**SUPREME COURT OF NOVA SCOTIA**
Citation: Goodick Estate v. Conrad Estate, 2011 NSSC 51

Date: 20110211
Docket: PtH 276741
Registry: Port Hawkesbury

Between:
**Lori Michelle Briand**, as representative of the **Estate of Michael Roger Goodick**, **Lori Michelle Briand** to her personal capacity, **Dylan Ryan Briand** and **Lauryn Amara Briand**, both infants, by their *guardian ad litem* and mother, **Lori Michelle Briand**

Plaintiffs

-and-

**The Estate of Clifton Arnold Conrad** and **MacLeod's Farm Machinery Limited**, a Nova Scotia Company

Defendants

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**Decision**

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**Judge:** The Honourable Justice Robert W. Wright

**Heard:** September 27-30- 2010 at Halifax, Nova Scotia

**Written Decision:** February 11, 2011

**Counsel:**
Counsel for the Plaintiffs - Robert Pineo (watching brief)
Counsel for the Defendant (MacLeod's Farm Machinery Limited) - Michael Dunphy, Q.C. and Andrew Sowerby
Counsel for the Defendant (The Estate of Conrad) - Dennise Mack

Wright, J.

**INTRODUCTION**

[1] As long time snowmobile enthusiasts, Clifton Conrad, accompanied by his friend Archie Lockhart, set out on January 25, 2006 on a snowmobiling trip to Margaree, Cape Breton where they had a camp. Unfortunately, on January 28th, disaster struck. Mr. Conrad was involved in a head on snowmobile collision with Michael Goodick which took the lives of both drivers. This resulted in the present lawsuit brought by Mr. Goodick's Estate and family members.

[2] At the time of the accident, Mr. Conrad was operating a brand new Polaris 700 Touring model snowmobile (the "700 model"). He had just taken delivery of that unit from the defendant MacLeod's Farm Machinery Limited ("MacLeod's") on January 26th after his new Polaris FST Touring model snowmobile (the "FST model") had broken down on its first day of use. Mr. Conrad had earlier purchased the FST model from MacLeod's on November 15, 2005 but took it back to MacLeod's on January 26th after the breakdown, at which time he took delivery of the 700 model to resume his snowmobiling trip in Cape Breton.

[3] These circumstances, which will be detailed later in this decision, raise the issue of the ownership of the 700 model at the time of the accident. The parties have severed that issue by consent order and the court is required to now determine whether it was Mr. Conrad or MacLeod's who owned the 700 model at the time of the accident. That finding, of course, will determine which liability insurer will be required to respond to the plaintiffs' claim for damages in the next stage of the proceeding.

**OVERVIEW OF FACTS**

[4] Both Mr. Conrad and Mr. Lockhart purchased new FST model snowmobiles from MacLeod's in mid-November of 2005 in preparation for an extended trip to Labrador they were planning to make in the winter months of 2006. Since there had been hardly any snow accumulation until about mid-January that year, the trip to Cape Breton over the extended weekend of January 26-28 presented the first real opportunity for them to try out their new FST model snowmobiles as a prelude to the Labrador trip.

[5] As it happened, both these new snowmobiles were in for repair at MacLeod's at its Truro location immediately prior to the trip to Cape Breton. Messrs. Conrad and Lockhart therefore planned to pick them up from MacLeod's en route on January 25th which they did .

[6] The trip began on a sour note when both snowmobiles broke down on their first morning of use in actual snow conditions. Mr. Conrad experienced two broken drive belts on his snowmobile and observed that the engine light was on as well. Since both snowmobiles were virtually inoperable, Messrs. Conrad and Lockhart loaded them on the latter's truck and headed back to MacLeod's in Truro.

[7] While en route Mr. Conrad made a series of four telephone calls to MacLeod's, using Mr. Lockhart's cell phone, between 2:06 p.m. and 4:00 p.m. (there possibly having been one earlier call before their departure from a land line in Cape Breton). Mr. Conrad was not a happy customer, being very dissatisfied

with the performance of his new snowmobile.

[8] There are conflicting versions as to what actually transpired during the first of those telephone calls to the dealership which was taken by Mark MacLellan, a salesman and Secretary-Treasurer at MacLeod's. The position advanced on behalf of the Conrad Estate is that Mr. Conrad intended only to return his FST model to MacLeod's on that date to have it repaired and that he concurrently took delivery of the 700 model only on loan for the weekend. The position advanced on behalf of MacLeod's, on the other hand, is that during that telephone call between Mr. Conrad and Mr. MacLellan, an agreement was made whereby Mr. Conrad would make an even trade of his FST model for a brand new 700 model, without any money changing hands (which he could then take back with him to Cape Breton that evening). That conflicting evidence will be reviewed in detail later in this decision.

[9] At all events, upon their arrival at MacLeod's at approximately 4:30 p.m., Mr. Conrad was presented with a brand new 700 model which had just been uncrated and undergone the usual dealer preparation that afternoon as promised. The license plate from the FST model was removed and given to Mr. Conrad to take with him. Also, by working overtime, MacLeod's technicians were able to make the necessary repairs to Mr. Lockhart's FST model so that it was ready to go. Nothing occurred by way of efforts to repair Mr. Conrad's FST model that day.

[10] No paperwork was done at the dealership before the departure of Messrs. Conrad and Lockhart at approximately 5:30 p.m. Just before their departure, however, the question of insurance coverage on the new 700 model was raised. As will be detailed later, Mr. Conrad was informed by MacLeod's that its liability policy would not provide coverage, whereupon Mr. Conrad telephoned his son Brent Conrad to ask that he arrange to switch their own policy coverage from the FST model to the 700 model (of which more will be said later). Shortly after making that call, Messrs. Conrad and Lockhart returned to Cape Breton to resume their snowmobiling trip the next day. It was on the day after that, January 28th, that the fatal accident occurred.

