addressed to him by Guertin on November 2, 1948, which contains the following passages:

[TRANSLATION] We always have No. 1 Feed oats and barley on hand. Needless to say, if we are to stay in business, we must furnish our customers with the quality of grain that will enable them to make a profit in their dairy, hog or poultry business.

To meet the competition at the doorstep of your mill, you will certainly be obliged to have a lower quality for sale: in other words, the same quality as your competitors. For this purpose, we also have available some mixed grain that we get at lower prices, and this makes it possible for us to supply a good chop feed at a much lower price than No. 1 Feed.

Chamberland seems to have hastened to follow this advice. To a considerable degree, however, instead of buying his grain through Guertin, he made arrangements to purchase it himself. Guertin was nevertheless authorized to take delivery of it, and undertook to store, grind and mix it as required, and to ship it to the customers to whom, Chamberland resold it. Most of this grain was of inferior quality. The livestock feed sold by Chamberland, but made up and shipped by Guertin, were basically of two types: "balanced" feed mixtures and ordinary feed. The first bore the Guertin trade marks VITAL and VIT; their ingredients were determined by registered formulas and Chamberland had nothing to do with this. In 1951 and 1952, Chamberland

registered his own OLEX trade mark and formulas for “balanced” feed mixtures that were manufactured by Guertin; but OLEX feed sales were not large, and they are of negligible importance in this litigation.

Except for 1949, when, as indicated in Exhibit P-44, the number of bags of balanced feed was about a third of the total number sold, the proportion for the three subsequent years was barely a sixth. Accordingly, it can be seen that most of Chamberland’s business was in grains and other ordinary feed. It is to be noted that by agreement between the parties, the labels on the bags were those of Chamberland, and it was he who told Guertin what goods were to be put under a given label.

From the outset Chamberland showed himself ready to make liberal use of ingredients with little nutritional value. It was not long before he attracted the attention of the Department of Agriculture because he was having powdered limestone put in the ordinary feeds. On April 9, 1949, he sent Guertin the following letter, which I must quote in extenso:

[TRANSLATION] Yesterday I visited Dr. St-Pierre, a member of the Provincial Feeds Board, and he gave me a formula for a low-priced dairy mix to enable us to use our powdered limestone.

I am sending you this formula and if possible, I would like you to make up the mixture so that we can have it analysed:

400 lbs. barley—600 lbs. oats—400 No. 1 screenings—240 lbs. linseed cake—60 lbs. powdered limestone—30 lbs. salt—270 lbs. alfalfa.

In his opinion, the protein content of this mixture would be 15.26%.

As we do not have No. 1 screenings on hand, it would perhaps be possible to replace the 400 lbs of No. 1 screenings with 200 lbs. of your ground oat hulls (*écaillé d’avoine moulue*) and 200 lbs. of middlings.

I would be glad to have your opinion on this matter. As for the formulas for hogs, on page 31 of the enclosed book on feeds you will find these suggestions applied to hog feed. I will soon be sending you the feed handbook for 1948.

It is understood that we would produce these mixes under a special name, solely for the purpose of meeting the competition, while at the same time ridding ourselves of our powdered limestone and finding a use for your oat hulls (*recoupes d’avoine*).

I shall be happy to accept all your suggestions on this matter.

Guertin’s reply is a letter dated April 16, of which the following are the relevant passages:

[TRANSLATION] With regard to your letter of April 9, I am willing to prepare whatever balanced feed you require, but as you know, we do not have wheat screenings for the dairy mix, although we could get some.

I feel that it would not be wise to replace the wheat screenings with 200 lbs. of middlings and 200 lbs. of oat hulls (balle d'avoine), as this mixture would give you 10% protein, 3% fat, and 19% fibre, while the wheat screenings give 17% protein, 5.2% fat, and only 7% fibre.

In any case, if you want it you have only to let me know, and I will include a ton in your next load so that you can try it and have it analysed.

