CITATION: 7868073 Canada Ltd. v. 1841978 Ontario Inc. and Sugar v. Vacuum Metallizing Limited, 2022 ONSC 4557
COURT FILE NOS.: CV-12-9795-00CL and CV-15-10971-00CL
DATE: 20220829

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:	
CV-12-9795-00CL	
7868073 CANADA LTD., 1841979 ONTARIO LIMITED, 1636833 ONTARIO INC., ARCHITECTURAL COATINGS SOLUTIONS INC., TRANSREFLECT INC., and ITOLO MALLOZZI	*Maureen L. Whelton* and *Edward Hiutin*, for 7868073 Canada Ltd., 1841979 Ontario Limited, 1636833 Ontario Inc., Architectural Coatings Solutions Inc., Transreflect Inc. and Itolo Mallozzi
Plaintiffs	
– and –	
1841978 ONTARIO INC., POWDER COATING SOLUTIONS INC., VACUUM METALLIZING LIMITED, ROBERT W. LANGLOIS carrying on business as REFLECTIONIGHT, CARRIE FERGUSON, carrying on business as REFLECTIONIGHT, ROBERT W. LANGLOIS, CARRIE FERGUSON, JEFFREY STEVEN SUGAR, GARY SUGAR, RJG LABS INC. and PULTRUCOATER INC.	*Mark A. Ross* and *Eric Brousseau*, for Gary Sugar *Jeffrey Steven Sugar*, represented himself, Vacuum Metallizing Limited, and Powder Coating Solutions Inc. *Robert W. Langlois*, represented himself
Defendants	
AND BETWEEN:	
POWDER COATING SOLUTIONS INC., ROBERT W. LANGLOIS, and 1841978 ONTARIO INC.	*Jeffrey Steven Sugar*, represented Powder Coating Solutions Inc. *Robert W. Langlois*, represented himself
Plaintiffs by Counterclaim	
– and –	

7868073 CANADA LTD., 1841979 ONTARIO LIMITED, 1636833 ONTARIO INC., ARCHITECTURAL COATINGS SOLUTIONS INC., TRANSREFLECT INC., ITOLO MALLOZZI, WADE KOSOWAN and LOW RISK LOGISTICS INC. Defendants to the Counterclaim	*Maureen L. Whelton* and *Ed Hiutin*, for 7868073 Canada Ltd., 1841979 Ontario Limited, 1636833 Ontario Inc., Architectural Coatings Solutions Inc., Transreflect Inc., Itolo Mallozzi, Wade Kosowan, and Low Risk Logistics Inc.
– and –	
CV-15-10971-00CL	
GARY SUGAR Plaintiff	*Mark A. Ross* and *Eric Brousseau*, for Gary Sugar
– and –	
VACUUM METALLIZING LIMITED, POWDER COATING SOLUTIONS INC., RJG LABS INC., PULTRUCOATER INC., JEFFREY STEVEN SUGAR and ROBERT W. LANGLOIS Defendants	*Jeffrey Steven Sugar*, represented himself and Vacuum Metallizing Limited and Powder Coating Solutions Inc. *Robert W. Langlois*, represented himself
AND BETWEEN:	
VACUUM METALLIZING LIMITED, POWDER COATING SOLUTIONS INC., RJG LABS INC., PULTRUCOATER INC., JEFFREY STEVEN SUGAR and ROBERT W. LANGLOIS Plaintiffs by Counterclaim	*Jeffrey Steven Sugar*, represented himself and Vacuum Metallizing Limited and Powder Coating Solutions Inc. *Robert W. Langlois*, represented himself
– and –	
GARY SUGAR Defendant to the Counterclaim	*Mark A. Ross* and *Eric Brousseau*, for Gary Sugar

) **HEARD:** November 15, 16, 17, 18, 19, 22,
) 23, 24, 25, 26, 29, 30, 2021; December 1, 2,
) 3, 6, 7, 8, 9, and 16, 2021, February 24 and
) 25, 2022

REASONS FOR JUDGMENT

DIETRICH J.

[1] These two related actions were ordered to be tried together by Newbould J. in his order dated October 9, 2015.

[2] Both actions centre around Robert Langlois and his experience in the powder-coating business. The principal issue to be decided is who, among the parties in both actions, is entitled to the profits from powder-coating work sourced by Mr. Langlois between 2013 and 2015.

[3] The first action, commenced in 2012, involves a business venture among Mr. Langlois, Wade Kosowan, and Itolo Mallozzi, as well as corporations in which one or all of them were direct or indirect shareholders (the "ACS Action").

[4] Mr. Kosowan and Mr. Mallozzi met Mr. Langlois in the fall of 2010. Their children attended the same school in Orangeville, Ontario, and their wives were friends. The families socialized together. In time, Mr. Langlois persuaded Mr. Kosowan and Mr. Mallozzi to co-venture with him in a powder-coating business, about which Mr. Kosowan and Mr. Mallozzi knew next to nothing. Mr. Langlois presented to them an ambitious plan to make millions of dollars in the powder-coating business in a short period of time. He overpromised and underdelivered.

[5] Mr. Kosowan, Mr. Mallozzi and Mr. Langlois incorporated the plaintiffs Architectural Coatings Solutions Inc. ("ACS") and Transreflect Inc. ("Transreflect"), through which they would operate their venture. The shares of these two companies were held by the plaintiff 7868073 Canada Ltd. ("786"). Unless otherwise noted, I will refer to these companies collectively as "ACS." The shares of 786 were owned equally by Mr. Kosowan, Mr. Mallozzi and Mr. Langlois, directly or indirectly.

[6] Mr. Langlois entered into a licence agreement with 786 (the "Licence Agreement"), in which he granted a broad licence respecting certain intellectual property he said he owned, as well as his equipment, processes, trade secrets, and manufacturing and distributing techniques, and knowledge acquired over many years in the powder-coating industry.

[7] Within less than 18 months, Mr. Kosowan and Mr. Mallozzi had invested over $350,000 in the venture, including regular payments to Mr. Langlois so he could support his family, and supplying him with a car, a computer and a cell phone. Despite their investment, the venture failed to attract any customers or earn any revenue.

[8] While working for ACS, Mr. Langlois remained in touch with a friend, the defendant Jeffrey Sugar. Jeffrey Sugar had been an investor in Mr. Langlois' previous employer Alliance Surface Finishing Inc. ("ASF"). Jeffrey Sugar's family was in the vacuum metallizing business

and had been for many years. Jeffrey Sugar let Mr. Langlois use painting facilities at Jeffrey Sugar's company, the defendant Vacuum Metallizing Limited ("VML"), to create powder-coating samples while Mr. Langlois was working at ACS. VML was in the liquid painting business but its principal, Jeffery Sugar, had some knowledge of powder coating and was open to expanding its business in that direction.

[9] While at ACS, Mr. Langlois assisted Jeffrey Sugar at VML to try to find a method to coat Crown Royal whiskey bottles with a gold-finish paint in an effort to win a contract from Diageo Canada Inc. ("Diageo").

[10] Mr. Langlois also asked Jeffrey Sugar, who has an MBA from York University, to review a business plan that Mr. Langlois was preparing for ACS to generate business. Jeffrey Sugar made some suggestions to Mr. Langlois to improve the plan. Jeffrey Sugar also discussed the plan with his brother, Gary Sugar, a corporate commercial lawyer, who had contacts who were interested in investing in private businesses. Gary Sugar, Jeffrey Sugar and Mr. Langlois discussed the possibility of a joint venture in the powder-coating business, which they would name Powder Coating Solutions Inc. ("PCS"). While still working for ACS, Mr. Langlois instructed Jeffrey Sugar to convert the "ACS Business Plan" to the "PCS Business Plan", essentially by replacing "ACS" with "PCS" throughout the draft.

[11] Gary Sugar promoted the PCS Business Plan to potential investors, but he was unsuccessful at attracting any investors. He then decided to invest in the PCS venture personally.

[12] In February 2012, Mr. Langlois left ACS, and began a new venture in the powder-coating industry with Jeffrey Sugar and Gary Sugar. In time, Gary Sugar incorporated PCS, and they all eventually became officers, directors and equal shareholders of PCS.

[13] When ACS discovered what Mr. Langlois had done, they commenced the ACS Action alleging, among other things, that Mr. Langlois had breached the Licence Agreement, and his fiduciary duties, including his duty of confidence. In the ACS Action, the plaintiffs seek, among other remedies, repayment of the amounts that ACS and Itolo Mallozzi lent to Mr. Langlois, and recovery of expenses ACS incurred in pursuing the venture. They also seek disgorgement of the profits and other income in the form of tax credits for Scientific Research and Experimental Development ("SR&ED") relating to powder coating, earned by Mr. Langlois, Jeffrey Sugar, PCS and VML arising out of Mr. Langlois' intellectual property, know-how and experience in the powder-coating business, which he had licensed to ACS.

[14] The PCS venture also failed, but not before earning revenue from the sale of three powder-coating machines and from a lucrative powder-coating contract from RM2 Canada Inc. ("RM2"). RM2 was in the business of manufacturing FRP (fiberglass-reinforced polymer) pallets, which required powder coating. The contract involved powder coating of component parts of pallets manufactured by RM2 (the "RM2 Contract").

[15] PCS, however, was not the only company to benefit from the RM2 Contract. Within a matter of months of PCS commencing work on the RM2 Contract, without notice to Gary Sugar, Jeffrey Sugar and Mr. Langlois arranged to transfer the RM2 Contract work to VML. VML then then invoiced RM2 directly for the powder-coating work. Once VML received the revenue, VML, Jeffrey Sugar and Mr. Langlois enjoyed the profits, to the exclusion of Gary Sugar.

[16] Gary Sugar never received any income from PCS. And he was out of pocket because he and Jeffrey Sugar had agreed to personally pay Mr. Langlois' PCS salary when PCS had no income to do so.

[17] In 2015, Gary Sugar commenced the second action (the "PCS Action"). In the PCS Action, Gary Sugar claims that Mr. Langlois and Jeffrey Sugar wrongfully, and without his knowledge, diverted the RM2 Contract from PCS to VML with the result that the profits from the RM2 Contract would be enjoyed by VML, Jeffrey Sugar, and Mr. Langlois but not by PCS or Gary Sugar. Among other things, Gary Sugar seeks a total disgorgement of the profits and other income earned by VML, Jeffrey Sugar and Mr. Langlois from the RM2 Contract and other powder-coating work, as well as SR&ED tax credit refunds.