**ISSUE**

[11] The sole issue to be now determined by the court is the ownership of the 700 model at the time of the accident. That outcome turns on the question of whether the parties agreed to a binding contract to trade the FST model for the 700 model on January 26, 2006 (whereby title to the 700 model passed to Mr. Conrad), or whether Mr. Conrad took delivery of the 700 model that day only on a loaner basis until the FST model was repaired (whereby title to the 700 model remained vested in MacLeod's).

**SUMMARIES OF THE EVIDENCE**

[12] It is acknowledged by counsel that the burden of proof on the issue of ownership lies on MacLeod's to establish that a binding agreement was made on January 26th for an even trade of the FST model for the 700 model. To that end, counsel for MacLeod's called three witnesses to testify, namely, Mr. Lockhart and

Messrs. Mark MacLellan and Dwayne Langille, the two employees of MacLeod's with whom Mr. Conrad dealt in this matter. I will first review the evidence of Mr. MacLellan.

[13] Mr. MacLellan began his testimony by giving some background information about MacLeod's business in the sales and service of farm machinery and recreational sports equipment. Since MacLeod's was a dealer for the manufacturer Polaris, Mr. MacLellan was familiar with their product line including both the FST and 700 models. The 700 model had been on the market for several years with a proven engine while the FST model was introduced as a new model in 2006. Both models featured the same chassis but the FST model was powered by a new engine.

[14] Mr. MacLellan was aware from industry literature prior to January 26, 2006 that the newly introduced FST model was initially fraught with a number of recurring problems which had lead other customers to return them to the dealership.

[15] Mr. MacLellan's first contact with Mr. Conrad was in November, 2005 when the FST model was purchased. He knew both Mr. Conrad and Mr. Lockhart to be experienced snowmobilers who were then planning another long trip.

[16] Mr. MacLellan's next contact with Mr. Conrad was on January 26, 2006 when he received the first telephone call from an irate Mr. Conrad who was unhappy and upset over the breakdown of his snowmobile. Although this was the

first time he had used it in actual snow conditions, he had already had the snowmobile back to the dealership for repairs on two prior occasions since he bought it two months earlier. Mr. MacLellan testified that he was told by Mr. Conrad that the FST model was a piece of junk, that he didn't want to talk about repairing it, and that he was bringing it back to the dealership because he didn't want it anymore.

[17] Faced with that edict, and being familiar with the common problems being experienced with the new FST model, Mr. MacLellan testified that his next option was to offer to take the FST model in even trade for a brand new 700 model (with which Mr. Conrad was already familiar). Mr. MacLellan testified that he spontaneously communicated that offer to Mr. Conrad during the same telephone call, to which Mr. Conrad replied that it sounded good to him. Mr. MacLellan accordingly informed Mr. Conrad that MacLeod's had a brand new 700 model available at the dealership and that he would arrange to have it uncrated and serviced by way of dealer preparation by 5:00 p.m. that day.

[18] Mr. MacLellan also informed Mr. Conrad that he was leaving work early that afternoon (because he was going on a snowmobile trip of his own) but that he would arrange for MacLeod's sales manager, Dwayne Langille, to look after him when he arrived.

[19] Mr. MacLellan acknowledged that he had no discussion with Mr. Conrad about price (knowing that the MSRP of the two models was almost the same). He also acknowledged that he did not know what mileage the FST model had on it but

knew that it would be very little because there had been no snow accumulation that year until mid-January. He testified that in his position of authority at MacLeod's, he was prepared to take Mr. Conrad's slightly used FST model in even trade for a new 700 model because he was focused on satisfying an angry customer with legitimate complaints.

[20] Mr. MacLellan further testified that Mr. Conrad was not looking to have his FST model repaired and that there was no indication from him that this was intended to be a temporary exchange. Mr. MacLellan understood the plan to be that MacLeod's would trade snowmobiles with Mr. Conrad and repair Mr. Lockhart's snowmobile that afternoon, enabling them to return to Cape Breton right away. In Mr. MacLellan's mind, he had committed MacLeod's to an even trade of the two snowmobiles, without any money being needed to change hands.

[21] Mr. MacLellan also testified that MacLeod's does not have a loaner snowmobile program for customers who bring their own units in for repair; nor do they have a demonstrator program to promote the sale of new snowmobiles. He said that if Mr. Conrad had asked for a loaner, he would not have been given one. Mr. MacLellan further refuted the contention that the 700 model was provided on a loaner basis by pointing out the economic comparison that had that been the case, MacLeod's would then have been left with a used snowmobile upon its return by Mr. Conrad which would have required them to reduce its price whenever it was sold.

[22] Thinking it was a done deal, Mr. MacLellan then spoke to Mr. Langille and told him that Mr. Conrad was en route to the dealership from Cape Breton to take delivery of the new 700 model, for which he had already arranged the uncrating and pre-delivery inspection on a priority basis. Mr. Langille agreed to look after him when he arrived.

[23] As it turned out, that was the last time that Mr. MacLellan was able to speak with Mr. Conrad. However, he did further explain the internal procedures by which a work order for the necessary repairs to the FST model was opened on the computer on January 27, 2006. Although the computer printout of the work order lists Cliff Conrad as the owner of that snowmobile on January 27th, Mr. MacLellan explained that the computer perpetuates the owner's name until such time as the sale of the unit to a new owner is entered in the computer program.

[24] That entry did not take place in this instance until February 9, 2006 when Mr. MacLellan finally prepared an invoice indicating the sale of the 700 model to Mr. Conrad against the trade-in of his FST model. The invoice was backdated to January 26, 2006 and the values used for the snowmobiles were simply those which he carried over from the initial sale of the FST model to Mr. Conrad on November 15, 2005. Mr. MacLellan's explanation for this delay was that he simply didn't know what to do in this unusual situation where he didn't have a customer but that he eventually decided to date this invoice January 26th because as he put it, "that's when the deal was done".