What is significant in this correspondence is the fact that whereas in his own letter Chamberland has used the expressions “écaillé d'avoine moulue” and “recoupes d'avoine”, Guertin in his reply used the expression “balle d'avoine” (oat hulls) as a synonym. Further, this was not the first time that the adulteration of merchandise was the subject of correspondence between the parties. In a letter dated March 9, 1949, Guertin told Chamberland:

[TRANSLATION] For your information, you are entitled to sell as ground barley feed, barley which does not contain more than 20% of other grain, either black oats, white oats, or wheat. To be on the safe side, we could make you a mixture with 15% black oats, and you would be entitled to put your ground barley feed label on it. As a postscript, he added:

[TRANSLATION] TO make barley feed with 15% black oats, you must use No. 1 Feed barley.

An order from Chamberland to Guertin on March 8 indicates that this adulteration was already being practised currently with his consent: in fact, there are instructions in parentheses not to put “Mixed Feed Oats” in a certain lot of ground barley, and in a letter dated December 7, 1948, Guertin told him:

[TRANSLATION] As you request, we will mix 5 Mixed Feed Oats and 15 barley to the ton... this barley will be good quality and very low priced.

As Montgomery J. points out in his dissenting judgment, Guertin clearly had in mind the standard of quality set by Schedule One of the Canada Grain Act (R.S.C. 1952, c. 25). No. 3 Feed barley may contain up to 20 per cent of foreign material, while No. 1 Feed barley may not contain more than 4 per cent. What Guertin calls “black oats” is obviously what the Schedule describes as Wild Oats, a weed the dark coloured seeds of which have hardly any nutritional value.

Chamberland took Guertin's advice, but often disregarded the postscript. Guertin's letter of April 16 indicates that at that time all his barley was No. 3, and he finally had complaints from customers who found the ground feed black. Here is now what he said in his testimony before the Court:

[TRANSLATION] In August 1949, some customers complained of the blackness of the ordinary ground feed. Barley prices were quite high then, and competition forced us to take Mixed Feed Oats and make a mixture with 50% barley to cut down the price and meet the competition. Some customers said “The feed is very black” so I went to Mr. Guertin, and he said: “Mr. Chamberland, there may be a way out”. He said, “I make oatmeal with Mixed Feed Oats, I take the biggest oats, which is 60-65%, because there are plenty of light oats in the Mixed Feed Oats, wild oats, small grain oats—even if I were to try to make oatmeal with that, it would not make good oatmeal. I will

let you have it for \$1.40 a hundredweight; don't use more than 15 to 20% and your feed will not be as black; and use white barley and white oats for the remaining 80%; your customers will be quite happy”.

Then we read this in a letter from Guertin to Chamberland, dated August 10, 1949:

[TRANSLATION] Further to our telephone conversation of this afternoon, we are mailing you two samples of feed under separate cover. The details of one sample are as set out overleaf:

800 lbs. of No. 1 barley and 200 lbs. of oat hulls.

Which comes to 800 lbs. of barley

\$3.06

\$ 24.48

200 lbs. of hulls

\$1.40

2.80

\$ 2.72³/₄

There is also a sample made with

500 lbs. of barley

\$3.06

\$ 15.30

300 lbs. of oats

\$2.69

8.07

200 lbs. of hulls

\$1.40

2.80

\$ 2.62

The first sample should be labelled 3 cwt. Mixed Grain, while the second should be labelled Ground Barley and Oats as you request in your order, and it is at the lowest price.

On February 7, 1950, Guertin renewed the suggestion of adulterating the feed by including oat hulls (or ground oat hulls):

[TRANSLATION] We enclose our new price list for balanced feed mixtures.

At the same time, we are pleased to offer you white oat hulls, which, when ground finely, resemble ground oats, at the low price of \$1.50/cwt. You can include these oat hulls in your barley and oat mixtures, which will lower the price of these mixtures and considerably increase sales.

We feel sure you will be able to offer ground barley or oats of good quality, white and finely ground, at a very low price.

Chamberland acted on this advice with such enthusiasm that on November 22, 1950, Guertin notified him that he had no more oat hulls on hand, and that to get more he would have to pay \$1.65 a hundredweight.

