Date: 19980731

Docket: T-1361-94

BETWEEN:

THERM-O-COMFORT CO. LTO.,

Plaintiff,

-and -

HER MAJESTY THE QUEEN.

Respondent.

fEDERA1 COURT OF CRNAIIA
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OTTAWA, ONTARiO

REASONS FOR ORDER

TREMBLAY-LAMER J.:

[1] This is an appeal pursuant to section 81.24 of the *Excise Tax Act*[1] *("Act")* from a decision of the Canadian International Trade Tribunal ("CITT").

1 R.S.C. 1985, c. E-15.

[2] By two notices of assessment dated January 24, 1989 (nos. 6841 and 6842). the Minister of National Revenue assessed the Plaintiff for unpaid tax under the *Act* with respect to the sales of cellulose insulation and a product called Fibramulch. The Plaintiff objected and as a result, the Minister varied notice of assessment no. 6841, but confirmed no. 6842. The Plaintiff appealed the Minister's decision to the CITT and the Tribunal dismissed the appeal in part.

[3] Two issues are before this Court: first, whether Fibramulch qualifies for exemption from tax as a fertilizer, pest control product or peat moss within the meaning of Part IV of Schedule III of the *Act;* and second, whether the property in cellulose insulation passed to the purchasers after July 1, 1985, thereby rendering the goods subject to tax.

1. Whether Fibramulch qualifies for exemption from tax as a fertilizer, pest control product or peat moss within the meaning of Part IV of Schedule III of the Act.

[4] Fibramulch is a product made by grinding down newsprint and other types of paper and adding green dye. Its purpose is to act as a medium for growing grass. Once it is sold, it is combined with grass seed and a wetting agent, and placed in lieu of sod on the sides of hills, slopes, stream embankments, highway ditches and other difficult areas where seed and

fertilizer cannot be incorporated into the soil with conventional farming equipment.

[51 Subsection 51 (1) of the *Act* exempts from taxation under section 50 all goods sold or imported which are mentioned in Schedule III of the *Act*. The Plaintiff contends that Fibramulch is exempt because it is a fertilizer, a pest control product and a peat moss within the meaning of section·s 9, 18, and 19 of Part IV of Schedule III.

[6] The relevant statutory provisions are as follows:

50. (1) There shall be imposed, levied and **collected a consumption or sales tax at the** rate prescribed in subsection (1.1) on the sale price or on the volume sold of all goods

(a) produced or manufactured in Canada...

51. (1) The tax imposed by section 50 does not apply to the sale or importation of the goods mentioned in Schedule III, other than those goods mentioned in Part XIII of that Schedule that are sold to or imported by **persons exempt from consumption or sales** tax under subsection 54(2).

Schedule III
Part IV
Farm and Forest

9. Fertilizers and materials for use exclusively in the manufacture thereof.

18. Peat moss when used for agricultural purposes, including poultry litter.

50. (1) Est imposee, prelevee et perc;ue une **taxe de consommation au de vente au taux** specifie au paragraphe (1.1) sur le prix de vente ou sur la quantite vendue de toutes **merchandises** :

a) produites au fabriquees au Canada ...

51. (1) La taxe imposee par !'article 50 ne **s'applique pas à la vente ou à !'importation des merchandises mentionnees à l'annexe** III, excepte les marchandises mentionnees à la partie XIII de cette annexe qui sont **vendues au importees par des personnes** exemptees du paiement de la taxe de **consommation au de vente en application** du paragraphe 54(2).

Annexe III
Partie IV
Produits de la ferme et de la foret

9. Engrais et mati8res davant servir exclusivement à leur fabrication.

18. Tourbe utilisee aux fins agricoles, y compris la litiere pour volaille.

19. Preparations, chemicals or poisons for pest control purposes in agriculture or horticulture, and materials used in the manufacture thereof.

19. Preparations, produits chimiques au poisons pour la lutte contre les parasites **dans l'agriculture au !'horticulture, de meme que les mati6res devant servir** exclusivement â leur fabrication.

[7] In the proceeding below, the Plaintiff's contentions were rejected. Despite the fact that Fibramulch contains three of the essential nutrients commonly found in fertilizers {i.e. nitrogen, potassium and phosphorous), they are found in quantities so small that it limits the quantity of nutrients released. The manner in which Fibramulch is applied also limits their release. Moreover, the CITT noted that the product was not intended to provide nutrition to plants, but was to be used as a medium for growing grass.