[18] For the reasons that follow, I find that ACS and Mr. Mallozzi are entitled to recover from Mr. Langlois the amounts they lent to him, and his one-third share of the expenses incurred in the ACS venture. ACS is also entitled to a disgorgement of all profits from PCS, and the profits from VML arising from the RM2 Contract, as well as a share of the SE&ED tax credit refunds paid to VML. Having made this decision, it is not necessary to decide the PCS Action. The PCS Action is dismissed. The counterclaim in each of the ACS Action and the PCS action are also dismissed.

<u>THE ACS ACTION</u>

Background and Evidence

[19] When Mr. Kosowan and Mr. Mallozzi met Mr. Langlois in the fall of 2010, Mr. Kosowan owned a transportation business known as Low Risk Logistics Inc. ("Low Risk"). Mr. Mallozzi was looking for a business in which to invest and participate.

[20] Mr. Langlois first engaged Mr. Mallozzi in discussions about investing in a joint venture in a powder-coating business, which would involve powder coating with a reflective finish. Mr. Mallozzi was interested and suggested to Mr. Langlois that they approach Mr. Kosowan as well. Mr. Langlois held himself out to Mr. Mallozzi and Mr. Kosowan as an expert in applying powder coating, as opposed to liquid paint, to substrates other than metal, especially plastic. He claimed to have developed the technology that allowed powder to be used to coat non-conductive surfaces, such as fiberglass, wood and plastic, as opposed to conductive surfaces, like metal. He showed them a copy of an industry publication that featured him on the cover as "Mr. Plastic."

[21] Mr. Kosowan's evidence is that in December 2010, Mr. Langlois told Mr. Kosowan that he had been in the powder-coating business for more than two decades and that his current business initiative, "Luminos," was focused on "retroreflective" powder coating, which made objects highly reflective, and visible in the dark. Mr. Langlois also explained that retro reflectivity had many possible uses, including in transportation and infrastructure, such as bollards, guard rails, street signs and truck signage. Mr. Kosowan could see the uses for this product in the transportation industry, in which he had many contacts that could prove beneficial to the venture. Mr. Langlois presented his business plan for "Luminos" (the "Luminos Plan") to both Mr. Mallozzi and Mr. Kosowan. Mr. Kosowan testified that based on the financial forecast in the Luminos Plan, the venture would yield a return of over $8 million in the first year of business.

[22] The Luminos Plan, in fact, contemplated a partnership that included Mr. Langlois' then employer ASF and Ryan Downey of Halo Coatings ("Halo"), who would later complain that Mr. Langlois, while working with ACS, was improperly exploiting a retro reflectivity patent owned by Halo.

[23] Mr. Langlois testified that he was looking for Mr. Kosowan and Mr. Mallozzi to invest in a joint venture based on the Luminos Plan, together with ASF, which would not make any financial contribution, and with Halo, which held the patent.

[24] It is undisputed that neither ASF nor Halo ever participated in the venture with Mr. Langlois, Mr. Kosowan and Mr. Mallozzi.

[25] When Mr. Langlois presented the Luminos Plan to Mr. Kosowan and Mr. Mallozzi, he was still employed by ASF. ASF was in the business of powder coating. Mr. Langlois served as its CEO and president from 2003 until June 2011, when he was terminated.

[26] Mr. Kosowan and Mr. Mallozzi testified that Mr. Langlois told them that he had been the CEO of ASF for the past 10 years and that he had created and developed significant powder-coating and reflective technology. He told Mr. Kosowan and Mr. Mallozzi that he owned two-thirds of the shares of ASF, and the private investors owned one-third. Mr. Langlois told them that ASF was in financial trouble because its private investors were no longer interested in investing in ASF, and he was looking to start his own powder-coating business.

[27] Mr. Kosowan and Mr. Mallozzi testified that Mr. Langlois also told them that all of the powder-coating technology that he had invented was proprietary to him and that he had patents for it. He also told them that he had filed provisional patent applications and that he would be applying for more patents for his inventions. He said that he, personally, had many clients, and that the timing for sales of powder-coating services was imminent.

[28] Mr. Kosowan and Mr. Mallozzi testified that they understood from Mr. Langlois that their venture would involve: a) powder coating non-conductive substrates, such as plastic or fiberglass; b) powder coating/reflective coating for commercial clients in the clients' premises, using the venture's own machines; c) the design, manufacture and sale of machines by the venture to customers to use in their own premises, having been taught by Mr. Langlois how to use the machines and the chemicals to powder coat; d) the sale of powder-coating and reflective-coating chemicals to customers; and e) entering into licence and royalty agreements with the customers.

[29] Soon after proposing the venture to Mr. Kosowan and Mr. Mallozzi, while Mr. Langlois was still employed at ASF, Mr. Langlois told Mr. Kosowan and Mr. Mallozzi that ASF was on the verge of receivership, and the creditors were about to seize the assets. He encouraged them to pursue the proposed venture with him so that he could continue doing the work he had been doing at ASF and grow the business.

[30] Mr. Kosowan and Mr. Mallozzi agreed to proceed. As among the three of them, they agreed that Mr. Langlois would be the powder-coating expert. Mr. Kosowan and Mr. Mallozzi believed that he had the patents, client contacts, know-how, and expertise relating to powder coating and retroreflective coating. Therefore, he would be responsible for developing the technology, the machines and the powder. With Mr. Mallozzi's help and business acumen acquired over the years,

Mr. Langlois would also be responsible for patents and provisional patent applications. The two of them would also be responsible for business development, including creating samples for potential customers, and sales calls.

[31] To succeed in the business, the venture would also require infrastructure. Mr. Kosowan agreed to provide office space, phones, computers, warehouse space and administrative support at reduced rates. Mr. Kosowan had a good customer base, which he agreed to refer to Mr. Langlois and Mr. Mallozzi. He also agreed to promote the business and to assist Mr. Langlois and Mr. Mallozzi generally, as needed.

[32] Regarding the funding of the venture, it was agreed that all three would be equal equity partners. Mr. Kosowan testified that Mr. Langlois told them that landing the first customer would not take long and would cost approximately $50,000. Each of Mr. Kosowan and Mr. Mallozzi contributed $25,000, and it was understood by them that Mr. Langlois would contribute his expertise, know-how and patents.

[33] Mr. Kosowan testified that between February 2011 and March 2011, it was agreed that Mr. Langlois would continue to work at ASF until operations ceased there, and when that happened, the ACS venture would begin. Mr. Kosowan testified that it was understood that the venture would be full-time work for Mr. Langlois and Mr. Mallozzi but not for Mr. Kosowan, who would continue to operate Low Risk on a full-time basis. Mr. Langlois agreed to devote his efforts on a full-time basis towards building business for the company. Mr. Langlois testified that he worked full time for ACS once he was no longer working for ASF.

[34] At the end of March 2011, the three co-venturers had agreed on the corporate structure for their venture. Each of them would own a one-third interest in 786, which in turn would own all the shares of a powder-coating company, the plaintiff Architectural Coatings Solutions Inc., and all the shares of a retroreflective coating company, the plaintiff Transreflect Inc. (“Transreflect”). Mr. Kosowan testified that he agreed to be the officer and director of each of 786, Architectural Coatings Solutions Inc., and Transreflect as part of his contribution to the venture.

[35] Between March 2011 and June 2011, Mr. Langlois continued to send emails to Mr. Kosowan and Mr. Mallozzi demonstrating the powder-coating technology and referring to potential customers. On March 2, 2011, Mr. Langlois sent them an email stating that he had a “first” customer for a reflective technology product, which would generate about $500,000 per year at a 60 per cent margin.

[36] During this time, Mr. Mallozzi assisted Mr. Langlois with provisional patent applications. On May 19, 2011, Mr. Mallozzi filed two such provisional patent applications, at his personal expense.

[37] On June 7, 2011, Mr. Langlois sent an email to the Mr. Kosowan and Mr. Mallozzi advising that the “end was near” at ASF, and that they should now send emails to his personal Blackberry as opposed to his ASF email address. June 7, 2011 was Mr. Langlois’ last day at ASF.

[38] On June 9, 2011, Mr. Langlois met with Mr. Kosowan and Mr. Mallozzi at the offices of Low Risk. Mr. Langlois had prepared an agenda regarding a strategy to pursue three potential clients: Teel Plastics of Wisconsin (“Teel”), a manufacturer of architectural fibreglass pultrusions,

Anderson Development Company (“Anderson”), a manufacturer of windows and doors, which owned a fibreglass pultrusion manufacturing company, and Omni.

[39] On June 10, 2011, Mr. Langlois sent Mr. Kosowan and Mr. Mallozzi an email regarding his dealings with potential customers AkzoNobel Coatings Inc., a large provider of paint and coating materials, and Teel. Mr. Kosowan and Mr. Mallozzi testified that, based on their discussions with Mr. Langlois, they believed these customers belonged to Mr. Langlois, as did the powder-coating technology. Much later, they would learn from ASF that ASF claimed these customers and the powder-coating technology as its own.

[40] Mr. Langlois, Mr. Kosowan and Mr. Mallozzi agreed to use Mr. Kosowan’s lawyer, David Fram, as the lawyer for their powder-coating venture. On June 16, 2011, Mr. Kosowan sent to Mr. Fram six provisional patent applications that Mr. Langlois had sent to him, including the two paid for by Mr. Mallozzi. Mr. Kosowan testified that all three agreed that Mr. Fram would have custody of the patents and provisional patent applications.

[41] Mr. Langlois, Mr. Kosowan and Mr. Mallozzi met again on June 19, 2011 at the offices of Low Risk. Mr. Langlois had, again, prepared the agenda, which covered pursuing potential customers, including Inline Fiberglass Ltd. (“Inline Fiberglass”), and the distribution of phone numbers and business cards to each of the venturers. An employee of Low Risk set up emails, domain names and websites for the venture. Mr. Kosowan and Mr. Mallozzi covered the cost.

[42] On June 24, 2011, the three co-venturers met with Mr. Fram again for advice on the operation of their venture, and to discuss a licensing agreement relating to Mr. Langlois’ intellectual property and other things. Mr. Fram testified that he advised Mr. Mallozzi and Mr. Langlois that he was counsel to Mr. Kosowan, that he would not be acting for them personally, and that they should seek independent legal advice. Mr. Mallozzi obtained independent legal advice. Mr. Langlois did not.