We must now see how Chamberland ordered this adulterated feed. Let us examine what seems to be the earliest of the innumerable documents of this kind that are on file. It is an order from Chamberland Co. Ltd. to Antoine Guertin Ltée, requesting shipment to P.F. Soucy, St. Alexandre, Kamouraska County, of four kinds of merchandise, the last of which is described as follows:

[TRANSLATION] 350 bags barley and oat feed (20% No. 1 Feed Barley—70% No. 1 Feed Oats—10% oat hulls) finely ground

The evidence indicates beyond doubt, as Chamberland frankly admits, that what is written on an order ahead of the parentheses is the description that goes on the label and will be the description on the invoice that Chamberland Co. will send to the consignee. What is between the parentheses is what Guertin is to put in the merchandise, and will be used to set the price. The proportion of hulls varies: it may be as high as 15, 20 or even 30 per cent. When Chamberland's attorney asked him what the customer knew, the reply was: "He knew it was light oats".

Chamberland thus admitted to the Court that though he ordered Guertin to put a portion of ground hulls into a considerable quantity of feed he sold to his customers, this fact was never disclosed to the purchaser, who instead was given the impression that he was getting ground light oats. Chamberland claims that he believed, from what Guertin told him, that what he was ordering as ground hulls (écaïlle) was light oats, that is, whole grain, seed and husks, and not husks alone.

On the contrary, documentary evidence shows that Chamberland was fully aware that "hulls" (écaïlle or recoupe) are residue from the manufacture of oatmeal. Besides the letters of April 1949, the record includes the copy which Guertin sent him of a letter written on August 15, 1951, to L'Idéale Mont-Carmel.

[TRANSLATION] In the last carload sent to St. Philippe, you got some ground barley that looked bad because apparently a mixup in our bins was not spotted by our men, since we found whole oat hulls in the sample we received from Mr. Chamberland.

You are doubtless aware that we have a machine for husking oats and making animal oat meal. These oat hulls, which are in a separate bin, must have run into the barley bin, because the slats were probably not closed.

As there was a mistake on our part, we are willing to take this feed back and replace it for you. Or, if you prefer, Mr. Chamberland, who is to call on you very shortly, will make you an allowance accordingly.

Please be assured that such errors will not be repeated, and you will be completely satisfied.

This copy was sent to Chamberland with a letter which said:

[TRANSLATION] AS requested on your last visit, we have mailed a letter similar to the enclosed copy to:

Mr. Léopold Bérubé, St. Philippe de Néri,

Coopérative Agricole, St. Joseph,

Mr. J.E. Duval, St. Pascal,

Mr. Alphonse Maurais, St. Anne de la Pocatière.

And another letter, which refers to ground barley instead of barley and oats, to:

L'Active St-Denis,

L'Idéale Mont-Carmel.

We do hope this letter will be satisfactory and that you will settle on the best terms possible.

If Guertin had given Chamberland the impression that hulls (*écaille*) were light oats, and not grain husks removed in manufacturing oat meal, he would certainly not have given him such clear and precise explanations of the nature of the merchandise. Clearly, the error consisted in having put in whole hulls, whereas according to Guertin's letter of February 7, 1950, what was to be mixed with the ground barley or oats was [TRANSLATION] "white oat hulls, which, when ground finely, resemble ground oats" (*italics mine*). If Chamberland had thought up to that point that "hulls" were "light oats", surely he would have reacted otherwise than by adjusting his customers' accounts and obtaining a credit of \$398.75 from Guertin for the cost of these adjustments. Indeed, he continued to order feed adulterated with hulls from Guertin.

In the fall of 1951 and on several occasions thereafter, Inspector Lavoie of the Department of Agriculture of Canada took a number of samples of feed sold under the Chamberland label, and even made several seizures. Many irregularities were found, including the presence of oat hulls (*recoupes*) in many of the samples. Requests for an explanation were sent to Chamberland by the Department, and letters were also sent to his customers telling them of the nature of the merchandise delivered.