[25] Mr. MacLellan acknowledged that no paperwork was prepared on January 26th except for an invoice handwritten that evening by Mr. Langille after Messrs. Conrad and Lockhart had departed for Cape Breton. In that handwritten invoice, Mr. Langille recorded the sale of the 700 model to Mr. Conrad against the trade-in of the FST model (without inserting any values). Mr. MacLellan explained that it was standard procedure to prepare the usual paperwork at the time the deal is made and that he would have done so had he remained at the dealership that afternoon. However, because he was leaving early on his own trip, he didn't take the time to do that. Rather, he left instructions about the trade deal with Mr. Langille to carry out.

[26] Because Mr. Langille didn't normally do such paperwork on the snowmobile side of the business, Mr. MacLellan anticipated that the necessary paperwork would be completed on the following Monday, although he acknowledged that he had no discussion with Mr. Conrad about that in their telephone call. Mr. MacLellan added that standard practice notwithstanding, it was not unusual for MacLeod's to allow a customer to take delivery of a vehicle without all the necessary paperwork first being completed. His mindset was that as of the end of the day on January 26th, MacLeod's was the owner of the FST model and Mr. Conrad was the owner of the 700 model.

[27] I now turn to a review of the evidence of Dwayne Langille, a part owner and sales manager of MacLeod's. Mr. Langille confirmed that he was informed by Mr. MacLellan on January 26th that he had just agreed with Mr. Conrad to take his FST model snowmobile in on trade in an even exchange for a brand new 700 model.

Mr. Langille was further advised that Mr. MacLellan had arranged for the 700 model to be ready for delivery that afternoon to Mr. Conrad who was on his way to the dealership from Cape Breton.

[28] Mr. Langille was also made aware of Mr. Conrad's dissatisfaction with the FST model. He too was already aware of the problems associated with that new model. He confirmed that Mr. MacLellan had the authority to make that agreement on behalf of MacLeod's and that he trusted his judgment to make such an agreement with a disgruntled customer. Mr. Langille agreed to meet Messrs. Conrad and Lockhart on their arrival to implement the transaction in Mr. MacLellan's absence.

[29] As identified in Mr. Lockhart's cell phone records, Mr. Langille said he spoke with Mr. Conrad at least twice by telephone before he arrived. In those calls, Mr. Conrad repeated to Mr. Langille that he was fed up with the FST model and was bringing it back to the dealership. Mr. Langille said that although they talked about looking at repairs to be made to Mr. Lockhart's snowmobile, no one mentioned anything about carrying out repairs to Mr. Conrad's FST model. Neither, said Mr. Langille, was there any discussion whatsoever with either Mr. Conrad or Mr. MacLellan about any sort of loaner arrangement for the weekend.

[30] Mr. Langille's understanding, from speaking with both Mr. MacLellan and Mr. Conrad, was that Mr. Conrad would be arriving later that afternoon to take delivery of the new 700 model, leaving behind his FST model as a trade-in. He further understood that MacLeod's would take a look at Mr. Lockhart's

snowmobile for the necessary repairs to enable them both to return to Cape Breton that evening. Mr. Langille also confirmed that MacLeod's had neither a loaner nor a demonstrator program available to its customers and that there was no reason to think from anyone that any sort of special arrangement had been made in that regard.

[31] When Messrs. Conrad and Lockhart arrived at approximately 4:30 p.m., the 700 model was ready to go. MacLeod's' technicians were also able to promptly make the necessary repairs to Mr. Lockhart's snowmobile. Mr. Langille confirmed that there was no repair investigation into Mr. Conrad's FST model that day because Mr. Conrad didn't want it repaired and was still angry over the failure of the unit which he described as a piece of junk.

[32] Mr. Langille went on to say that once Mr. Conrad had cooled down a bit, they talked about the need of doing the required paperwork at the beginning of the following week. Mr. Langille was content to leave the paperwork until then because that was normally Mr. MacLellan's responsibility and they were already at or past closing time for the day. Mr. Langille was not particularly concerned over allowing Mr. Conrad to take delivery of the 700 model without completion of the paperwork because, as he put it, "we had exchanged sleds and the deal closed that way". He too confirmed that that was not an uncommon business practice for MacLeod's in that community.

[33] Before the departure of Messrs. Conrad and Lockhart, a MacLeod's mechanic removed the license plate from the FST model and gave it to Mr. Conrad to take with him because, as Mr. Langille said, the plate goes with the owner. It was at about the same juncture that Mr. Lockhart raised the question of liability insurance coverage for the 700 model. Mr. Langille's reply was that MacLeod's would no longer have insurance on that new snowmobile and that Mr. Conrad had better get his own insurance. Mr. Langille then retrieved the serial number for the 700 model and provided it to Mr. Conrad ,who then made a telephone call to his son with instructions to arrange the appropriate coverage.

[34] With that done, Messrs. Conrad and Lockhart departed for Cape Breton at which point Mr. Langille testified that he believed that MacLeod's had become the owner of the FST model and Mr. Conrad had become the owner of the 700 model. He formed this belief because of the terms of the transaction that had been communicated to him by Mr. MacLellan, along with the fact that Mr. Conrad had switched his own insurance coverage to the 700 model.