[8] Fibramulch also did not qualify as a pest control product because it was not created for that purpose. The fact that it happens to hide seeds from birds is not sufficient to qualify it as a preparation for pest control.

[9] Finally, the CITT did not consider Fibramulch to be peat moss. Shredded newsprint dyed green does not fit the definition of peat moss.

a) *Does Fibramulch qualify as a fertilizer?*

[10] There is no definition of the word "fertilizer" in the *Act*. In the absence of a definition, the principles of statutory interpretation allow us to resort to related legislation to interpret the term. There is a presumption that when more than one statute is enacted on the same subject, they operate together:

> Where two or more statutes are enacted by a legislature on the same subject, they are presumed to operate together to create a single regulatory regime. In such cases, the provisions of each statute must be read in the context of the others and consideration must be given to their role in the overall scheme.[2]

[11] The *Fertilizers Acf* defines fertilizer as:

"fertilizer" means any substance or mixture of substances, containing nitrogen, phosphorus, potassium or other plant food, **manufactured, sold or represented for use** as a plant nutrient;

uengrais» Substance ou melange de substances, contenant de l'azote, du phosphore, du potassium ainsi que tout autre element nutritif des plantes, fabrique ou vendu à ce titre ou represents comme tel.

[12] The evidence indicates that Fibramulch contains small quantities of three essential nutrients found in fertilizers, i.e. nitrogen (0.17%). potassium (0.5%} and phosphorous (0.5%).

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[2] Ruth Sullivan, *Driedger on the Construction of Statutes,* 3rd ed. (Toronto: Butterworths, 1994) at 286.

[3] R.S.C. c. F-9, s. 1.

[13] Further, due to the loading (quantity used per acre} and lack of dissipation of the nitrogen content into the air as compared to conventional fertilizers, the nitrogen available to the new seedlings is greater after 7 to 10 days with Fibramulch then it would be using unincorporated conventional urea fertilizers.

[141 Fibramulch is used to promote germination of grass seed in areas which are otherwise difficult to seed.

[15] The Plaintiff maintains that the definition does not indicate a minimum amount. According to Mr. Flood, a witness for the Plaintiff, notwithstanding the low concentrations, it provides sufficient nutrients for a healthy crop.

[16] On the other hand, the Defendant's witness, Mr. Radey, a fertilizer evaluator pursuant to the *Fertilizers· Act,* was of the opinion that he would never use Fibramulch because of the low concentration of nutrients. Almost all vegetable matter contain those nutrients; it does not mean that they qualify as a fertilizer.

[17] Further, common fertilizers to be effective are incorporated into the soil to allow microbes present in the soil to interact with the fertilizers

allowing the release of plant nutrients. Fibramulch is applied to the surface of the soil. Therefore, microbial interaction cannot occur.

[18] I give great weight to Mr. Radey's testimony, more specifically his expertise on the meaning of what is a fertilizer. I agree with him, and it is common sense, that it is not because a product contains some residual nutrient that it can qualify as fertilizer. As pointed out by Mr. Radey, the purpose of a fertilizer is to provide nutrition. The evidence indicates that common fertilizers contain much more nutrients. If no minimum amount is required, then any plant material, straw, sawdust, would be fertilizers.

[19] Secondly, the definition requires that the product be manufactured sold or represented as a fertilizer. Mr. Radey testified:

> A product manufactured, sold or represented as a fertilizer would be a product whose use is to provide nutrients to a crop, **the essential plant nutrients. Its representation, it would be** properly labelled as a fertilizer. It would be labelled according to the labelling requirements identified in the *Act* and ***regulations.***[4]

[20] The *Fertilizers Regu/ations*[5] require the following labelling requirements:

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[4] Transcript, val. 2 at 240.

[5] C.R.C., c. 666.

16. (1) Subject to subsections (2), (4) and (5). every package containing a fertilizer shall have a label affixed to it on which shall be printed

(a) the name and address of the manufacturer of the fertilizer or of the registrant or, in the case of a fertilizer that **is not registered under these Regulations,** the name and address of the person who caused the fertilizer to be packaged;

(b) the brand of the fertilizer, if any;

(c) the name of the fertilizer;

(d) the registration number of the fertilizer, where applicable;

(e) the guaranteed analysis prescribed in section 15;

(f) in the case of a fertilizer-pesticide, a product represented to contain lesser plant **nutrients other than calcium, magnesium or** sulphur, a specialty fertilizer or a product represented for foliar feeding, the directions **for use;**

(g) where the fertilizer is a fertilizer-pesticide, all statements required by the Compendium of Fertilizer-Use Pesticides;

(h) the weight of the fertilizer; and

(i) where the fertilizer is other than a specialty fertilizer and has intentionally **incorporated in it or is represented to contain boron, copper, manganese, molybdenum or zinc or, in the opinion of** the Minister, has a natural high content of **one or more of these lesser plant nutrients,** the following cautionary statement: "CAUTION: This fertilizer contains (specify name of lesser plant nutrient) and should be used only as recommended. It may prove harmful when misused."