Thus, on October 23, 1951, the District supervisor wrote to the Coopérative Agricole de St-Hubert:

[TRANSLATION] We enclose a copy of certificate No. DF-3075 concerning the analysis of an official sample taken at your premises from about 80 bags of a feed marked as ground barley, and sold by Chamberland Company Limited, CN car No. 402663. The date of the invoice is October 3, 1951. Kindly note that the official sample analysed contained at least 50% ground oats, with ground wheat and wild oats.

We are sending a copy of this letter to Chamberland Company Limited, and will draw their attention to the serious violation set out in the attached certificate of analysis.

Concurrently, a copy of this letter was sent to Chamberland Co. Ltd. with a letter which said:

[TRANSLATION] We enclose a copy of a letter addressed to the Coopérative Agricole de St-Hubert.

The violation set out in the attached certificate is regarded as serious, and we would remind you that the Feeding Stuffs Act contains penalties for persons who are in breach of it.

Kindly let us know what explanations you have offer in the matter.

What did Chamberland do? He continued to order from Guertin feed adulterated with 10, 15, 20 and even 30 per cent hulls.

Thus, included in the bundle of documents produced by Chamberland as Exhibit P-27 is an order which he sent to Guertin on November 5, 1951, for feed to be sent to the very same Coopérative Agricole de St-Hubert. Of the four kinds of feed ordered, other than “balanced” mixtures, he asked for 30 per cent, 15 per cent, 10 per cent and 20 per cent of hulls respectively, in the manner previously described. It is not surprising that when the Inspector discovered this, he laid a complaint on which Chamberland had to plead guilty.

On February 13, 1952, Chamberland wrote Guertin a letter, the second paragraph of which reads as follows:

[TRANSLATION] Since we arrived, we have learned from our customers that Inspector Lavoie took samples from the last load, namely number 7; not only did he take samples from the last load received, but he also took copies of invoices and Bills. It is obvious that when they have finished proceeding on the question of the mixtures, they will get us on the illegality in the description of the merchandise in the cars.

On February 28, 1952, several complaints were laid by Inspector Lavoie against the Chamberland Company. The four complaints on which pleas of guilty were entered on May 26, 1952, all dealt with sales of “ground barley and oats” except the last, which involved “ground barley”. The dates and quantities were as follows:

29 Oct. 1951–J.E. Duval Enrg.

50 bags

6 Nov. 1951–Coopérative de St-Antonin

50 bags

19 Nov. 1951—Coopérative Agricole de St-Pascal

50 bags

19 Nov. 1951—Coopérative Agricole de St-Hubert

40 bags

In each case the charge was

[TRANSLATION] “that he fraudulently lessened the value of this feeding stuff in contravention of the statutes made and provided in such cases, the Feeding Stuffs Act, 1937, s. 11 (b).”

In respect of the last two cases, the record includes the order given by Chamberland to Guertin, the invoice from Guertin to Chamberland, that from Chamberland to the purchaser, and the certificate of analysis. In the first of these two cases, the description of the merchandise in the order dated November 13, 1951, is as follows:

[TRANSLATION] ground barley and oats (40% No. 2 Feed barley—40% No. 3 Feed oats—20% hulls) Guertin’s invoice shows 10 per cent hulls and 10 per cent of another ingredient. Chamberland’s invoice to the customer only refers to “ground barley and oats”. The certificate of analysis shows the following result:

[TRANSLATION] Ground oats and barley, with at least 5% oat hulls

Below, it bears the following comment:

[TRANSLATION] Ground wild oats and wheat, with traces of other weed grains and of corn, make up about 20% of the sample. There is a trace of ground malt sprouts also.

In the last case, the order to Guertin dated November 5, 1951, describes the merchandise as follows:

[TRANSLATION] ground barley 80 x 20

Chamberland himself explained to the Court that this meant 80 per cent barley and 20 per cent hulls. Guertin’s invoice mentions 10 per cent hulls and 10 per cent “Malt Sprouts”. Chamberland’s invoice says simply, “ground barley”. The result of the analysis is:

[TRANSLATION] Ground barley with about 10% oat hulls and at least 1% malt sprouts.