[35] It was only after Messrs. Conrad and Lockhart left the dealership that Mr. Langille prepared a single piece of paperwork as referred to earlier, namely, a handwritten invoice (on a MacLeod's printed form) recording that the 700 model had been sold to Mr. Conrad on January 26, 2006 against a trade-in of the FST model (without any values being inserted). Mr. Langille's testimony was that because the formal paperwork was being deferred until the following week, he prepared this handwritten invoice (at about 6:00 p.m. that day) as he would for anything leaving the shop. He said he didn't feel it necessary to insert any values

on that handwritten invoice because the deal was for an even trade of the two snowmobiles. For that reason, neither did he discuss with Mr. Conrad the MSRP (or values) of the respective models (which, incidentally, were virtually the same with the 700 model being listed at $100 higher than the FST model).

[36] Mr. Langille also confirmed the internal computer entry practices at MacLeod's that were spoken to by Mr. MacLellan and which need not now be repeated. In the result, the change of ownership of the 700 model was not entered on the computer records until February 9, 2006 (although backdated by Mr. MacLellan to January 26, 2006 to coincide with the date of the handwritten invoice prepared on the day of the transaction). Because the other standard paperwork was never completed, ownership of the FST model was never transferred out of Mr. Conrad's name and that unit was ultimately sold for parts.

[37] That brings me to an assessment of the evidence of Mr. Lockhart which is very problematic for the court.

[38] Mr. Lockhart was anticipated to be an important witness where he accompanied Mr. Conrad throughout his dealings with MacLeod's on January 26th as well as their remaining time in Cape Breton. Mr. Lockhart was a long time friend of Mr. Conrad's and obviously knew him well from their common interest in snowmobiling, which included a trip they took together from Alberta to Nova Scotia in 2004. Both were excited to try out their new FST model purchases on their Cape Breton trip as a prelude to their upcoming trip to Labrador and back.

[39] It soon became obvious in his direct testimony that Mr. Lockhart was a very reluctant witness and didn't want to be involved in this proceeding. Although he was called as a witness for MacLeod's, he had refused to meet in advance with counsel for MacLeod's but rather had chosen to meet in advance with counsel for the Conrad Estate.

[40] It wasn't long into Mr. Lockhart's testimony on direct examination before it became apparent that counsel for MacLeod's was not getting the answers he expected, given the discovery evidence that Mr. Lockhart had given earlier in the proceeding. Counsel for MacLeod's first approached these inconsistencies by referring Mr. Lockhart to the pertinent excerpts from the transcript of his discovery evidence for the stated purpose of refreshing his memory. However, as the direct examination progressed, it began to take on the tenor of an impeachment of the witness, in the court's estimation, as the inconsistencies grew.

[41] For example, Mr. Lockhart was asked in a number of ways what he overheard Mr. Conrad tell MacLeod's and whether Mr. Conrad told them that the FST model was a piece of junk and that he didn't want it anymore but rather wanted a new unit with a two stroke engine in its place (i.e., the 700 model). Mr. Lockhart's repeated response was that he couldn't recall any specifics of what Mr. Conrad said to MacLeod's in his presence and that nothing came to his memory as to whether Mr. Conrad talked in terms of a trade or repair of his FST model. That testimony was markedly different from what he had said earlier on discovery which, although less than clear in some respects, was generally consistent with the evidence of Messrs. MacLellan and Langille that a trade of the two snowmobiles

had been made on that day.

[42] When asked whether his discovery evidence was accurate, Mr. Lockhart said that he felt that he was in a pressure cooker when giving his discovery evidence, surrounded as he was by lawyers he didn't know and what parties they represented. He said the lawyers examining him kept pressing him with questions, asking them in different ways until they got the answer they wanted.

[43] He further cast doubt on the veracity of his discovery evidence by saying that he didn't always digest the question he was asked, that he had to answer quickly and that he may have answered differently if he had been given sufficient time. He said he was giving everything second thought in his testimony at trial, particularly with respect to the meaning of technical words, alluding to the term "trade" about which he had been questioned.

[44] On the one hand, Mr. Lockhart kept saying (on several occasions) that he was being truthful at discovery as best he could recall it at that time. On the other hand, he kept casting doubt on the veracity of his discovery evidence for the reasons above recited.

[45] I do not consider that any useful purpose would be served in tracing through the many inconsistencies which stood out between Mr. Lockhart's discovery evidence and his trial evidence. Suffice it to say by way of overview that his discovery evidence put to him at trial tended to be more consistent with the evidence of a trade given by Messrs. MacLellan and Langille. By comparison, his

trial evidence, particularly on cross-examination, generally supported the position of the Conrad Estate that this was a loaner arrangement to try out the 700 model and not an actual trade.

[46] In his closing submissions, counsel for MacLeod's argued that the passages from Mr. Lockhart's discovery evidence which had been put to him at trial should be used by the court for the truth of its contents. Counsel for the Conrad Estate took the opposite view, contending that these discovery excerpts with which Mr. Lockhart had been confronted could only be used to impeach the credibility of his evidence given at trial.

[47] The *Nova Scotia Civil Procedure Rules (2009)* contain only one direct provision pertaining to this issue. Rule 18.20(1) reads that "Answers given by a witness at discovery may be used to impeach the witness at trial, or on the hearing of an application or motion". It is non-party witnesses who fall under that restriction. No such restriction applies to the use of the discovery evidence of a party which, under Rule 18.20(2) may be used for any purpose by an adverse party.

[48] The law on this point is summarized at s.16.134 of *The Law of Evidence in Canada* (1999) (second edition) authored by Sopinka, Lederman and Bryant. The relevant excerpt reads as follows:

> If the witness, however, is a party in a civil proceeding (whose statement is voluntary), the prior statement is admissible for the truth of its contents under the admission exception to the hearsay rule . . . Otherwise, unless the witness adopts the truth of the contents of the previous statement, it does not become evidence of the truth of the facts stated therein. Thus, if

> the only purpose is to impeach the witness' credibility, the proof that a witness made an inconsistent statement may have the effect of neutralizing her or his testimony. It only goes to show that the witness' evidence is not reliable . . . With respect to a statement that can only be used for impeachment and not for the truth its contents, the judge or jury are not obliged to disregard all of the witness' testimony because of the contradiction, but they may give whatever weight to the evidence that they feel is appropriate in light of the contradiction.