[43] Mr. Fram arranged for the incorporation of 786 on May 18, 2011, and he arranged for the incorporations of Architectural Coatings Solutions Inc. and Transreflect as well. Mr. Fram advised Mr. Kosowan, Mr. Mallozzi, and Mr. Langlois to hold their one-third interest in 786, through their respective holding companies, the plaintiff 1636833 Ontario Inc. (“833”), the plaintiff 1841979 Ontario Limited (“979”), and the defendant 1841978 Ontario Inc. (“978”).

[44] Mr. Fram also drafted a licence agreement, described as “Exclusive Lisense [*sic*] Agreement: Patents, applications for Patents and Technical Information” (the “Licence Agreement”). The Licence Agreement was between Mr. Langlois and Mr. Mallozzi, collectively, as Licensor, and 786 as Licensee. Following the June 24, 2011 meeting, on the same day, Mr. Fram circulated to the co-venturers a revised draft of the Licence Agreement, via email, showing revisions.

[45] On June 27, 2011, another meeting took place at Low Risk among the co-venturers. Again, Mr. Langlois prepared the agenda. Like the previous agendas, the agenda for this meeting did not include any item relating to compensation for any of them for their contributions to the venture.

[46] Mr. Kosowan testified that sometime after June 27, 2011, Mr. Langlois approached his co-venturers and asked to be paid a salary. Mr. Langlois testified that, at the outset, it had been agreed

by the co-venturers, orally, that he would be paid a salary. Mr. Kosowan and Mr. Mallozzi disagree that there was any such oral agreement. Mr. Kosowan's evidence is that when Mr. Langlois asked for a salary, he told them that a salary would only be necessary for a short time because business was imminent. Mr. Kosowan and Mr. Mallozzi testified that because they had already invested in ACS, without any return when Mr. Langlois asked for a salary, they agreed to make advances to Mr. Langlois for a short period of time, but the advances would be structured as shareholder loans to be repaid irrespective of the venture's success.

[47] On June 30, 2011, Mr. Langlois received a cheque from 833 for $4,940.

[48] Mr. Langlois testified that Mr. Kosowan and Mr. Mallozzi had agreed to pay him a weekly salary of $2,250 every two weeks, plus expenses. He received cheques on each of July 15, 2011, July 28, 2011, August 15, 2011, and August 30, 2011, in the amounts of $4,940, $4,993, $4,756.72 and $4.500, respectively. Mr. Langlois denies that these payments were shareholders' loans, however, there is documentary evidence in respect of the payments made on July 28, 2011, August 15, 2011 and August 30, 2011 showing that these payments were "shareholder's draws", and Mr. Langlois signed a receipt in respect of two of them acknowledging that they were indeed shareholder draws.

[49] The co-venturers signed the Licence Agreement on July 15, 2011, though it is dated June 24, 2011. Mr. Kosowan and Mr. Mallozzi testified that at the July 15, 2011 meeting, Mr. Kosowan handed Mr. Fram a binder that contained all of the patents and provisional patent applications to that date (copies of which Mr. Langlois had sent to Mr. Kosowan by email, and Mr. Kosowan had forwarded to Mr. Fram by email). Mr. Langlois and Gary Sugar dispute that a binder containing the patents was ever delivered to Mr. Fram.

[50] Mr. Fram also prepared a Unanimous Shareholders Agreement between 833, 978, 979 and 786 (the "ACS Shareholders Agreement"), effective as of the 18th day of May 2011, but executed on July 15, 2011. The ACS Shareholders Agreement is silent on any salary or other remuneration for any shareholder. Schedule "A" to the ACS Shareholders' Agreement provided that each of the ACS co-venturers were obligated to advance $10,000 as needed to replenish the initial $50,000 investment.

[51] On July 26, 2011, ASF's Chair, Peter McLaughlin, sent a "To Whom It May Concern" letter to Mr. Kosowan. In the letter, Mr. McLaughlin warned Mr. Kosowan that "Mr. Langlois has, or at least should have, no intellectual property rights to any of the powder paint or other technology developed at Alliance during his tenure as President and CEO. In the event that he proposes to provide powder paint coating services or technology, he is probably doing so in breach of confidentiality and non-competition provisions in favour of Alliance."

[52] Mr. Kosowan spoke to Mr. Langlois regarding the letter from Mr. McLaughlin. In response, Mr. Langlois provided Mr. Kosowan with a letter dated August 8, 2011, written by Carl Cunningham of Bennett Jones LLP (the "Bennett Jones Letter") to Mr. McLaughlin in response to Mr. McLaughlin's July 26, 2011. In the Bennett Jones Letter, Mr. Cunningham challenged the position taken in Mr. McLaughlin's letter in the context of an alleged restraint of trade in Mr. Langlois' employment agreement and the scope of Mr. Langlois' prohibition from working on powder-coating applications, as well as the geographic scope of Mr. Langlois' obligations.

[53] Mr. Kosowan and Mr. Mallozzi testified that the Bennett Jones Letter quelled any concern they had about whether Mr. Langlois owned the powder-coating technology. They believed that he did and ASF did not.

[54] By August 4, 2011, Mr. Kosowan and Mr. Mallozzi had contributed $21,092 to the venture and had loaned Mr. Langlois a total of $14,689.72 between June 30 and July 28, 2011. On August 4, 2011, Mr. Langlois sent an email to Mr. Kosowan and Mr. Mallozzi in which he requested an additional $1,000 for "unforeseen expenses" to be paid the next day. They paid it. Mr. Langlois denies ever requesting a payment for "unforeseen expenses", but his email expressly states that "unforeseen expenses have arisen."

[55] On September 6, 2011, by accessing information from an ACS computer, Mr. Kosowan discovered that Mr. Langlois had been making applications for employment.

[56] Following this discovery, Mr. Kosowan and Mr. Mallozzi met with Mr. Langlois to express their concern. Mr. Langlois admitted that he had started to look for work because he was frustrated by his failure to attract customers to ACS. Mr. Kosowan testified that Mr. Langlois agreed to stop sending job applications and to focus on finding customers for ACS.

[57] By August 31, 2011, Mr. Langlois had received shareholder loans of $28,189. Mr. Langlois sent an email to Mr. Kosowan and Mr. Mallozzi asking that he continue to receive shareholder loans in the amount of $63,500 to be advanced between then and December 31, 2011. At this point, Mr. Langlois had not brought in a single customer. However, Mr. Kosowan and Mr. Mallozzi agreed and paid him $63,500 in additional shareholder loans between August and December 2011.

[58] Mr. Kosowan and Mr. Mallozzi testified that sometime before September 9, 2011, Mr. Langlois requested an additional $40,000 to cover expenses, which they paid to him in cash - $20,000 each. Mr. Langlois signed a promissory note in the principal amount of $40,000 in favour of 786 on September 16, 2011, dated September 14, 2011. Mr. Kosowan and Mr. Mallozzi testified that the $40,000 loan was made in cash, in exchange for the $40,000 promissory note.

[59] Mr. Langlois disputes that there was ever any $40,000 cash payment. On August 3, 2011, Mr. Langlois sent an email to Mr. Kosowan and Mr. Mallozzi with "Discussion re security agreement" in the subject line. In that email, Mr. Langlois acknowledged that he had received approximately $27,000 in "wages" at that point and was expecting to receive $63,000 to December 31, 2011. He offered a mortgage on his ski chalet for $21,000, or for $33,000 if Mr. Kosowan and Mr. Langlois would agree to pay him $3,000 per week until December 31, 2011. Mr. Kosowan responded with resistance to "another advance."

[60] On September 9, 2011, Mr. Kosowan sent an email to Mr. Langlois with a copy to Mr. Mallozzi. Mr. Kosowan wrote that pursuant to a meeting the previous week, certain things were agreed to, including "Security was provided on Chalet for 40." Mr. Kosowan and Mr. Mallozzi testified that a mortgage was not registered against Mr. Langlois' ski chalet.

[61] On September 16, 2011, Mr. Kosowan sent the promissory note to Mr. Fram with a note stating that "Rob is putting 40k up for his side shareholders loan to the corporation", and Mr. Kosowan referred to a possible mortgage. Mr. Fram acknowledged receipt of the note.

[62] Mr. Langlois testified that the promissory note was to secure Mr. Langlois' loans on account of past and future "salary" payments and was not given in exchange for a $40,000 cash payment.

[63] Mr. Kosowan testified that Mr. Langlois provided him with two additional provisional patent applications, which Mr. Kosowan sent to Mr. Fram via email on September 9, 2011 and September 16, 2011. Mr. Fram testified that he added these documents to the Schedule "A" binder to the Licence Agreement. The September 16, 2011 does not appear to have been added to the binder as part of Schedule "A."

[64] On September 21, 2011, on behalf of ACS, Mr. Langlois wrote to Joe Spitz of Teel. In that letter he referred to a visit with Mr. Spitz in mid-October to discuss moving forward jointly. In the letter, Mr. Langlois refers to the benefits of super-conductive coatings for its profiles, provided through an inline pultrusion system, or offline. In the email, Mr. Langlois described the line that ACS would install to provide a powder-coating finish as well as a super conductive finish. Mr. Langlois concluded by stating, "I firmly believe that we have a robust coating system that will provide the yields that are expected …"

[65] In October 2011, ACS had prepared a draft "License and Supply" contract between ACS and Teel, and in November 23, 2011 Teel acknowledged receipt of a "LOI" and indicated that its team would meet the following week.

[66] On December 9, 2011, Mr. Langlois sent an email message to Mr. Spitz confirming some pricing and offering that both Mr. Kosowan and he would be free to meet prior to the holidays in the hopes of keeping the momentum going. Mr. Langlois wrote to Mr. Spitz again on December 16, 2011 regarding a potential new customer for the proposed joint venture coating line.

[67] Mr. Kosowan testified that on October 4, 2011, Mr. Downey, of Halo, sent an email to Mr. Langlois with a copy to him in which Mr. Downey asserted that the retroreflective technology that Mr. Langlois had claimed as his own belonged to Halo.

[68] Mr. Langlois dismissed the email, and he wrote to Mr. Mallozzi that Mr. Downey "has nothing and [his assertion] is built on a lot of misdirection rather than fact."

[69] By late 2011, ACS had no customers or revenue. On November 1, 2011, the co-venturers met to discuss a means to raise $100,000 of bridge financing. This plan was recorded in the minutes of their meeting.

[70] On November 15, 2011, Mr. Langlois prepared a draft letter to Teel regarding a joint venture between ACS and Teel. In the letter, Mr. Langlois described ACS as the developer of a powder-coating process for finishing architectural fiberglass substrates and other non-conductive plastic components as described in a U.S. patent application. Mr. Langlois included the title "President and CEO" of Architectural Coatings Solutions Inc. next to his name under the signature line.