The result of the analysis thus confirms Guertin’s invoice completely and, in the light of the complaint and the certificate, the fraud admitted by Chamberland consisted in adulterating the ground barley, chiefly by having 10 per cent of ground hulls, (écaïlle), put into it.

After the date of the complaints, there is in the record no order from Chamberland to Guertin mentioning a percentage of hulls in parentheses, and there is hardly any further occurrence of a practice that had been frequent until then—a description in parentheses which differed from the

initial description that was to correspond to the label. However, business declined, and in 1953 Chamberland and his company found they had to cease operations. On November 2, 1953, they brought an action for damages against Guertin and his two companies, alleging that since 1949 goods had been delivered to them which were not of the type and composition agreed to and specified, and fraudulently so. In particular, they complained of the VIT and VITAL balanced feeds, and claimed compensation for loss of reputation, goodwill and income.

The trial was very long. The first witnesses were heard on March 22, 1955, and the last, on September 11, 1957. The depositions show that the defendants were guilty of all kinds of reprehensible practices in preparing the products delivered to Chamberland's customers. The trial judge concluded that they were solely responsible for the prejudice suffered by Chamberland and his company, and condemned them jointly and severally to pay a total sum of \$43,000: \$10,000 to Chamberland and \$33,000 to the company.

This judgment was upheld by a majority in the Court of Appeal[2]; Salvais J., with whom Rivard J. concurred, said:

[TRANSLATION] The trial judge, after a detailed study of the evidence, came to the conclusion that the deterioration in the products supplied by the appellant companies resulted from the fault and the fraudulent manufacturing procedures of the employees of these companies, acting with the authority and on the instructions of appellant Antoine Guertin and his chief associates.

In law, the appellant companies are responsible to the respondent company. Their obligation is contractual in nature; and in view of the evidence, they have also incurred a delictual, or quasi-delictual, liability.

As regards appellant Antoine Guertin, his is a delictual, or quasi-delictual, liability towards Chamberland Co. Ltd., and also towards Jean-Paul Chamberland, who, as we have seen, was in fact if not in law the owner of the respondent company.

Montgomery J., dissenting, considered that the action should be dismissed without costs for the following reasons:

I agree with the trial judge that Appellants' conduct of their business was open to criticism in many respects but I am not satisfied that this was the effective cause of the loss of confidence in Respondents and the resulting ruin of their business. Respondents have, in my opinion, violated the fundamental rule that he who come before the courts should come with clean hands, and I find that they have not established that the damages that they suffered resulted from the faults of Appellants rather than from their own conduct in inducing their customers to buy feeds that they knew to be of inferior quality.

As the trial judge put it, "the two conflicting propositions put forward in this case were as follows:

[TRANSLATION] 1. Chamberland says: I ordered good quality merchandise, and I received poor quality;

2. The defendants, for their part, say: If we produced poor quality merchandise, it was because we faithfully carried out Chamberland's orders."

As regards all the merchandise which Chamberland sold by representing it to his customers as containing "light oats", while unknown to them he was ordering "hulls" from Guertin, the trial judge, after reviewing the testimony on the meaning of the words "bale" and "écaille", completely accepted Chamberland's contention:

[TRANSLATION] The use of the word "écaille" by Guertin could certainly not be taken by Chamberland to mean "bale".

It appears to be fairly well established that, to Chamberland as to the customers he called as witnesses, "bale" always meant the worthless chaff previously referred to. Where Guertin could certainly have misled Chamberland was that for him the words "bale", "écaille" and "écale" meant the same thing.

He apparently never disclosed to Chamberland that, to him, these three words were synonymous.

(Underlining in the text.)

Clearly, there must be very strong reasons for setting aside concurrent findings of facts, especially when credibility is involved. However, we are here faced with unchallengeable documentary evidence which, with respect, the courts below do not seem to have taken into account as they should have in the circumstances.