[49] This passage was quoted with approval by the Ontario Court of Appeal in **R. v. McKerness**, 2007 ONCA 452. The same principle was also reiterated by the Nova Scotia Court of Appeal in **Burton v. Hollett**, 2001 NSCA 35 at para. 22.

[50] In the result, Mr. Lockhart's discovery evidence can only be used for the truth of its contents to the extent that he adopted it at trial as being true. Otherwise, it can only be used for purposes of impeachment of his evidence given at trial and hence his credibility. Here, it is difficult to discern what parts of his discovery evidence he was adopting at trial as being true, in light of the wide circle of doubt he cast on its veracity overall by his comments above recited.

[51] The theory of counsel for MacLeod's is that Mr. Lockhart told the truth on discovery before he realized its significance and that now being cognizant of that, he was backtracking at trial because he wanted to support the position of the Conrad family with whom he remains friends. However that may be, and I do not suggest that Mr. Lockhart was deliberately lying in his testimony, I conclude that his evidence is simply too unreliable to hold sway on the findings of fact to be made by the court.

[52] Counsel for the Conrad Estate called three witnesses at trial, namely, Donald McDermaid, Brent Conrad and Eva Conrad. I need only review the evidence of the first two of them in this decision.

[53] Mr. McDermaid was an insurance broker with the firm of Stanhope Simpson and at the time, the Conrads were one of his clients. Mr. McDermaid's involvement in this matter began when he received a fax from Brent Conrad, the son of Clifton Conrad, on January 26, 2006 at 4:54 p.m. The text of that fax reads as follows:

> This is to notify you that Clifton Conrad is demonstrating a new 2006 Polaris 700 snowmobile S/N SNIPT7HS46C637076 until Jan 30/06. His new Polaris snowmobile is in the dealership for warranty work. He wanted the insurance switched from his to this demo unit.

[54] Upon receipt of this fax, (which he believes he did not actually see until the following day) Mr. McDermaid contacted Brent Conrad because he wanted to clarify that the 700 model was not a substitute vehicle on the existing policy. Upon completion of that call, Mr. McDermaid handwrote a note to file under date of January 27/06 which reads as follows:

> Rec'd a fax from Brent Conrad re Cliff's snowmobile that broke down. Brent says Cliff took machine back to dealership in Truro (MacLeod's). They are repairing his machine and gave him a loaner to use in meantime.
>
> I told Brent this wasn't their machine and the Aviva policy wouldn't cover it. It should be covered by the dealer since it's a loaner.

[55] Mr. McDermaid then took the further step of sending a very brief e-mail to Aviva on January 27th simply informing the insurer that the new snowmobile had broken down and the dealership had provided a loaner. That is the full extent of the documentation entered into evidence pertaining to that issue.

[56] Mr. McDermaid readily acknowledged that the word “loaner” which he himself had used in his file note is not to be found in the fax from Brent Conrad. He explained that when writing this note and the e-mail to Aviva, he was substituting the word “loaner” for “demo”. He thought that the word “loaner” came from his telephone discussion with Brent Conrad although he acknowledged that he could not recall any specific words spoken during that call.

[57] Brent Conrad was next to testify. Up until the fatal accident, he and his father had jointly owned and operated a business named BCR Equipment Limited in Enfield, Nova Scotia. Through that company, they operated a truck and automotive repair and sales business which also included off-road vehicles. The company was founded in 1987 and prior to that, his father Clifton Conrad owned and operated a similar business involving sales of new vehicles since 1975. Mr. Conrad testified that his father was involved in the everyday operations of the business, including sales and repairs, and was very familiar with the paperwork required in connection with the sale of new and used vehicles.

[58] Mr. Conrad also said that he and his father worked closely together in running the business. He was also involved in several discussions with his father in the selection of the FST model purchased in November of 2005, a decision that was months in the making.

[59] Mr. Conrad then related the events of January 26-28, 2006 in which he was personally involved. It began with his receipt of a telephone call from his father on January 26th who was then on his way from Cape Breton to MacLeod’s in Truro.

Mr. Conrad related that he was told by his father that he was taking the FST model back to the dealership (along with Mr. Lockhart's snowmobile) to have them repaired. He testified that his father did not say that he was going to trade the FST model for something else.

[60] Mr. Conrad went on to say that the next telephone call from his father was at approximately 5:00 p.m. that afternoon (which the telephone records disclose to have been made at 4:44 p.m. to be exact). On that call, his father said that MacLeod's had given him another sled to take back to Cape Breton to finish their trip while the FST model was in for repairs. He was then asked by his father to call their insurer to give notification of the new sled he was taking from MacLeod's.

[61] Mr. Conrad acknowledged in his testimony that the purpose of his father's call was to switch insurance from the FST model to the 700 model. His understanding was that MacLeod's had told his father that its insurance coverage would not apply to the 700 model and that new insurance was therefore needed to be placed.

[62] Mr. Conrad further testified that his father did not say why he needed to place new insurance coverage where the 700 model was being provided to him only as a demonstrator unit. He readily acknowledged that in his own experience in the business, it is the dealer's insurance coverage which applies when demonstrator vehicles are provided to prospective customers. Curiously, Mr. Conrad was not asked by counsel, given his industry knowledge, why he didn't

himself question his father on the need to switch snow vehicles on their own insurance policy in such circumstances.