[71] Mr. Kosowan testified that by November 2011, Mr. Mallozzi and he had invested approximately $240,000 into the venture, and Mr. Langlois had still not landed a single customer. The co-venturers agreed that they would formulate a business plan for the purposes of attracting

outside investors. Mr. Langlois took the lead on drafting the ACS Business Plan dated November 2011 (the “ACS Business Plan”).

[72] Around the same time, Mr. Langlois offered to assist Jeffrey Sugar on bottle-coating sample work that VML was doing to attract the Diageo contract. Jeffrey Sugar testified that the work could have, potentially, involved powder coating, and at that time, VML did not do any of its own powder-coating work. Jeffrey Sugar testified that if the Diageo contract had come through, both ACS and VML could have benefitted.

[73] While working with Jeffrey Sugar, Mr. Langlois asked him to review the draft ACS Business Plan.

[74] The parties do not agree on whether ACS ever provided a copy of the ACS Business Plan to potential customers. Mr. Langlois testified that Mr. Kosowan or Mr. Mallozzi could have done so. There is no documentary evidence in support of such action.

[75] Around November 28, 2011, Mr. Kosowan met with Mr. Fram to discuss making a shareholder cash call under the ACS Shareholder Agreement.

[76] In mid-December 2011, Mr. Fram disseminated a Memorandum of Agreement among the co-venturers providing that over-advances made to date would be retroactively treated as having been made under a cash call by the shareholders.

[77] By December 2011, Mr. Langlois had still not brought any customers or investors to ACS. Mr. Kosowan and Mr. Mallozzi met with Mr. Langlois to discuss their disappointment. Mr. Langlois offered a charge over his shares in 786 in consideration of the loans from Mr. Kosowan and Mr. Mallozzi. Mr. Fram prepared the security agreement, the draft of which Mr. Langlois reviewed and commented on. The security agreement, dated November 28, 2011, was signed by the co-venturers between December 19, 2011 and December 25, 2011.

[78] The co-venturers held a meeting on January 9, 2012 to discuss a cash call. Mr. Kosowan testified that, at that time, Mr. Langlois had made no financial contribution but was still demanding draws. The Memorandum of Agreement was signed at this meeting by all of Mr. Kosowan, Mr. Langlois and Mr. Mallozzi. The minutes from this meeting reflect that ACS was waiting for Jeffrey Sugar to have the ACS Business Plan “cleaned up” and ready to present to his own group of investors from whom they were looking for $600,000 and $2 million. The minutes also showed that Jeffrey Sugar would fund $20,000 against a convertible debenture, and Mr. Langlois would not participate in the cash call. Mr. Kosowan and Mr. Mallozzi would need to make up the difference. Jeffrey Sugar denies ever agreeing to provide $20,000 of funding to ACS. The minutes also referred to a “(Stanley JV)” regarding a future fibreglass coatings joint venture. It is undisputed that the “Stanley” referred to here is Stanley Rokicki.

[79] Mr. Rokicki was the principal of Inline Fiberglass, and one of Mr. Langlois’ long-standing contacts. Mr. Langlois testified that he had known Mr. Rokicki since 2009 or 2010. Mr. Langlois had reconnected with Mr. Rokicki as early as June 20, 2011, and by November 2011, Mr. Langlois told his co-venturers that Mr. Rokicki would invest $2,000,000 in ACS. Mr. Fram prepared certain documents in anticipation of the investment.

[80] In December 2011, Mr. Langlois prepared a “Joint Venture Agreement” between ACS and “Inline Fiberglass Inc. (Stanley)”.

[81] Mr. Kosowan testified that despite Mr. Langlois’ failure to attract any customers or make any financial contribution to ACS, Mr. Kosowan, remained optimistic. On January 4, 2012, he joined Mr. Langlois for a business trip to South Carolina to make a sales pitch to Philips/Shakespeare. Mr. Kosowan paid all the expenses for that business trip.

[82] On January 6, 2012, Mr. Langlois, holding himself out as “President & CEO” wrote to Jim Bob Wiles at Philips, thanking them for the recent meeting, and providing them with costing on a powder-coating system to be installed in between the dye and the grippers.

[83] By January 10, 2012, Mr. Langlois, who was still holding himself out as President & CEO of ACS in his email communications, had provided spreadsheets showing *pro forma* to revenue calculations for each of Teel and Inline Fiberglass to Jeffrey Sugar.

[84] Mr. Kosowan and Mr. Mallozzi did not advance any more funds directly to Mr. Langlois on behalf of ACS, apart from $2,250 that Mr. Mallozzi personally advanced to Mr. Langlois on January 13, 2012, in exchange for a promissory note.

[85] Mr. Kosowan testified that by January 20, 2012, Mr. Langlois was seldom at Low Risk’s premises or in contact with his co-venturers. Mr. Kosowan testified that Mr. Langlois’ desk appeared to have been cleaned out and the samples he had created had gone missing. Later that month, Mr. Mallozzi discovered that Mr. Langlois was working in an office at Mr. Rokicki’s Inline Fiberglass premises at 2365 Dixie Road, in Mississauga, Ontario (“2365 Dixie Road”).

[86] On January 25, 2012, Mr. Kosowan received a second communication from Mr. Downey of Halo. The email contained further allegations about Mr. Langlois’ alleged breaches of agreements with ASF and Halo.

[87] Around the same time, on the central server for ACS, Mr. Kosowan discovered a “PCS Business Plan”, dated January 2012. In substance, the PCS Business Plan was virtually identical to the ACS Business Plan. Mr. Kosowan testified that he deduced that Mr. Langlois had placed the PCS Business Plan on the server using an ACS computer.

[88] On January 30, 2012, Mr. Kosowan spoke to Mr. Downey about Mr. Langlois’ alleged violation of agreements with Halo and with ASF. Mr. Kosowan testified that Mr. Downey suggested that Mr. Kosowan contact ASF for further information. Mr. Kosowan arranged to meet with ASF on February 3, 2012.

[89] On February 3, 2012, Mr. Kosowan met with Shane McGivern, Mr. McLaughlin, Denis Bernhard and Geoffrey Goad of ASF. Mr. Kosowan testified that at that meeting, the ASF representatives told him that creditors had not moved in to take control of ASF as Mr. Langlois had alleged, and Mr. Langlois did not leave ASF but was terminated for failing to deliver anything significant following ten years of support by investors who had invested millions of dollars in ASF to support Mr. Langlois’ powder-coating efforts. Mr. Kosowan testified that ASF showed him a number of documents that demonstrated that ASF was pursuing the same clients that ACS was pursuing, and they showed him an ASF Business Plan that was essentially the same as the ACS Business Plan and the recently discovered PCS Business Plan. Mr. Kosowan testified that ASF

told him that the intellectual property and technology that Mr. Langlois was using at ACS belonged to ASF. Mr. Kosowan further testified that the ASF representatives with whom he met told him that they felt that the IP and know-how and technology was theirs.

[90] Mr. Kosowan testified that following a tour of the ASF facilities, when Mr. Kosowan and the ASF representatives returned to the company's boardroom, they were surprised to see Mr. Langlois sitting there. Mr. Kosowan testified that Mr. Langlois asked him why he was at the ASF offices and Mr. Kosowan told Mr. Langlois what he had just learned at ASF, none of which Mr. Langlois denied.

[91] Following the meeting at ASF, Mr. Kosowan called Mr. Mallozzi to report on the email from Mr. Downey, his visit to ASF, and what he had learned there.

[92] Mr. Mallozzi testified that on the same day as Mr. Kosowan's visit to ASF, he called Mr. Kosowan. He reported to Mr. Kosowan that Mr. Langlois had called him after seeing Mr. Kosowan at ASF and that, at the time of the call, Mr. Mallozzi and Mr. Langlois were in the parking lot at Low Risk.

[93] Mr. Mallozzi testified that, following his call with Mr. Kosowan, he and Mr. Langlois went to a restaurant for lunch to discuss what had just happened. Following the lunch, Mr. Mallozzi suggested that Mr. Langlois go to Low Risk to talk things over with Mr. Kosowan. Mr. Langlois refused. Mr. Mallozzi met with Mr. Kosowan later that same day and reported that Mr. Langlois had told him during their lunch that "the gig was up", and Mr. Langlois would be leaving the venture to work with Jeffrey Sugar and Gary Sugar at VML. Mr. Mallozzi testified that he also reported to Mr. Kosowan that Mr. Langlois had invited Mr. Mallozzi to join him at VML, but Mr. Mallozzi had declined.

[94] Also, later that day, Mr. Kosowan got an email from Mr. Downey stating that Mr. Langlois had called Mr. Downey to say that he had left "Transflect" a couple of weeks ago. Mr. Mallozzi testified that Mr. Langlois had been working for ACS up to and including February 3, 2012, and Mr. Langlois had been pursuing a potential client named Vic De Zen of Vision Eco, a large North American extruder, around that time.

[95] Mr. Kosowan testified that after February 3, 2012, he did not hear from Mr. Langlois again. By the end of the trial, Mr. Langlois had not repaid any of the loans made by ACS or Mr. Mallozzi, and Mr. Langlois had made no financial contribution to ACS.

[96] Mr. Kosowan testified that shortly after Mr. Kosowan's meeting with ASF on February 3, 2011, Mr. Kosowan, on behalf of ACS, and ASF agreed to work together to turn the issues relating to Mr. Langlois' alleged wrongful use of technology into a "win-win situation."

[97] On February 14, 2012, Mr. Kosowan sent an email to ACS's contacts and potential customers. In the email, Mr. Kosowan wrote, among other things: "Robert Langlois has stated that he is no longer associated with ACS – this is definitely our position as well." Mr. Kosowan also stated that "ACS will move forward in an exclusive relationship with ASF to provide our customers with a full range of powder-coating solutions, and that the new relationship mitigates any intellectual property risk and adds significant value due to ASF's in house capabilities."

Mr. Kosowan's email stated that "ASF commercially powder coats non conductive [*sic*] substrate products today at their facility located in Vaughan, Ontario" (the "February 14 Email").

[98] Mr. Kosowan and Mr. McLaughlin each testified that ACS and ASF worked together for a period of time but made little money from their joint efforts at powder coating. Mr. Kosowan testified that ASF and ACS did not make much money in their collective effort because, according to the potential customers they contacted, Mr. Langlois had discouraged the customers from having their powder-coating work done by ACS and ASF.