16. (1) Sous reserve des paragraphes (2). (4) et (5). chaque emballage contenant un engrais doit porter une etiquette sur laquelle **seront imprimes les renseignements suivants :**

a) le nom et l'adresse du fabricant de **l'engrais au de l'inscrit au, dans le cas d'un engrais qui n'est pas enregist.re en vertu du** present reglement, le nom et l'adresse de la personne qui a fait emballer l'engrais;

b) la marque de l'engrais, le cas echeant;

c) le nom de l'engrais;

d) le numero d'enregistrement de l'engrais, le cas echeant;

e) l'analyse garantie, prescrite ■ ˇ article 15;

f) dans le cas d'un engrais-antiparasitaire, **d'un produit annonce comme renfermant des principes nutritifs secondaires autres que le calcium, le magnesium ou le soufre,** d'un engrais special ou d'un produit annonce comme etant destine â la nutrition foliaire, le mode d'emploi;

g) dans le cas d'un engrais-antiparasitaire, les mentions exigees par le Recueil des **pesticides â usage dans les engrais;**

h) le poids de l'engrais; et

iJ **lorsque l'engrais est un engrais autre** qu'un engrais special, lorsqu'il a ete intentionnellement additionne de bore, de **cuivre, de manganese, de molybdene ou de zinc ou est cBnse en contenir ou lorsque, de l' avis du ministre, il accuse une haute teneur naturelle de l'un ou plusieurs de ces principes nutritifs secondaires, la declaration suivante relative aux precautions â prendre :**
« AVERTISSEMENT : Cet engrais renferme (indiquer le nom du principe nutritif secondaire) et ne doit etre employe que de **la mani8re recommandee. Il peut etre nocif s'il est. employe mal â propos.** »

[211 The evidence shows that all fertilizers are subject to these label requirements. The Fibramulch labels do not meet these requirements. Fibramulch is exempt because it is not manufactured and sold or represented as a fertilizer. Mr. Radey explains as follows:

> A. If the product is sold as a fibre mulch the product would be exempt from the *Act* and *Regulations*. If it is represented to provide nutrients and it is being sold as a source of plant nutrients, then it would be subject to the *Act* and *Regulations*.
>
> Q. If someone is bringing a product to the Department and says "I want to represent this as a fertilizer", is there any way that they go about proving to you that it is a fertilizer?
>
> A. Common fertilizers, farm fertilizers, and specialty fertilizers that are used as a source of plant nutrients, nitrogen, **phosphorous and potassium, are exempt from registration.**
>
> Being exempt from registration does not mean that they are not subject to the labelling requirements or the contents of the Regulations. They are still subject to labelling, standards, et cetera, identified in the *Regulations*.[6]

!221 Thus, it does not meet the second part of the definition.

b) ***Does Fibramulch qualify as a pest control product?***

[23) As previously indicated, section 19 of Part IV of Schedule III of the *Act* provides an exemption for "preparations, chemicals or poisons for pest control purposes in agriculture or horticulture".

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[6] Transcript, val. 2 at 249-50.

[24] It is undisputed that Fibramulch is not a chemical or a poison. The issue is whether it qualifies as a preparation for pest control purposes.

[25] The Plaintiff contends it is because it conceals the grass seeds from the birds and prevents the growth of weeds. According to the testimony of Mr. Bill Aimers, president of "The Grass Company" which uses the product, Fibramulch when applied forms a thin carpet on the ground which effectively hides the grass seeds from the birds and stops weeds from growing.[7]

[26] In my opinion, it is not a pest control product for it was never intended to be used for that purpose. Rather, it is used on slopes, hills etc. to prevent erosion and ensure that the grass can take and become well established. The fact that it incidentally hides or camouflages seed from birds is not sufficient for it to qualify as a pest control preparation. If it were, then any ground cover could potentially meet the requirements of section 19. This cannot be so. As counsel for the Respondent asked, if you put a tarp over the seeds, would it qualify as a pest control product? Probably not.