[63] At all events, Brent Conrad carried out his father's instructions and promptly sent a fax to Mr. McDermaid (at 4:54 p.m. as above recited). Mr. Conrad was uncertain as to whether he telephoned Mr. McDermaid just prior to sending that fax or whether it was the next day when they first spoke. It was Mr. Conrad's testimony, however, that the term "demonstrator" which he used in the fax came from his father during their telephone discussion. Indeed, he testified that he specifically recalls his father using the word "demo unit" and that his father never said that he was purchasing the 700 model, but rather it was going to go back to the dealership after the Cape Breton trip.

[64] Mr. Conrad also acknowledged that he spoke with Mr. McDermaid by telephone (which he thinks occurred the next day) because Mr. McDermaid wanted to determine what was happening with the FST model and why the Conrads would want to change their insurance to the 700 model if it was actually a demo unit. Mr. Conrad clarified that he did not use the term "loaner" in his discussions with Mr. McDermaid, nor had his father used that term in their telephone call (although he had given the opposite answer in his discovery). In any case, it is unclear to the court why Brent Conrad did not question the need for placement of their own insurance coverage on the 700 model if he thought it had been provided to his father as a demonstrator.

[65] Two days later, on January 28th, Brent Conrad himself went to Cape Breton with his own snowmobile where he met his father and Mr. Lockhart. Mr. Conrad testified that he was told by his father that he had driven Mr. Lockhart's repaired FST model most of the previous day to find out whether it presented the same problems as he had experienced. He related that his father then told him that Mr. Lockhart's snowmobile worked perfectly and he was therefore confident that MacLeod's could fix his own FST model satisfactorily.

[66] Mr. Conrad further testified that his father did not indicate to him at any time that he had traded the FST model or purchased the 700 model.

[67] In cross-examination, counsel for MacLeod's drew out a number of inconsistencies between Mr. Conrad's direct testimony and his earlier discovery testimony. Most of these inconsistencies were in the nature of relatively minor logistical details, however, such as the number of calls he received from his father on January 26th, the time and length of the calls, the sequence of inserting the serial number in the fax to Mr. McDermaid and when the fax was prepared, and when it was that he spoke with Mr. McDermaid. There was also the inconsistency above referred to where he had said on discovery that his father had used the term "loaner". With respect to such details, Mr. Conrad acknowledged in cross-examination that his memory could be inaccurate but that he did know the main purpose of the call and its generalities, although not the specific words used.

[68] Mr. Conrad also explained his understanding of the difference between the terms “loaner” and “demonstrator”. The former applies when a vehicle is provided to customers while their own vehicle is in for repairs. The latter term applies to the situation where a new model is being provided to the customer to try it out as a means of sales promotion.

[69] Mr. Conrad acknowledged that his father did not say to him that he was trying out the 700 model with a view to purchasing it. He also acknowledged in cross-examination that he made assumptions at the time from the conversation he had had with his father.

**LEGAL ANALYSIS**

[70] From this collection of evidence, the court must determine whether:

(a) The 700 model was provided to Mr. Conrad on a loaner basis for the weekend while his FST model was being repaired by MacLeod’s, OR

(b) Whether a contract was made on January 26th for an even trade of the two snowmobiles whereby title to the 700 model passed to Mr. Conrad.

[71] Those are the two competing theories of this case and as noted earlier, it is common ground that the burden of proof lies on MacLeod’s, on a balance of probabilities, to establish the transfer of ownership of the 700 model to Mr. Conrad.

[72] It is abundantly clear from the evidence of Messrs. MacLellan and Langille

that their intention on January 26th was to bind the dealership to an agreement to make an even trade of the two snowmobiles. Their belief, as both attested to, was that at the end of the day, Mr. Conrad had become the owner of the 700 model and MacLeod's had become the owner of the FST model. The question is whether that was a mutual intention held by Mr. Conrad whose testimony unfortunately we do not have.

[73] Clearly, the intention of the parties must be manifested when (or before) the contract is made, if it is to govern the transaction. The method of discerning the intention of the parties is the subject of the following commentary by G.H.L. Fridman in the textbook *Sale of Goods in Canada*, 5th ed. (Thompson Carswell, 2004) at p. 66:

> This all-important intention, however, may not easily be discoverable. Nothing may be said or done by the parties to elucidate what they meant to happen as regards the passing of property, nor may the previous course of dealing between the parties, if any, the customs or usages of the trade or business involved, if such there be, or the surrounding circumstances, throw any light upon this question. In such a situation, therefore, the provisions of the Act become applicable. What the Act does is to lay down certain *prima facie* rules for ascertaining the intention of the parties as to the time at which property in the goods is to be transferred to the buyer, if no different intention is manifested in the ways mentioned above. The content of these rules differs according to the nature of the goods involved in the terms of the contract relating to them.

[74] The legislation thus referred to is found in the Nova Scotia *Sale of Goods Act* R.S., c. 408 at ss. 20 and 21. They read as follows:

> **20 (1)** Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> **(2)** For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. R.S., c. 408, s. 20.
>
> **21** Unless a different intention appears, the following are rules for ascertaining the

intention of the parties as to the time at which the property in the goods is to pass to the buyer:

> Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

[75] As Fridman further writes (at p.64) of his textbook:

> To discover the intention of the parties, as required under the Act, regard must be paid to the terms of the contract, the conduct of the parties, and the circumstances of the case. This deliberately vague and general statutory language allows considerable latitude to the parties and to any Court which has to decide this question. Hence, as indicated above, it is necessary to see what the parties have expressly provided, or impliedly agreed upon where the contract is one for the sale of specific or ascertained goods.

[76] Can it be said that the parties here, either expressly or impliedly, agreed upon all the essential terms of a contract for the even trade of the two snowmobiles? If such a contract was in fact made unconditionally on January 26th, it follows that title to the 700 model thereupon passed to Mr. Conrad.

[77] It should be noted that a barter or trade arrangement has the same legal effect as a "sale" for purposes of the *Sale of Goods Act* and for purposes of assessing when the title in goods is transferred (see, for example, *Smith v. Billard* (1922) 55 N.S.R. 502).