In the first place, I agree with Montgomery J., who felt that by his letter of April 16, 1949, Guertin made it clear to Chamberland that, to him, "écaille" and "balle" were synonymous. In fact, replying to the letter of April 9, in which Chamberland suggested the use of "200 lbs. of your ground oat hulls (écaille d'avoine moulue) and 200 lbs. of middlings", Guertin described it as "200 lbs. of middlings and 200 lbs. of oat hulls (balle d'avoine)". How could Chamberland have failed to understand that Guertin took the two to be the same, or equivalent? His letter of April 9 shows that Chamberland knew quite well what hulls were. In fact, at the end, he uses the correct term "recoupes d'avoine". This word "recoupe", which is not in current usage, is defined as follows in the Grand Larousse Encyclopédique:

[TRANSLATION] "Bran resulting from the grinding of coarse flour, or grey milling flour."

This word, it should be noted, is found again in the certificates of analysis. It refers clearly, and without any possible doubt, not to whole grains of light oats but, as Guertin explained, to a by-product of the manufacture of oatmeal. By using it in his letter of April 9, 1949, Chamberland showed that, far from being ignorant, he was well versed in every aspect of his trade—as was to be expected after more than ten years.

That is not all. We must now consider what importance should be attached to the pleas of guilty entered in the criminal proceedings brought against the Chamberland company. As to this, the trial judge said:

[TRANSLATION] Initially, a large number of complaints were put in evidence at the trials, but these exhibits had to be withdrawn because, on all but four complaints, there had been no conviction or plea of guilty. On January 31, 1956, this Court rendered a judgment rejecting twenty exhibits which the defence had sought to introduce into the record by amendments to paragraphs 17 and 22 of its pleadings.

As regards the others, on which Chamberland pleaded guilty, the Court feels it would be unfair to use them as a basis for finding him liable in this case. Technically, the offence was committed by him because, under the Feeding Stuffs Act, his name was on the labels; but on the evidence, he did not manufacture the product. Basically, as we have concluded after quite a lengthy analysis, it seems quite easy to see that he was not the person really responsible.

With respect, I must hold that this reasoning is wrong in law, as it does not take into account the real nature of the offences admitted. We are not concerned here with strict liability offences such as gave rise to our decision in *The Queen v. Pierce Fisheries*[3]. The offence here consists in having “fraudulently lessened the value of any feeding stuff”, the word “fraudulently” clearly requires that the act be committed with mens rea. Fraud simultaneously excludes accident, inadvertence and ignorance: a person is only guilty of fraud if he acts knowingly, with the object of deceiving someone. If Chamberland had acted in good faith as he claimed, he would not have been guilty of the offence in question. If, as the trial judge appears to have believed, the manufacturer, and not he, had been at fault, he ought to have been acquitted. If the merchandise had been falsely labelled without his knowledge, he would not have been found guilty because he would not have been party to the offence.

Here, however, the evidence shows beyond doubt that, in the instances where Chamberland entered pleas of guilty, the fraudulent debasement of the feeding stuffs sold was done on his instructions. It is therefore not correct to say that “he was not the person really responsible”.

Chamberland was aware that the presence of ground oat hulls in the ground barley constituted an adulteration; moreover, as his letter of April 9, 1949, shows, he knew quite well from the outset that “écaille” meant hulls. Further, nearly two months before ordering the merchandise about which he entered the pleas of guilty, he had received from Guertin a document in which “écaille” was clearly described as the residue from the manufacture of oatmeal. Finally, he was officially warned of the illegality of the adulteration shortly before giving the orders. Thus there is no question in this case of holding an admission of guilt made in criminal proceedings to be inconclusive in civil proceedings, as was held to be possible in *La Foncière v. Perras*[4]. In the present case it is clear that the plea was made with full knowledge of what was involved and that Chamberland could not possibly deny his guilt.

The trial judge recognized that in some cases “Chamberland’s orders to Guertin differed from the customer’s orders”, but he treated these as isolated cases, insufficient to offset the preponderance of the evidence. He gave as the reason for not attaching importance to “these isolated cases” two items in the evidence:

[TRANSLATION] (1) Guertin could easily have misled Chamberland into taking the expressions “écaille”, “écale” and “bale” as synonymous;

- (2) Guertin’s letter of November 2, 1948 to Chamberland, in which he said “we also have available some mixed grain that we get at lower prices, and this makes it possible for us to supply a good chop feed at a much lower price than No. 1 Feed.”