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7 Transcript, vol. 1 at 14-15, 25-26.

[27) Moreover, section 19 requires that the preparation be used in agriculture or horticulture. There is no evidence that Fibramulch is used in agriculture. In fact, Mr. Matthie, the National Co-ordinator for Crop Protection at the Canadian Horticultural Council and an expert in horticulture, testified that he had never encountered the product in farming circles and that it did not have an application for general farm purposes.[8]

[281 Horticulture is defined as the cultivation of gardens including growing of flowers, fruit and vegetables. Growing grass on the sides of hills and on the road side is certainly not included in horticulture.

[29) Further, it cannot be a pest control product because birds are not pests. In *Weed-Master (Western) Ltd.* v. *Minister of National Revenue for Customs and Excise,*[9] the CITT held that the provision distinguished between horticultural pests and occasional nuisances. I fully agree with the view of the Tribunal:

> It is the Board's view that in determining what is a pest in the context of paragraph 20, as well as the nature and function of the goods in issue, it must differentiate between a horticultural pest and an occasional nuisance. If one were to include under the term pest all forms of animal or indeed human life that either by disposition or habit result in obnoxious behaviour, the list would be long indeed. On the other hand, it can be said of the goods in issue that it modifies the normal behaviour of cats

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[8] Transcript, vol. 2 at 307, 317.

[9] (1974). 6 T.B.R. 226 (CITT).

> and dogs to make them conform to the requirements of urban and suburban life. However, it does not follow from this that the presence of a pattern of behaviour which is incidental to the animal's other activities would warrant the classification of these animals as pests either under an interpretation of the English term "pest control" or the French term *la lutte contre les paras[tes.*[10]

[30] In that case, dogs and cats were not held to be pests within the meaning of section 19. The same applies in the case at bar. Although they can occasionally be nuisances in the context of agriculture, birds are not pests within the meaning of section 19.

c) *Does Fibramulch qualify as peat moss?*

[31] *The Oxford English Dictionary*[11] defines "peat moss" as "[v]egetable matter decomposed by water and partially carbonised by chemical changes often forming bogs or 'mosses' of large extent"Y

[321 In his testimony, Mr. Radey defined the term as "partially decomposed vegetable matter... used as a soil amendment to improve the water retention capabilities of the soil".[13]

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10 *Ibid.* at 229-230.

, Vol. XI, 2nd ed. (Oxford: Clarendon Press, 1989).

12 *Ibid.* at 405.

13 Transcript, *vol.* 2 at 275.

[33] Fibramulch meets neither of these definitions. First, it does not contain any vegetable matter. It is simply shredded newspapers dyed green. Second, under cross-examination, Mr. Radey disagreed with the proposition that Fibramulch and peat moss are interchangeable. He explained that Fibramulch is "a paper product which performs differently in the soil than the peat moss would do.... [I]t is slower to break down. It does not increase the tilt of the soil the same as peat moss would".[14] Therefore, I find that Fibramulch does not qualify as peat moss within the meaning of section 18 of Part IV of Schedule III of the *Act*.

2. · Whether the property in cellulose insulation passed to the purchasers after July 1, 1985, thereby rendering the goods subject to tax.

[34] By virtue of subparagraph 50(1}(a)(i) of the *Act,* a sales tax imposed on the price of goods manufactured in Canada is only payable by the manufacturer at the time when the goods are delivered to the purchaser or when the property in the goods passes, whichever comes first:

50. (1) There shall be imposed, levied and **collected a consumption or sales tax at the** rate prescribed in subsection (1.1) on the sale price or on the volume sold of all goods

(a) produced or manufactured in Canada

50. (1) Est imposee, prelevee et per ue une **taxe de consommation ou de vente au taux** specifie au paragraphe (1.1) sur le prix de vente ou sur la quantile vendue de toutes **marchandises** :

a) produites ou fabriquees au Canada :

14 Transcript, val. 2 at 349-350.

(i) payable, in any case **other than a case mentioned in subparagraph** lii) or (iii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods **passes, whichever is the earlier.**	**lil** payable, dans tout cas **autre que ceux mentionnes** aux sous-alim\as lii) ou **liiil.** par le producteur ou fabricant au moment ou les marchandises sont livnles â **l'acheteur au au moment oU** la propriete des **marchandises est transmise, en choisissant** celle de ces dates qui est anterieure â **l'**autre.