[78] It is a well-known principle of law, in advancing this analysis ,that the intention of the contracting parties is required to be determined objectively. This principle was recently affirmed by the Nova Scotia Court of Appeal in *United Gulf Developments Ltd. v. Iskandar* [2008] N.S.J. No. 317. The court there ruled that the trial judge was correct in having determined from the perspective of an

objective, reasonable bystander, in light of all the material facts, whether the parties intended to contract and whether the essential terms of that contract could be determined with a reasonable degree of certainty. It was further noted that evidence of one party's subjective intent has no independent place in this interpretative exercise (see para. 82).

[79] This objective approach to ascertaining the intention of the parties is expounded upon by the author John Swan in *Canadian Contract Law*, 1st ed. (LexisNexis, 2006) beginning at p. 489:

> It has been emphasized throughout this examination of the law of contracts that what is important are the outward forms of communication adopted by the parties as they negotiate their relation, operate within it and seek to settle what problems they may encounter. This focus on the outward or objective communications - giving that word its most comprehensive connotation - is what permits the Courts to have regard to the reasonable expectations created in one party by what the other did or said. From this point of view, the subjective intentions of one of the parties or his, her or its idiosyncratic meanings of the words are irrelevant, except to the extent that the other either knew of that intention or meaning or perhaps reasonably should have known it.

[80] The application of these legal principles now takes me to a review and analysis of the nature of the agreement, the conduct of the parties and the surrounding circumstances of the case.

[81] The contextual background is an important first consideration. Mr. Conrad was an avid and experienced snowmobiler. His enthusiasm for the sport had earlier taken him on a long trip from Alberta to Nova Scotia and he was about to go on another one to Labrador and back. He obviously needed a reliable machine to make such a trek.

[82] After researching the market, as his son Brent Conrad attested to, Mr. Conrad chose to purchase the newly introduced FST model (which he did from MacLeod's on November 15, 2005). He was eager to try it out as a prelude to the Labrador trip but because of the late arrival of winter snow that year, he had been restricted to using it in his yard prior to January 25, 2006. Twice it failed from that limited use, whether from stalling or slipping gears. When Mr. Conrad finally got the opportunity to use his new FST model in actual snow conditions in Cape Breton, it broke down on the very first day which necessitated a long walk and a tow. It therefore stands to reason that Mr. Conrad would want nothing further to do with the FST model in favour of the 700 model which had a proven engine. Obviously, reliability of his machine would have been an important consideration for the upcoming trek to Labrador.

[83] With those extenuating circumstances, I have no hesitation in accepting the evidence of Mr. MacLellan that he was told by an agitated Mr. Conrad during their telephone call that he thought the FST model was a piece of junk and that he didn't want it anymore. I also accept Mr. MacLellan's evidence that there was no talk between them about repairing the FST model which was on its way back to the dealership as they spoke.

[84] I further accept Mr. MacLellan's evidence that he made a spontaneous business decision, recognizing the legitimacy of Mr. Conrad's complaints, to offer to take back the FST model in exchange for a brand new 700 model on an even

trade basis. Moreover, I accept Mr. MacLellan's evidence that Mr. Conrad's reply to this offer was "that sounds good to me" or words to that effect. It is to be remembered that Mr. Conrad appears to have been already familiar with the 700 model which had been available on the market for some time. It is also to be remembered that the MSRP for these two models was virtually the same (the 700 model MSRP being only $100 higher).

[85] The foregoing evidence forms a strong indicator, from the perspective of a reasonable and objective onlooker, that the parties shared a mutual intention to carry out an even trade of the FST model (which was virtually new) for a new 700 model. Mr. Conrad would thereby be rid of a machine that he had found unreliable and didn't want anymore. In its place, he would have a new 700 model with a proven track record at no additional cost.

[86] MacLeod's, on the other hand, were trying to do something to satisfy an irate customer with legitimate complaints and they took pride in their service reputation. Granted, MacLeod's would thereby be left with a slightly used FST model which they would have to sell at a discounted price but they would have been left in much the same situation had the 700 model been provided to Mr. Conrad on a loaner basis and thereby returned as a slightly used unit.

[87] Beyond that, there are other cogent indicia of an intention to carry out this even trade of snowmobiles, as opposed to the provision of the 700 model to Mr. Conrad on a loaner basis. First of all, MacLeod's did not have or operate either a

loaner program or a demonstrator program for the benefit of its customers. Indeed, as noted earlier, Mr. MacLellan testified that had Mr. Conrad asked for a loaner unit, he would not have been provided with one. Even if an exception had been made (of which there is no evidence), it does not reconcile that MacLeod's would have taken a brand new 700 model right out of the crate that afternoon for such a purpose.

[88] Added to that, even more significantly, is the evidence that when the subject of liability insurance coverage for the 700 model was raised at the dealership, and having been advised by Mr. Langille that MacLeod's policy would not provide coverage, Mr. Conrad telephoned his son Brent with instructions to switch his own policy coverage from the FST model to the 700 model. In my view, that is very telling evidence because Mr. Conrad, with over 30 years experience in sales and service in the automotive/truck industry, must be taken to have known that when a loaner unit is provided to a customer, it remains covered by the dealership's liability insurance policy. Only if he had acquired ownership of the 700 model would it be necessary for him to have placed that coverage under his own insurance policy.

[89] Similarly, the evidence is unequivocal that when Mr. Conrad left his FST model at the dealership that day, someone at MacLeod's removed the license plate from the FST model and it was thereupon taken by Mr. Conrad. Again, with his

long experience in the industry, he must be taken to have known that when a vehicle of any sort is left at a dealership for repair, the license plate remains affixed to it. The fact that the license plate here was so removed and taken by Mr. Conrad is yet another indicator of intent that the FST model was no longer his.