We have already seen why it is quite impossible to believe in Chamberland’s good faith, and to this must be added the fact that he had himself made it very difficult to prove any discrepancy between his customers’ orders and those he sent to Guertin by not keeping the former, a practice which was highly irregular and inexcusable in the circumstances.

In view of the evidence provided by the documents and the pleas of guilty, it is impossible to avoid the conclusion not only that fraudulent acts were committed at the request of Chamberland, but that these were not isolated cases but operations repeated frequently and systematically over a period of several years. Clearly this was criminal fraud in which Guertin undoubtedly participated, and the fact that complaints were laid only against the Chamberland company does not change matters. I agree with the trial judge that Guertin was the chief culprit, not only because he was the instigator of and accomplice in the adulteration scheme, but also because he derived the greatest benefit from it, for I also agree with the trial judge in recognizing that, in spite of the adulteration, Chamberland was far from making an exorbitant profit on the merchandise. None of this means that the parties are not to be dealt with in law as accomplices in criminal activities. Whatever sympathy may be felt for Chamberland who was the victim of Guertin’s bad advice, his participation in criminal activities deprives him of any remedy against his accomplices. It is quite true that as a general rule common fault does not rule out all recourse: it only calls for a reduced recovery in proportion to the gravity of the respective faults. This principle, however, cannot be applied in the case of an immoral and criminal activity, such as a conspiracy to defraud. Savatier says (*Responsabilité civile*, 2nd ed., vol. 1, p. 243):

[TRANSLATION] Recovery of amounts paid under unlawful contracts is more easily allowed; but a party to an unlawful contract, who has knowingly and freely participated in it, is not allowed to recover from the other party, in whole or in part, damages caused to him by a concerted breach of the law.

Similarly André Nadeau says (*Traité de Droit civil du Québec*, v. 8, para. 32, p. 20):

[TRANSLATION] Thus, a court of civil jurisdiction may look into the degree of fault in order to find that, despite a conviction in criminal court, the insured is entitled to recover on his policy if an intentional or fraudulent act is not proved, and consequently, public order is not involved.

While I agree with Montgomery J. that Chamberland is not entitled to a legal remedy for damages arising out of fraudulent activities in which he participated, it does not seem to me that this case, which is governed by the civil law of Quebec, should be decided on the basis of the rule of equity quoted by him.

In my opinion, we must first consider that, fundamentally, the remedy which the Chamberland company seeks from the Guertin companies has a contractual basis. Indeed, this part of the claim is simply an action by a buyer against a seller for damages caused by defects in the thing sold, an action based in such case on art. 1527 of the Civil Code, as was pointed out in *Samson et Fillion v. Davie Shipbuilding*[5]. It is clear, and this follows directly from art. 1062 of the Code, that a contract with a fraudulent object, in this case delivery to a third party of merchandise which is fraudulently described and labelled, is absolutely void as offending public order. Its nullity under the law does not have to be pleaded: once the Court has taken cognizance of the immoral character of the contract, it must refuse to enforce it. To award damages for faulty implementation of such a contract would be to enforce it.

The remedy sought by the Chamberland company against Guertin personally, and that sought by Chamberland himself against Guertin and the two Guertin companies clearly cannot involve contractual liability, but solely delictual liability. Having come to the conclusion that we are dealing here with fraudulent activities carried out at the request of Chamberland and his company and with his full knowledge, I am of the opinion that the maxim *volenti non fit injuria* must be applied. By knowingly taking part in fraudulent activities, Chamberland and his company voluntarily ran the risk of the damage they suffered—the injury to their reputation and the loss of their customers. As André Nadeau puts it (*op. cit.* para. 551, p. 476):

[TRANSLATION] The *volenti non fit injuria* rule exists in our French law of liability, as in English law, but with us it takes a different form. It requires the victim's consent to the injurious act, sometimes called acceptance of risk, which often involves a certain degree of recklessness on his part.