[35) In the instant case, the sales tax on insulation became effective July 1, 1985. The evidence shows that the delivery of the bags of insulation in question to the customers took place after that date.[15] The issue is whether the property in the goods passed to the purchasers before the insulation became subject to tax.[16]

[361 The transfer of property of goods which are the subject of a contract of sale is governed in Ontario by the *Sale of Goods Act,*[17] and more specifically by sections 17, 18 and 19:

17. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained.	**17. La propriBt8 d'objets incertains n'est transf8n3e â l'acheteur que lorsqu'ils sont devenus certains.**

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[15] Transcript, vol. 1 at 153.

[16] **Approximately 20 invoices are in issue. In the case of invoices nos. 15930 and** 16268, the Tribunal found for the Plaintiff. The Defendant did not take issue with these findings.

[17] R.S.O. 1990, c. S-1.

18.(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.

19. 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 5.-

(i) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.

18.(1) La propriete d'objets determines au certains· est transferee à l'acheteur au moment aU les parties au contrat ant l'intention de la transferer.

(2) Pour determiner !'intention des parties, il y a lieu de considerer les stipulations du contrat, la conduite des parties et Jes circonstances de l'espBce.

19. Sauf intention contraire, les regles suivantes servant à determiner !'intention des parties quant au moment du transfert a l'acheteur de la propriete des objets:

Regie 5.-

(i) Lorsqu'il s'agit d'un contrat de vente sur description d'objets ind9termines ou futurs, la propriete des objets est transferee a l'acheteur au moment aU des objets livrables de cette description sont affectes sans condition au contrat, soit par le vendeur avec le consentement de l'acheteur, soit par l'acheteur avec le consentement du vendeur. Ces consentements peuvent 6tre exprBs au tacites et peuvent etre donnas avant ou apres l'affectation.

[37] In dealing with the passing of property, the *Sale of Goods Act* distinguishes between specific goods and unascertained goods. As defined in subsection 1(1), specific goods are goods which are "identified and agreed upon at the time the contract of sale is made". Unascertained goods are not

defined, but refer to goods which are not specifically identified at the time the contract is made. They are usually generic goods identified by description only, future goods which have not already been manufactured or a portion of a specific whole not yet severed and identified.[18]

[381 · It is agreed by the parties that the contract for the sale of insulation bags is one for the sale of unascertained goods.

[391 Where there is a contract for the sale of unascertained goods, section 17 of the *Sale of Goods Act* stipulates that no property in the goods can pass *to* the buyer until some act is performed which ascertains which goods are those to be delivered to the buyer. Goods are ascertained when they become more particularly identifiable after the contract is made. Fridman describes ascertainment in the following manner:

> What is needed for ascertainment, said an English judge, is that the buyer should be able to say, "Those are my goods". This **requirement is satisfied if he can say, *"All* those are my goods".**[19]

[40] This provision aside, the *Sale of Goods Act* otherwise lets the p;; rties determine the specific moment at which they want the transfer of property

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18 G.H.L. Fridman, *Sale of Goods in Canada,* 4th ed. (Toronto: Carswell, 1995) at 91.

19 *Ibid.* at 92.

of specific or ascertained goods to occur.[20] When this intention cannot be ascertained from the terms of the contract or the circumstances of the case, section 19, rule 5 applies. It stipulates that in the case of a contract for the sale of unascertained or future goods by description, property in the goods will pass to the buyer when goods of that description, in a deliverable state, are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller. Such assent may be expressed or implied, and may be given either before or after the appropriate is made. In most cases, the act of ascertainment is simultaneous with the act of appropriation.[21]

[41) In the case at bar, the CITT found that it was the intention of the parties to *have* the property in the insulation pass when payment was received in full. The invoice expressly provided so. The Tribunal wrote:

> On the question of intention, the Tribunal gave considerable weight to the provision on the appellant's invoices that provides that property passes only after payment is made. Mr. Wiley testified that this provision did not govern the appellant's dealings with its customers. However, the Tribunal has difficulty relying solely on the uncorroborated testimony of the witness regarding what was in the minds of the appellant's customers. In the absence of corroborating testimony, the Tribunal is of the

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20 *Supra* note 17, s. 18.

21 *Supra* note 18 at 92 n. 165.

> view that it should consider at face value the **plain and unequivocal wording of the invoice.**[22]

[42] The Plaintiff objects to this finding, arguing that the clause was subsequent to the formation of the contract and cannot be relied on as an expression of the parties' intention. It argues that rule 5 of section 19 is applicable and that the property passed when the goods were appropriated to the contract which allegedly took place prior to July 1, 1985.