[90] Everything that was communicated by Mr. Conrad to both Mr. MacLellan and Mr. Langille on that day, and Mr. Conrad's own actions in taking his license plate from the FST model with him and arranging for an immediate switch of snowmobiles under his own insurance coverage, is consistent with a trade having occurred. And so it was in the immediate aftermath that Mr. Langille prepared a handwritten invoice, for eventual entry onto the computer system, recording the sale of the 700 model to Mr. Conrad against the trade-in of the FST model. His professed intention, which I accept, was to complete all of the standard paperwork associated with such a transaction at the beginning of the following week.

[91] The only material evidence that counters the foregoing analysis is the testimony of Brent Conrad and the fax he sent to Mr. McDermaid in the late afternoon of January 26th. Indeed, this evidence is completely irreconcilable with the evidence given by Messrs. MacLellan and Langille. The difficulty in this is compounded by my assessment that all three of these witnesses meant to be truthful on the stand.

[92] I have already recited Brent Conrad's evidence at length earlier in this decision. In essence, he recounts that he was told by his father that the FST model

had been taken back to MacLeod's for repair work and that the new 700 model had been provided by the dealership as a demonstrator unit for the weekend. What is puzzling to the court is why Brent Conrad, given his extensive industry knowledge, acted on his father's request without questioning the need for switching snowmobiles under their own insurance policy coverage (even if only to January 30th). Both father and son must be taken to have known from their extensive industry knowledge that such a change in insurance coverage was not necessary or even appropriate had the 700 model been provided by the dealership on a demonstrator unit basis.

[93] I am therefore left to conclude that although Brent Conrad was attempting to be truthful in his testimony, it was either based on a mis-communication between his father and himself as to what transpired with MacLeod's, or he was reconstructing events from the fax he sent to Mr. McDermaid and making incorrect assumptions in doing so. In my view, Brent Conrad's evidence does not have sufficient strength or reliability to displace all of the other indicia of a trade of snowmobiles having been made which I have earlier recited.

[94] Much has been made of the fact that Mr. Conrad was permitted to take delivery of the new 700 model without a stitch of transfer documentation having been completed by MacLeod's. Nor did Mr. Conrad sign off on his certificate of registration of the FST model in favour of MacLeod's. Counsel for the Conrad Estate argues that this is a strong indicator that a trade of the two snowmobiles was never mutually intended or, alternatively this was at best an agreement to agree

situation.

[95] While registration of a vehicle (including a snow vehicle as referred to in the *Off-highway Vehicles Act*, R.S., c. 323) is *prima facie* evidence of its ownership, it is not conclusive of the determination of that question. There are many decided cases where courts have looked beyond the name of the registered owner to determine the true ownership of a vehicle.

[96] In the present case, the evidence of Mr. Langille, which I accept, is that it was his intention to complete the necessary paperwork (beyond his handwritten invoice of January 26th) on the following Monday. Both he and Mr. MacLellan testified that this was not an uncommon practice by MacLeod's as a rural dealership. Moreover, he knew both Mr. Conrad and Mr. Lockhart to be existing customers and, of course, the FST model remained in MacLeod's possession. For all these reasons, Mr. Langille was not concerned to leave the completion of the formal paperwork until the following Monday.

[97] The legal principle to be applied here is well stated by Justice Cromwell in *United Gulf Developments Ltd.* in the following passage (at para. 75):

> Parties may agree that they will execute a future, more formal document. If they have agreed on all of the essential terms and it is their intention that their agreement be binding, there is an enforceable contract; it is not unenforceable simply because it calls for the execution of a further formal document. The question is whether the further documentation is a condition of there being a bargain, or whether it is simply an indication of the manner in which the contract already made will be implemented.

[98] I have concluded on the whole of the evidence that a contract was made between Mr. Conrad and MacLeod's on January 26th for an even trade of the FST model for the new 700 model. I find that all of the essential terms of the contract were agreed upon, namely, (a) the sale of specific or ascertained goods, (b) to be exchanged on an even trade basis without any monies changing hands, with (c) delivery to be made that same day. There was no need for any further discussion about price or trade-in value where it was to be a straight up even trade of the two snowmobiles. Nor were there any other terms of the transaction requiring further negotiation.

[99] Having thus found that a binding contract between Mr. Conrad and MacLeod's was made on January 26th, it follows (in keeping with s.21, Rule 1 of the *Sale of Goods Act*) that the property in the 700 model thereupon passed to Mr. Conrad. I find that that was the mutual intention of the parties at the time from the legal perspective of an objective, reasonable bystander in light of all the material facts.

[100] Inherent in this conclusion is my finding that the completion of the formal transfer of registration documents intended to take place the following Monday was simply to effect the implementation of a contract that had already been made.

[101] It may very well be that Mr. Conrad changed his mind over his decision to trade in the FST model after experiencing the superior performance of that model

while driving Mr. Lockhart's machine during the following day. He may have been hopeful that MacLeod's would reverse the transaction once he got back from Cape Breton and the repairs of the FST model were completed. Be that as it may, the contract made between Mr. Conrad and MacLeod's on January 26th remained unaltered up until Mr. Conrad's unfortunate death.

**CONCLUSION**

[102] I am satisfied, on a balance of probabilities, that MacLeod's has discharged the burden of proving that a binding agreement was made between Mr. Conrad and MacLeod's on January 26, 2006 for an even trade of the FST model for the 700 model, whereby ownership of the 700 model passed to Mr. Conrad. In the result, it is the insurer for the Conrad Estate who will bear the responsibility of now responding to the plaintiffs' claim for damages.

[103] MacLeod's will also be entitled to party and party costs of this trial. If counsel cannot agree on costs, I would ask for written submissions from counsel within the next thirty days.

J.