[99] ACS and ASF entered into a Memorandum of Agreement, dated July 1, 2012, in which ASF assigned its then on-going action against Mr. Langlois to the plaintiffs, and ASF assigned the rights it believed it held in certain intellectual property relating to powder coating to the plaintiffs (the "Assignment Agreement"). Despite the July 1, 2012 date on the Assignment Agreement, it is not disputed that it was made in 2015 or 2016, after the plaintiffs commenced the ACS Action. The Assignment Agreement was first produced to the defendants mid-trial, though, based on the evidentiary record, the defendants were aware of its existence through the discovery process years before the trial.

[100] Meanwhile, following the February 3, 2012 meeting at the ASF office, Mr. Langlois continued to work with Jeffrey Sugar. Jeffrey Sugar admitted that Mr. Langlois had instructed him to change the "ACS" Business Plan to the "PCS" Business Plan" sometime in January 2012 prior to Mr. Kosowan's discovery of it on the ACS server.

[101] Jeffrey Sugar testified that on February 4, 2012, he approached Gary Sugar about raising funds to finance a powder-coating business. Gary Sugar's legal services included brokering potential investors with business opportunities.

[102] On February 22, 2012, Jeffrey Sugar sent a copy of the PCS Business Plan to Gary Sugar. Gary Sugar testified that this was his introduction to PCS and to Mr. Langlois.

[103] Gary Sugar testified that around the same time, he learned of a dispute between ACS and Mr. Langlois in which ACS was alleging that Mr. Langlois was in possession of ACS's powder-coating paint gun and was in breach of the Licence Agreement, among other allegations. Gary Sugar testified that he agreed to write a letter to ACS, as counsel, on Mr. Langlois' behalf. The letter addressed ACS' allegations about VML's attempts to contract with Diageo and their demand that Mr. Langlois return the powder-coating gun that belonged to ACS.

[104] Gary Sugar wrote a letter to ACS on March 2, 2012, in which he demanded a duly authorized direction before Mr. Langlois would return the powder-coating paint gun.

[105] On March 9, 2012, Mr. Fram wrote to Gary Sugar, on behalf of ACS, alleging that Mr. Langlois had breached his duty of confidentiality and misappropriated the ACS Business Plan, and Mr. Langlois had no rights to assign, or to use the powder-coating technology. He also provided Gary Sugar with a copy of the Licence Agreement, but he declined to provide a copy of Schedule "A" to the Licence Agreement, "to prevent further damage" to ACS. Mr. Fram testified that he declined to provide a copy of Schedule "A" to the Licence Agreement, because he believed it contained proprietary information.

[106] On March 20, 2012, Mr. Langlois provided Gary Sugar with a list of the provisional patents that he believed had been included in Schedule "A" to the Licence Agreement. In his note to Gary Sugar, Mr. Langlois indicated that each such provisional patent had been abandoned or would be abandoned in May of that year (unless renewed by ACS) and that all of the listed provisional patents had little to no chance of becoming patents.

[107] On April 3, 2012, Mr. Langlois advised Gary Sugar and Jeffrey Sugar that he would apply for USA provisional patent for "our Philips" technology for a year pending filing a full patent, and he filed for that patent on April 5, 2012. This technology involved the installation of a powder-coating machine between the dye and the grippers.

[108] On April 19, 2012, on behalf of Mr. Langlois, Gary Sugar sent a letter to ACS in which he alleged that the Licence Agreement was invalid and unenforceable, and in any event had been terminated (the "April 19 Letter").

[109] Between February and June 2012, the details of the PCS operations were sorted out among Mr. Langlois, Jeffrey Sugar and Gary Sugar. It was agreed that Mr. Langlois would bring his skills and know-how to PCS, work for PCS on a full-time basis and draw $2,500 per week in repayable loans. Jeffrey Sugar would contribute capital and provide reasonable access to VML's facilities, charging only for direct costs, and Gary would contribute capital and act as in-house counsel, *pro bono*, and assist in PCS' search for external funding.

[110] Jeffrey Sugar testified that he offered to house ACS (and subsequently PCS) on the understanding that ACS/PCS would enter into a tenancy with VML once a cashflow had been established". Mr. Langlois testified that Jeffrey Sugar would provide reasonable access to VML's resources (i.e. facility, staff and equipment, and provide PCS with an office in VML at minimal to no cost). Mr. Langlois also testified that the use of these resources at a reasonable cost (only direct expenses would be charged to ensure PCS could break even, with indirect costs absorbed by VML) would prevent PCS from seeking capital investments, which would otherwise dilute the interest of the PCS co-venturers in PCS.

[111] On July 27, 2012, Gary Sugar and Mr. Langlois entered into a Letter of Intent respecting Gary Sugar's personal interest in investing in PCS. Gary Sugar agreed to loan Mr. Langlois $20,000, which he paid out in four advances between April and August 2012. The loan was not secured.

[112] In September 2012, PCS and its three shareholders, Mr. Langlois, Jeffrey Sugar and Gary Sugar, signed a Non-Competition Agreement in which each agreed that as long as he was a shareholder, director, officer or employee of PCS, he would not "carry on or be engaged in or loan any money to any business competitive with that carried on by [PCS]" within a specified geographic region. However, at the request of Jeffrey Sugar, this Agreement specifically provided that "Jeffrey Sugar may continue the operations of Vacuum Metallizing so long as it does not compete with the business of the Corporation."

[113] Mr. Langlois carved out the right to operate the defendant Reflectionight, a business he operated with his wife, the defendant Carrie Ferguson. Among other things, Reflectionight sold powder-coating powder.

[114] During the first several months at PCS, Mr. Langlois continued to look for joint venture partners to finance, purchase and operate powder-coating machines. He was unsuccessful.

[115] In January 2013, PCS decided to invent a new type of powder-coating machine, called the Pultrucoater, which relied on infrared heating technology.

[116] On April 25, 2013, the PCS partners met with Peter Andrianopoulos and other representatives of RM2 in the hope of selling them a Pultrucoater. RM2 declined to buy a Pultracoater at that time because they did not want to be the first buyer of a new machine. However, they asked whether PCS could powder coat component parts of their pallets with an anti-skid coating to make them less slippery. During the trial, Gary Sugar, on one hand, and Jeffrey Sugar and Mr. Langlois, on the other, gave opposing testimony as to what was said at the meeting, and after the meeting, regarding the powder-coating work. Mr. Langlois and Jeffrey Sugar testified that RM2 was told that PCS could not do the powder-coating work, but perhaps VML could do it. Gary testified that he told Mr. Andrianopoulos that PCS could manually powder coat RM2 pallet component parts until RM2 was ready to purchase a Pultrucoater.

[117] The following day, Mr. Langlois sent an email to Mr. Andrianopoulos in which the subject line read: “Re: MSDS for the coating.” Mr. Langlois wrote: “I will be working with our team to come up with some “Manual” coating system options and pricing. I will also work up some numbers for PCS to paint 500, 5000, 10,000 slats at our shop.” Mr. Langlois’ email includes his title: “President & CEO Powder Coating Solutions Inc.” Both Gary Sugar and Jeffrey Sugar were copied on this email.

[118] On April 30, 2013, Mr. Langlois sent Mr. Adrianopoulos a letter on PCS letterhead in which he stated that “RM2 must either incorporate a coating system into its own facility or out-source to PCS.” No mention was made of VML, and Mr. Langlois signed the letter as President and CEO of PCS.

[119] On May 13, 2012, PCS received a deposit for the first powder-coating machine it would sell. This sale was made to Creative Pultrusions. A second sale was made to Comfortline in February 2014, and a third sale was made to RM2 also in February 2014. PCS signed license agreements with each of them for the purchase of powder and earned royalty revenue from 2014 to 2016.

[120] On May 16, 2013, Mr. Langlois sent an email to Jeffrey Sugar and Gary Sugar stating that he expected the RM2 Contract to grow “exponentially.” He made no mention of any role to be played by VML.

[121] On June 13, 2013, Jeffrey Sugar sent an email to Mr. Langlois and Gary Sugar attaching a spreadsheet with a cost breakdown for the RM2 Contract. The spreadsheet includes a charge for “occupancy cost.”

[122] The RM2 Contract work done by PCS began on June 10, 2013. PCS hired the labour and paid for the powder. PCS’ first invoice for powder-coating services to RM2 was dated June 10, 2013. PCS’ final invoice for this service was dated December 30, 2013.

[123] On July 24 and 25, 2013, Mr. Langlois and Gary Sugar exchanged emails about a provisional patent application relating to the work PCS was doing for RM2.

[124] On August 20, 2013, Gary Sugar sent an email to Mr. Langlois and Jeffrey Sugar in which he suggested tying the purchase of a Pultrucoater to PCS' continued powder coating of RM2's pallet parts.

[125] RM2 went public on the London Stock Exchange on January 6, 2014. Between January 22 and January 28, 2014, without Gary Sugar's knowledge, Mr. Langlois and Jeffrey Sugar transferred the RM2 Contract from PCS to VML. Gary Sugar's evidence is that they backdated the transfer to the end of 2013 and adjusted PCS' books and records to make it appear that the RM2 Contract had been transferred to VML before the initial public offering.

[126] Jeffrey Sugar testified that he never discussed with Gary Sugar his approach to the RM2 Contract, which involved a shift of the powder-coating work from PCS to VML. Jeffrey Sugar testified that, in his mind, the RM2 Contract always belonged to VML. However, he and Mr. Langlois had decided to allow PCS to temporarily do the work to generate cashflow for PCS so that Gary Sugar would not have to advance more funds to PCS to pay expenses, including loans to Mr. Langlois for his salary. Both Jeffrey Sugar and Mr. Langlois testified that they made this decision without involving Gary Sugar, and they did not tell him about their decision to transfer the RM2 Contract from PCS to VML.

[127] On January 22, 2014, Jeffrey Sugar sent an email to Natalija Trajkovik of RM2 listing the PCS invoices 1062-1087, which had been sent prior to January 22, 2014 and asking when they would be paid. Jeffrey Sugar's email included the PCS logo, and his title as PCS' Vice President. Mr. Langlois was copied on this email, but Gary Sugar was not.

[128] By email dated January 24, 2014, Ms. Trajkovik advised Jeffrey Sugar that RM2 Canada would no longer be paying the invoices, but its Swiss parent RM2 SA would make the payments by wire. She asked Jeffrey Sugar to reissue all invoices from January 1, 2014 onward to RM2 SA. Ms. Trajkovik copied Rene Reupp of RM2 SA on the email and noted that "Vacuum Metallizing Limited is the company who [*sic*] powder coating our pallets (stringers and channels) and going forward they will invoicing [*sic*] RM2 SA for this service."