[431 The evidence shows that it was the Plaintiff's practice to put the insulation bags in trailers immediately after they were manufactured. A tally sheet was affixed to the trailer indicating the number of bags loaded. Once a client placed an order, the invoice number was indicated on the tally sheet. Depending on the number of bags ordered, the contents of a trailer could either be assigned entirely to a client or to more than one client.

[44] In my opinion, when the full content of a trailer was assigned to one account, the goods were ascertained because it is clear that they were destined for one customer.[23] The invoice number was indicated on the tally

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22 **Tribunal's Reasons for Decision at 6.**

23 *Pullman Trai/mobi/e Canada Ltd.* v. *Hamilton Transport Refrigeration Ltd. eta/.* (1979), 23 O.R. (2d) 553 (Ont. H.C.); *Wait* & *James* v. *Midland Bank* (1926), 31 Com Cas 172.

sheet affixed to the trailer thereby identifying the goods to the contract. This amounts to ascertainment.

[451 Property in those goods could therefore pass before July 1, 1985 and potentially the goods would not be subject to the sales tax, unless there was a contrary intention found in the express terms of the contract.

[46) The invoices indicate that "All materials and equipment remain the property of Therm-O-Comfort Co. Ltd. until paid in full". The Plaintiff argues that this clause does not form part of the contract. The contract was concluded when the customer placed his order and the invoice was only seen by the customer upon delivery. Thus, the transfer of property provision in the invoice cannot be incorporated into the contract.

[47) There is a long line of authority which establishes that a party cannot rely on a condition which was added after the formation of the contract. In the English case of *Dennant* v. *Skinner and Collom,*[24] Hallett J. wrote:

> **Now the document in its terms contemplates that the** ownership of the vehicle has not passed to the bidder, but, as lhave already said, in my judgment it had passed upon the fall of the hammer, and if subsequently the bidder executed the document acknowledging that ownership of the vehicle would

[24] [19481 2 K.B. 164.

> not pass to him, that could not have any effect on what had already taken place.[25]

[48] The Ontario Court of Appeal endorsed the same proposition in *Trigg v. Ml Movers International Transport Services Ltd.*[26] when it stated:

> Essentially, a term cannot be included in an agreement unless it **was contemplated at the time that the agreement was** concluded, or was added thereto by a proper variation or **modification.**[27]

[49] However, this is not the situation in the case at bar. First, at the hearing before the CITT, it was recognized by Mr. Bernard Wiley, President of Therm-O-Comfort, that the invoice constituted the contract between the parties and that he was aware of the presence of the impugned clause.[28] This supports the conclusion that the wording of the contract establishes the date of the transfer of ownership.

[50] Second, no evidence was adduced by the Plaintiff to contradict Mr. Wiley's admission. It did not adduce any evidence from the buyer as to

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25 *Ibid.* at 172.

26 (1991). 4 O.R. (3d) 562 (C.A.).

27 *Ibid.* at 567-568.

28 Transcript, vol. 1 at 160-161.

what were the terms of the contract. There is no evidence to indicate that the provision was not part of the agreement between the parties. Therefore, in the absence of such evidence, I conclude that it did form part of the agreement.

[51] The evidence establishes that the invoices at issue were still outstanding July 1, 1985.[29] Hence, the goods are subject to the sales tax.

[52] Where the contents of a trailer are the subject of more than one contract with more than one customer, the goods are only ascertained on delivery. As stated by Fridman:

> ... [I]f there were other goods on board subject to contracts with other buyers, the onloading of such goods will result in the ascertainment of the particular buyer's goods by a process of exhaustion. What is left on the ship, as long as it all pertains to contracts with the same buyer, will be ascertained for the purposes of the section, and will be the property of that buyer.[30]

[53] As I have previously indicated, all deliveries took place after July 1, 1985, thereby rendering the goods subject to the sales tax.

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[29] Transcript, vol. 2 at 371.

[30] *Supra* note 18 at 92.

[54) For these reasons, the appeal is dismissed.

JUDGE

OTTAWA, ONTARIO
July 31, 1998.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-1361-94
STYLE OF CAUSE:	THERM-O-COMFORT CO. LTD. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 23, 1998

REASONS FOR ORDER OF MADAME JUSTICE TREMBLAY-LAMER

DATED: JULY 31, 1998

APPEARANCES:

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JEFFREY ANDERSON	FOR DEFENDANT

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