The maxim is applied when the victim has freely and knowingly, with full awareness of the circumstances, consented to a risk or danger, the nature or extent of which he was fully able to appreciate, and has thus tacitly accepted the consequences in advance.

((55) *Montreal Park and Island Ry. Co. v. McDougall* (1905) 36 S.C.R. 1 (industrial accident); *C.P.R. v. Fréchette* (1915) A.C. 871, 880, 24 K.B. 459; *Letang v. Ottawa Electric Ry. Co.* (1926) A.C. 725, 41 K.B. 312; *Nolin v. Canadian Vickers Ltd.* (1928) 34 R.J. 222 (j. DeLorimier), *aff. by C. of Appeal and Supr. C.*, (1930) 1 D.L.R. 71; *Sharp Construction Co. v. Bégin* (1920) 59 S.C.R. 680: skilled workman injured cleaning a pulley while the machine was in operation.)

We must now consider whether this disposes of the case. In effect, the trial judge concluded that, as a general rule, poor quality merchandise was systematically delivered to Chamberland's customers. The first delivery to a customer was usually of good quality, then the quality declined. Numerous adulteration procedures were described by several witnesses and there is no doubt that the trial judge was fully justified in coming to the conclusion that there was evidence of adulterations other than those ordered by Chamberland as above stated.

It must be remembered that a part only of the merchandise was sold under the Chamberland label. The VITAL and VIT balanced mixtures bore the Guertin label and were his sole responsibility. There was ample evidence of customer dissatisfaction with these products, although the analysis reports did not disclose many cases of significant departure from the standard. As Montgomery J. observed:

In only a few cases were the samples analysed much inferior to standard but in many cases they were slightly inferior.

May the responsibility be divided, and the condemnation be upheld only for that part of the damages that can be attributed to the delivery of “balanced” mixtures of inferior quality and, perhaps, to the delivery of ordinary feed of a quality inferior to what was ordered other than as part of the fraudulent activities in which Chamberland participated?

To answer this question, we must first of all look at the nature of the claim. The action did not claim the damages that may have been occasioned by this or that particular delivery of merchandise. It can be seen from the exhibits submitted that whenever there was a problem with buyers, as in the case of L’Idéale Mont-Carmel, the two parties saw to it that a settlement was made.

The relief claimed by the action, which was allowed by the courts below, was compensation to the company for the loss of its reputation and goodwill, and compensation to Chamberland personally for the loss of his reputation. Can these losses in any way be associated with anything other than the fraudulent activities in which the claimants participated? I do not think so. The least that can be said, as Montgomery J. maintained, is that it has not been proved that it was the poor quality of the feed delivered by Guertin that brought about the ruin of the Chamberland Company’s business, rather than the sale of feeds falsely labelled at the request of Chamberland himself. It is plain that, on the whole, the cause of the damage to Chamberland’s personal reputation and of the loss of his company’s goodwill was the merchandise fraudulently sold under his label. That is what gave rise to the justified intervention by officials of the Department of Agriculture of Canada, the series of letters to customers, the seizures, the complaints and the admissions of guilt.

For these reasons, I would allow the appeal, set aside the judgments of the Superior Court and the Court of Appeal, and dismiss respondents’ action. However, like Montgomery J., I think that since the appellants succeed only on account of a fraud in which they participated and for which they were primarily responsible, they do not deserve to be awarded any costs.

Appeal allowed without costs.

Solicitors for the defendants, appellants: Lizotte, Marchessault, Arsenault, Lagacé & Poussard, Granby.

Solicitor for the plaintiffs, respondents: L.R. Leblanc, Montreal.

[1] [1968] Que. Q.B. 954.

- [2] [1968] Que. Q.B. 954.
- [3] [1971] S.C.R. 23, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591.
- [4] [1943] S.C.R. 165, 10 I.L.R. 45, [1943] 2 D.L.R. 129.
- [5] [1925] S.C.R. 202, [1925] 2 D.L.R. 856.
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Prepared on 27 October 2026 · Esheria