[129] That same day, Jeffrey Sugar sent an email to Ms. Trajkovik in which he is shown as "President, Vacuum Metallizing Limited" and "Vice President, Powder Coating Solutions." In that email, he provides wiring instructions for Vacuum Metallizing's Canadian currency account. On January 28, 2014, Jeffrey Sugar sent Ms. Reupp re-issued invoices 1062-1087, which he describes in the subject line as "Invoice from Vacuum Metallizing Limited", as opposed to PSC. Mr. Langlois was copied on these emails, but Gary Sugar was not.

[130] These January 2014 emails and VML's re-issued invoices to RM2 SA were not disclosed in the defendants' affidavits of documents in the PCS Action. They were only produced as a result of an Order of Hainey J. dated October 16, 2018, in response to Gary Sugar's request that the defendants be required to search their files using search terms selected by Gary Sugar.

[131] As of January 2014, RM2 work began to be invoiced from VML, and the fees were paid to VML as opposed to PCS.

[132] The three PCS partners had entered into a written agreement that all three would start to receive wages as of January 1, 2014. Gary Sugar testified that when he asked his PCS co-venturers

why he was not receiving wages as of January 1, 2014, Jeffrey Sugar told him that the RM2 Contract was not profitable, and that he was not receiving wages either.

[133] Gary Sugar testified that by mid-2014, he had learned that the RM2 Contract had been taken over by VML. He also testified that, at this time, Jeffrey Sugar told him that the RM2 Contract was still not profitable, and Jeffrey Sugar refused to disclose to Gary Sugar evidence of the revenue and profits generated. The revenue from the RM2 Contract ceased in 2015.

[134] RM2 entered a licensing agreement with PCS in October 2014 for the purchase of powder to be used with the powder coating machine it purchased in the same year.

[135] Ephraim Stulberg, of Matson Driscoll & Damico Limited, Forensic Accountants, prepared two expert reports. The plaintiffs in both the ACS Action and the PCS Action instructed Mr. Stulberg on the preparation of the Report on Accounting of Profits (the "Accounting Report"), dated January 9, 2020, and they both rely on it. Mr. Stulberg was asked to opine on the incremental profits of VML and PCS from the use of powder-coating technology from 2012 to 2020, as well as calculation of the amounts paid to Mr. Langlois. According to the Accounting Report, the estimated profits earned by PCS and VML related to powder coating from 2012 to 2019 was $3,018,702.

[136] Included in this amount is total remuneration paid to Mr. Langlois from PCS of $838,784. The Accounting Report shows that Mr. Langlois received this remuneration despite the fact that the PCS shareholders agreement provided that, until the business began generating income, each of the three partners agreed to contribute his labour for no charge, except for Mr. Langlois who would be loaned money from PCS. According to the Accounting Report, Mr. Langlois received, through his company, 1921908 Ontario Ltd., consulting fees of $682,520 from the fiscal year ended March 31, 2016 to September 2019. Mr. Langlois was paid salary and wages in fiscal 2014 totalling $156,784, which amount does not include shareholder loans of approximately $135,000.

[137] According to the Accounting report, PCS was earning revenue from various customers through 2018 but in 2019 operations appeared to have essentially ceased.

[138] Mr. Stulberg prepared a second report for use by Gary Sugar, as plaintiff in the PCS Action. It is the "Calculation of Valuation Report". It provides an *en bloc* fair market value of all the business assets of PCS as of October 1, 2019 , being the Current Valuation Date, and an *en bloc* fair market value of all of the business assets of PCS using a retrospective valuation date of May 21, 2015, being the Retrospective Valuation Date. The Calculation of Valuation Report also provides a separate valuation of the present value of the incremental powder-coating service profit that is expected to be earned by VML from October 1, 2019 onwards. Gary Sugar relies on the Calculation of Valuation Report in the PCS Action in support of his request for an order directing that Mr. Langlois and Jeffrey Sugar buy out his shares of PCS.

The Licence Agreement

[139] Pursuant to the Licence Agreement, Mr. Langlois and Mr. Mallozzi, each of whom had filed provisional patent applications relating to powder coating prior to the formation of ACS, were the Licensors, and 786 was the Licensee. Mr. Mallozzi testified that he has no intellectual property

in powder coating. He merely assisted Mr. Langlois in the preparation of two provisional patent applications.

[140] The relevant terms of the Licence Agreement for the purposes of the ACS Action include the following:

> WHEREAS:
>
> 1. The Licensor is engaged in the design, manufacture and distribution of powder, liquid and other coating technology pursuant to the patents, patent applications and technological disclosures and designs set out in Schedule "A" to this Agreement, and has developed <u>equipment, processes, trade secrets and manufacturing and distributing techniques and knowledge acquired during many years (all collectively referred to herein as the "Licensed Rights")</u>; … [emphasis added]
>
> **1. Licensor Covenants**
>
> (1) *License Grant.* The Licensor grants to the Licensee, subject to the conditions set forth in this Agreement, an exclusive, non-assignable (except as a successor or assignee of the general over-all business of the Licensee) world wide [*sic*] license to the Licensed Rights and the exclusive right to sell, distribute and put into use throughout the world the coating technology embodying the inventions and Licensed Rights set forth or claimed in the patent applications licensed by this Agreement and as set out in Schedule "A" attached. <u>The parties agree, understand and intend that the Licensed Rights granted hereunder are broader than the contents of the patent applications, and shall continue to be broader than the patent applications</u>. [emphasis added]
>
> (2) *Future Inventions.* The Licensor agrees to extend the Agreement to include all future patents, patent applications, inventions, designs, equipment, improvements in product, processes and manufacturing techniques relative to the articles falling within the scope of the patents included in the Licensed Rights.
>
> …
>
> (4) *Licensor's Restriction.* The Licensor agrees that it will not during the term of this Agreement, unless sooner terminated as provided, grant any assignment, license or lisencesublicense [*sic*] to manufacture or sell the Licensed Rights covered by this Agreement to any person, firm or corporation anywhere in the world.
>
> …

(6) *License Warranty*. The Licensor warrants that it has the right to grant this license; and it further warrants that it has granted no prior lisense [*sic*] and that there is no outstanding license granted by it covering the Licensed Rights or the powder coating technology as claimed in the patents and applications included in the Licensed Rights in conflict with the license granted to the Licensee.

2. Licensee covenants

(1) *Royalty*. The Licensee shall pay no royalties to the Licensor for the rights granted hereunder, the Licensor having taken an ownership in the Licensee in consideration of this Agreement.

(2) *Exploitation of License.* The Licensee agrees to manufacture, sell, distribute and to use its best efforts to promote the powder coating technology in the territories assigned.

(3) *Validity of Patents.* The Licensee agrees not to contest the validity of the letters patent under which it is licensed, or the right or title of the Licensor to it, or to any process, trade or manufacturing secret, and further agrees not to aid others in doing so.

(4) *Improvements and Devices.* The Licensee agrees to assign and transfer to the Licensor on its written demand any and all improvements on any of the patents, applications, inventions, processes, secrets, and knowledge referred to, designed or otherwise obtained by the Licensee during the continuance of the Agreement, and the Licensee shall transfer to the Licensor any and all papers necessary or proper to vest in the Licensor title to all improvements.

(5) *Transfer of License.* The Licensee agrees not to assign, transfer, or encumber its interest in this Agreement, or the rights granted to it without the written consent of the Licensor; provided, however, that if the Licensee sells or transfers its entire business to a responsible business organization, it may on written notice to the Licensor transfer the license as a part of the general assignment of its business, provided that it is intended by the parties that the Licensee shall sublicense the Licensed Rights or any part thereof to subsidiary corporations and others as part of the process of exploiting the Licensed Rights.

(6) *Restrictions on Use.* The Licensee agrees that it will not during the term of this Agreement permit others to use the inventions, processes, secrets and knowledge disclosed to it by the Licensor pursuant to the terms of this Agreement; and that it will keep all process and confidential information secret; and that, after termination of this Agreement, the Licensee shall not use and shall have no right to use any of the patents, patent rights, inventions,

processes or trade secrets for the use of which it is licensed, or any part thereof, except that the restrictions contained in this provision shall not preclude the use of processes which have become public knowledge.

3. Term

The term of this Agreement shall be for an unlimited period, being a grant in perpetuity of a license to the Licensed Rights.

4. Cancellation for default

This Agreement shall be subject to cancellation by the Licensor on the following conditions:

(a) if the Licensee shall fail to do any of the acts or things by it agreed to be done at the times and in the manner provided, or

(b) it shall do any act or thing prohibited under the terms of this Agreement;

provided, however, that if the Licensor cancels this license [*sic*] Agreement, the Licensor shall give the Licensee sixty days' notice in writing of the Licensee's default or omission constituting grounds for cancellation, and of its election to cancel this Agreement. If within sixty days after the receipt of the notice the Licensee shall cure the deficiency or omission fully, and makes good its default or omission, the cancellation notice shall be without force or effect. If the omission or default, specified in the notice is not cured within the sixty-day period, the Agreement and the rights under it shall become finally terminated.

5. Termination

The Licensor shall have the right to terminate this Agreement at any time on or after the filing of the Licensee of an assignment in bankruptcy, or on or after the Licensee is either bankrupt or insolvent or after any adjudication that applications for the reorganization, readjustment, or rearrangement of the business of the Licensee under any law or governmental regulation relating to bankruptcy or insolvency, or on or after the appointment of a receiver for all or substantially all of the property or assets of the Licensee, or on or after the making by the Licensee of any assignment or attempted assignment for the benefit of creditors, or on or after the institution by the Licensee of any proceedings for the winding-up of its business. In any event, this Agreement shall be terminated after fifteen days after the Licensor has given written notice to the

> Licensee, or its legal representative, of the exercise of its right of termination under this paragraph.
>
> …
>
> **11. Schedule "A" to this Agreement**
>
> The parties agree that Schedule "A" to this Agreement contains the particulars of all the Licensed Rights as at the date of this Agreement. The parties further agree that Schedule "A" may be updated from time to time and that updated materials intended to be added to and form part of Schedule "A" shall be signed and identified by the parties from time to time as intended for this purpose, and following which signing and identification shall be added to and form part of Schedule "A."

Positions of the Parties

The Plaintiffs

[141] The plaintiffs concede that Mr. Langlois had no patents to license to 786 when he entered into the Licence Agreement, and the intellectual property listed on Schedule "A" to the Licence Agreement are provisional patent applications. However, they submit that the Licence Agreement was intended to and did ensure that, in addition to any patents and patent applications, Mr. Langlois granted 786 the rights to his intellectual property, as well as his know-how, expertise, and knowledge acquired during many years regarding powder coating.

[142] They submit that despite having licensed his vast know-how and confidential business practices to 786, Mr. Langlois then left ACS for PCS, where he used the licensed know-how and confidential practices that belonged to 786, and finally delivered profits to PCS, VML and himself. In the result, only Mr. Langlois and Jeffrey Sugar benefitted, to the plaintiffs' detriment.

[143] In doing so, the plaintiffs submit that Mr. Langlois breached his various duties to them, including contractual obligations under the Licence Agreement, and his fiduciary duties including his duty of confidence. They further submit that Jeffrey Sugar and Gary Sugar knowingly assisted him in the breach of those duties.

[144] The plaintiffs seek to recover from Mr. Langlois the amounts that ACS and Mr. Mallozzi lent to him over the course of their venture, as well as ACS' financial investment in the venture. The plaintiffs also seek a remedy for Mr. Langlois' breaches of the Licence Agreement, and his breaches of fiduciary duty. They seek a prophylactic disgorgement of the profits earned by PCS, and the profits earned by VML related to the RM2 Contract and other powder-coating work, as well as the SR&ED tax refunds paid to VML related to powder coating. The plaintiffs seek disgorgement from Mr. Langlois, PCS, VML and Jeffrey Sugar, jointly and severally, based on Jeffrey Sugar's knowing assistance in Mr. Langlois' misconduct. Despite his knowing assistance in Mr. Langlois' conduct, they do not seek recovery against Gary Sugar, because he did not share in the profits. The plaintiffs also seek to recover from Mr. Langlois and the defendant Carrie Ferguson, carrying on business as Reflectionight, the proceeds from the sale of powder-coating

powder sold by them between 2013 and 2017 on the basis that Mr. Langlois and Ms. Ferguson misappropriated these proceeds that ought to have been paid to ACS.

Mr. Langlois

[145] Mr. Langlois submits that Mr. Kosowan and Mr. Mallozzi had made an oral agreement with him that ACS would pay him a bi-monthly salary, and he disputes that he was paid $40,000 in cash at the time he executed the promissory note.

[146] Mr. Langlois also submits that the Licence Agreement is unenforceable for a number of reasons. These include the fact that there was no Schedule “A” to the Licence Agreement, and if there was, its contents were not properly signed and dated. Accordingly, Mr. Langlois submits that ACS had no “Licensed Rights”, and he had the right to use all of the technology referred to in the provisional patent applications that formed part of the alleged Schedule “A.” Alternatively, he submits that he had the right to use the technology because all of the processes contained in the alleged Schedule “A” were public knowledge, and in the further alternative, he submits that none of those processes were used by him or VML in the RM2 Contract.

[147] Mr. Langlois also submits that the Licence Agreement is invalid or unenforceable by reason of duress, undue influence, unconscionability and/or misrepresentation, and that he was terminated by ACS and was not restricted from competing with ACS once terminated. He submits that he was terminated by ACS upon receipt of his final “pay” in November 2011.

[148] Mr. Langlois also submits that the work done by PCS was completely different than the work done at ACS, and as such, he was not in breach of the Licence Agreement or any fiduciary duty to ACS or his former partners.

[149] Mr. Langlois seeks to have the ACS Action dismissed as against him and 978.

[150] In the counterclaim Mr. Langlois seeks punitive damages against the plaintiffs.

Gary Sugar

[151] Gary Sugar submits that the Licence Agreement is unenforceable. He submits that the licence of Mr. Langlois’ know-how and expertise in perpetuity is a draconian, unconscionable covenant in restraint of trade whereby Mr. Langlois would be prevented from ever working in the field of powder coating again.

[152] Gary Sugar also submits that there is no evidence to support the theory that Mr. Langlois, Mr. Mallozzi or ACS had any proprietary intellectual property to license or assign, and that even if they did, there is no evidence to show that such intellectual property was used by PCS or VML to perform the RM2 Contract.

[153] Gary Sugar also submits that ACS had no confidential information, and that even if it did, that PCS or VML never used any of that information to generate revenue. Gary Sugar further submits that there was no breach of confidence by him.

[154] Gary Sugar also submits that the plaintiffs are attempting to claim lifetime rights to all Mr. Langlois’ know-how and work, and therefore claim damages based on profits from customers

acquired by PCS and VML in a different context and over one year after ACS had severed all ties with Mr. Langlois. Gary Sugar asserts that such claims are patently unreasonable.

[155] Gary Sugar also submits that Mr. Langlois was entitled to earn a living in the powder-coating business once the plaintiffs had ended their relationship with Mr. Langlois by mutual agreement and partnered with ASF. He further submits that the February 14 Email was intended to and did terminate ACS's relationship with Mr. Langlois, and the termination severed Mr. Langlois' fiduciary duty to ACS.

[156] Gary Sugar also submits that he did not knowingly assist Mr. Langlois in the breach of any fiduciary duty or other obligation that Mr. Langlois may have had to ACS when PCS was formed.

Jeffrey Sugar

[157] Jeffrey Sugar submits that ACS, through its actions, terminated Mr. Langlois, which resulted in ACS' failure, and that he had no role to play in its demise. In particular, he did not knowingly assist Mr. Langlois in the breach in any of the obligations or duties that Mr. Langlois may have had to ACS when PCS was formed.

[158] Jeffrey Sugar also submits that ACS effectively terminated Mr. Langlois once they stopped paying him in November 2011, or when ACS entered into a joint venture with ASF in February 2012, or when Mr. Kosowan circulated the February 14 Email, the latter of which Jeffrey Sugar asserts was the "official" termination of Mr. Langlois. Once Mr. Langlois' commitment to the ACS venture ended, Mr. Langlois was entitled to use his knowledge and experience freely without restraint of trade.

[159] Jeffrey Sugar also submits that the Licence Agreement was officially terminated when Gary Sugar sent the April 19 Letter asserting that the Licence Agreement was invalid and of no force and effect or had been terminated.

[160] Jeffrey Sugar also submits that VML and he were not precluded in any way from competing with ACS, and in any event, the plaintiffs did not possess any intellectual property, confidential information or trade secret that VML could have misappropriated. He asserts that the method used by PCS and VML to powder coat non-conductive substrates had long been in the public domain.

[161] Jeffrey Sugar also submits that ACS' business was concerned with retro-reflective coatings whereas PCS's business was concerned with the application of conventional powder paints onto fibre-reinforced and other non-conductive substrates. Jeffrey Sugar further submits that the anti-slip powder paint formula applied to the RM2 slats was in in the public domain, and that the paint can be purchased from any significant industry supplier.

[162] Jeffrey Sugar also submits that ACS has no interest in the SR&ED work performed at VML and that Mr. Langlois did not breach his fiduciary duty to the plaintiffs because this work did not involve any technology licensed to ACS. In any event the work on the SR&ED claims was all completed and claimed for fiscal years ending June 30, 2012 and later, after Mr. Langlois had been terminated by ACS.

[163] Jeffrey Sugar further submits that the plaintiffs cannot rely on the Accounting Report because the accounting of PCS's profits, which were earned after Mr. Langlois had been

terminated from ACS, has nothing to do with them. Further, he asserts that the plaintiffs have no proprietary interest in the painting methods or product used by VML to earn the profits.

Issues

[164] The issues in the ACS Action are as follows:

1. Is the Licence Agreement invalid or unenforceable?

2. Did Mr. Langlois breach his contractual obligations and fiduciary duties owed to ACS and his business partners at ACS?

3. Did Mr. Langlois breach his duty of confidence?

4. Did Gary Sugar and Jeffrey Sugar knowingly assist Mr. Langlois to breach his fiduciary duties?

5. Does Gary Sugar have other defences to the plaintiffs' claims?

6. If Mr. Langlois breached his contractual obligations or his fiduciary duties, or both, what are the plaintiffs' damages?

Issue 1: Is the Licence Agreement invalid or unenforceable?

[165] Mr. Langlois and Gary Sugar assert that the Licence Agreement is invalid or unenforceable. For the reasons that follow, I find that neither Mr. Langlois nor Gary Sugar has met his onus to show that the Licence Agreement is invalid or unenforceable.

[166] Mr. Langlois pleads that the Licence Agreement is unenforceable by reason of duress, undue influence, unconscionability and/or misrepresentations. Mr. Langlois did not, however, lead any evidence with respect to these allegations.

[167] Mr. Langlois is university-educated and owned and operated his own business in Arizona, in the United States, for a number of years before returning to Canada, working for a couple of companies, and then joining ASF for approximately ten years and serving as its CEO. He admitted that he had read the Licence Agreement before signing it, but that he was relying on Mr. Fram to advise him in respect of the Licence Agreement. I do not find Mr. Langlois credible on this point. Mr. Fram testified that he advised both Mr. Mallozzi and Mr. Langlois that he represented Mr. Kosowan, and that both Mr. Langlois and Mr. Mallozzi should obtain independent legal advice regarding the Licence Agreement and the Unanimous Shareholders' Agreement. Mr. Mallozzi testified that, on Mr. Fram's recommendation, he did obtain independent legal advice. I am satisfied that Mr. Fram advised Mr. Langlois to obtain independent legal advice regarding both the ACS Shareholders Agreement and the Licence Agreement, and that Mr. Langlois declined to do so. Mr. Langlois made the same decision to decline to obtain independent legal advice when advised by Gary Sugar to do so when Mr. Langlois entered into a joint venture with Gary Sugar and Jeffrey Sugar, and PCS was incorporated.

[168] There is no evidence to suggest that Mr. Langlois did not understand the Licence Agreement, that he was pressured into signing it, or that it did not reflect what the parties intended.

Licensing Know-How

[169] Gary Sugar asserts that a licence of Mr. Langlois' know-how and expertise in perpetuity is draconian and an unconscionable covenant in restraint of trade. He does not, however, suggest that know-how cannot be licensed.

[170] In a 2007 paper by H. Roger Hart and Daniel R. Bereskin of Bereskin & Parr, "*The Licensing and Commercializing of Intellectual Property*", the authors describe "know-how" as any useful commercial information that is not protected by a patent and that is known to the liscensor but not the licensee. They state that a licensor's right to control the use of know-how is limited to the extent to which the information can be protected as confidential information.

[171] With regard to the licensing of know-how, the authors state as follows on p. 2:

> The common law will protect a person's confidential information which has been ascertained illegally by another or which has been disclosed to another under circumstances which impart a duty of confidence. Information can be protected against unauthorized disclosure even if it is not absolutely secret, but information that is easily available through public sources cannot. Know-how that is essentially a compilation of information that is publicly available may be transferred for consideration since the licensee still may obtain value for the know-how by getting a head start over his competitors. This is because the more difficult it is to acquire the know-how, in terms of time and money, the more significant the competitive advantage, and hence the more valuable and protectable the information. [footnotes omitted]

Void as Against Perpetuity

[172] Gary Sugar asserts that the Licence Agreement is unconscionable because it binds Mr. Langlois to ACS in perpetuity, and because Mr. Langlois received no consideration for licensing his intellectual property and his powder-coating know-how. He licensed these things without any guarantee of receiving any value in exchange.

[173] I disagree. The Licence Agreement binds Mr. Langlois to ACS in perpetuity, or until terminated in accordance with its terms. The Licence Agreement can be terminated. Further, contracts will be enforced if they are intended to be of indefinite or permanent duration. In *Conseil Scolaire Catholique Franco-Nord v. Nipissing Ouest (Municipalité)*, 2021 ONCA 544, 158 O.R. (3d) 332, Rouleau J.A. carefully reviewed the subject contract that had no term closely. He set out the factors to be considered where the parties are silent on the issue of duration.

[174] I agree with the plaintiffs that a careful review of the Licence Agreement to determine the parties' intention is not necessary in this case because the parties, in negotiating the contract, were not silent on the term. They turned their minds to it, and at paragraph 3 specifically agreed: "The term of this Agreement shall be for an unlimited period, being a grant in perpetuity of a license to the Licensed Rights."

[175] In *Conseil Scolaire*, Rouleau J.A. reiterated the overriding principle, as set out in *Thunder Bay (City) v. Canadian National Railway Co*., 2017 ONSC 3560, rev'd 2018 ONCA 517, 424 D.L.R. (4th) 488, leave to appeal refused [2018] S.C.C.A. No. 358, at para. 24, that the "meaning of an agreement and the intent of the parties in entering into it must be derived from the words the parties used and the context in which they used those words." At para. 31 of his decision, Rouleau J.A. cited with approval a passage from John McCamus, *The Law of Contracts*, 3rd ed. (Toronto: Irwin Law, 2020), at p. 844, stating that "there is no reason, in principle, precluding parties from agreeing to indefinite or perpetual obligations and if, on the proper construction of the agreement, a perpetual obligation is intended, it will be enforced." In *1397868 Ontario Ltd. v. Nordic Gaming Corporation (Fort Erie Race Track),* 2010 ONCA 101, 258 O.A.C. 173, at para. 17, the Court of Appeal observed that given the significant commitments of a perpetual business relationship, one might expect that the intent to be bound in that manner would be expressly stated. Such is the case in the agreement made by Mr. Langlois in the Licence Agreement. The grant of the licence of the Licensed Rights is expressly stated to be a "grant in perpetuity."

[176] I reject Gary Sugar's assertion that Mr. Langlois received no consideration for the licence he granted. Paragraph 2(1) of the Licence Agreement states that the Licensee shall pay no royalties, "the Licensor having taken an ownership interest in the Licensee in consideration of the Agreement." Mr. Langlois, through 978, is an equal shareholder in ACS, together with Mr. Kosowan and Mr. Mallozzi. Further, each of Mr. Kosowan and Mr. Mallozzi testified that they, collectively, have contributed over $350,000 to ACS in consideration of the Licence Agreement.

Restraint of Trade

[177] Although Gary Sugar did not plead restraint of trade, he asserts that the Licence Agreement imposes an improper restraint of trade on Mr. Langlois. Jeffrey Sugar also raises restraint of trade as an impediment to the enforceability of the Licence Agreement. The plaintiffs submit that such an assertion cannot succeed because the imposition of a restraint of trade arises once the relationship between two contracting parties comes to an end, and one party is restrained from doing certain things in competition with the other. I agree with the plaintiffs that, in this case, Mr. Langlois began to compete with his ACS venture partners while the Licence Agreement was still in effect and while it prevented Mr. Langlois from sharing his intellectual property, know-how and experience with anyone other than 786.

Termination

[178] All of Mr. Langlois, Gary Sugar, and Jeffrey Sugar submit that the Licence Agreement was terminated, and that it does not restrain any of the parties from using the "Licensed Rights" after its termination. Mr. Langlois and Jeffrey Sugar rely on the April 19 Letter sent by Gary Sugar, as Mr. Langlois' counsel. In the April 19 Letter sent to 786 and to Mr. Mallozzi, Gary Sugar asserted that the Licence Agreement was invalid and of no force or effect based on a perpetual licence, restraint of trade, termination of the Licence Agreement, and other bases.

[179] In the alternative, Gary Sugar, gave notice that the Licence Agreement had been cancelled pursuant to paragraph 4 due to breaches by 786 of paragraphs 2(2), 2(3), 2(5) and 2(6) of the Licence Agreement, and terminated pursuant to paragraph 5 due to the insolvency of 786.

[180] In support of these assertions relating to termination, Gary Sugar stated that Mr. Kosowan, on behalf of ACS, terminated the Licence Agreement by a) failing to use his best efforts to promote the licensed rights, by locking Mr. Langlois, Mr. Mallozzi and ACS out of their leased premises, and terminating Mr. Langlois' and Mr. Mallozzi's telephone and computer access (contrary to para. 2(2)); b) disclosing 786's confidential information to a competitor, namely, ASF, and assisting ASF in contesting 786's rights to its business (contrary to para. 2(3)); d) encumbering 786's interest in the Licence Agreement or the rights granted to it, without the consent of the Licensor (contrary to para. 2(5)); and e) permitting ASF to use the processes and knowledge disclosed to 786 by Mr. Langlois as licensor (contrary to para. 2(6)).

[181] At trial, Mr. Langlois conceded that he had no evidence to support any of the allegations set out in the April 19 Letter, apart from the fact that he had seen Mr. Kosowan meeting with ASF management at ASF's premises on February 3, 2011, and the statements made by Mr. Kosowan in the February 14 Email.

[182] Regarding the meeting at ASF, Mr. Langlois was inconsistent in his testimony. Ultimately, he conceded that he did not hear any of the conversations between Mr. Kosowan and the people with whom he was meeting at ASF.

[183] The only evidence of Mr. Langlois being locked out of the Low Risk premises came from Jeffrey Sugar. Jeffrey Sugar testified that Mr. Mallozzi told him that Mr. Kosowan had locked Mr. Langlois and Mr. Mallozzi out of the premises on February 3, 2012. This evidence was not corroborated either by Mr. Mallozzi or by Mr. Langlois or through any documentary evidence. Emails exchanged on that day between Jeffrey Sugar and Mr. Langlois make no mention of a lock-out. Notwithstanding that Jeffrey Sugar insisted that he overheard a discussion about a lock-out, there is no corroborative evidence to support that submission. Mr. Kosowan testified that he never locked Mr. Langlois out of the ACS premises. On the evidence before the court, I am satisfied that he did not.

[184] All of Mr. Langlois, Gary Sugar, and Jeffrey Sugar submit that when Mr. Kosowan sent the February 14 Email, Mr. Kosowan unilaterally terminated the Licence Agreement and relieved Mr. Langlois of his contractual obligations under it and any fiduciary duty he may have owed to ACS.

[185] In the February 14 Email, Mr. Kosowan stated his intention to clarify ACS's position vis à vis Mr. Langlois. It reads, in part: "Robert Langlois has stated that he is no longer associated with ACS – this is definitely our position as well." Gary Sugar's argument that the February 14 Email relieves Mr. Langlois from his contractual and other obligations is not advanced or supported by Mr. Langlois himself. Mr. Langlois led no evidence regarding the February 14 Email or its effect on his relationship with ACS.

[186] The evidence supports the conclusion that Mr. Langlois had, without notice to his ACS co-venturers, left the ACS venture before February 14, 2012. Jeffrey Sugar conceded that Mr. Langlois had told him to change the name of the ACS Business Plan to the PCS Business Plan in January 2012. This change coincided with Mr. Kosowan's discovery of the PCS Business Plan on an ACS computer. Mr. Downey wrote to Mr. Kosowan on February 3, 2012, stating that he had heard from Mr. Langlois that Mr. Langlois had "left Transreflect a couple of weeks ago." Further, at their lunch on February 3, 2012, Mr. Langlois told Mr. Mallozzi that the "gig was up", that

Mr. Langlois was going to work with Jeffrey Sugar and Gary Sugar at VML, and that Mr. Mallozzi should join him there. Also, Mr. Langlois sent an email on February 4, 2012 from his personal, as opposed to his ACS email account, referring to a "new venture" that had been agreed to between Jeffrey Sugar and Mr. Langlois, which could potentially include Mr. Mallozzi but did not include Mr. Kosowan. Both Jeffrey Sugar and Mr. Langlois conceded this point. On February 8, 2012, Gary Sugar sent an email to Jeffrey Sugar asking him to send "your business plan." Jeffrey Sugar conceded that Gary was asking for the PCS Business Plan. Between February 8 and 15, 2012 (based on metadata evidence that is not disputed), Mr. Langlois created a document entitled "notes to the inline opportunity." Mr. Langlois conceded that this document was in reference to a potential joint venture opportunity in which PCS (not ACS) would manage a coating system with Stanley Rokicki's company, Inline Fiberglass. That document states: "Robert needs to start drawing an income, it has been 9 months we have been working on this"; "Income for Robert – 10K month was discussed – needs to start this week." Under cross-examination, Mr. Langlois did not concede that "we" referred to Jeffrey Sugar and him, however, on his examination for discovery, his then counsel agreed that "we" referred to Mr. Langlois' relationship with Jeffrey Sugar.

[187] Further, there is email evidence, dated February 13, 2012, that shows that Mr. Langlois was pursuing an opportunity on behalf of PCS with Philips, a client that Mr. Langlois and Mr. Kosowan had met approximately one month earlier. When Philips raised the issue of ACS' involvement in that work, Mr. Langlois attempted to assure Philips that the "old company [ACS]" did not have "any right or claim to the business."

[188] On February 17, 2012, Mr. Langlois wrote to Kimberley Janssen of Andersen Corp., and advised: "I have joined a company which is in a better position to execute on a global basis my architectural coating technology, I will advise all the particulars shortly. Please delete both my and Daves email address for Architectural Coatings." On cross-examination, Mr. Langlois refused to concede that the "new company" was PCS. Instead, he testified that the reference to the company was "just himself." In light of all the correspondence that was being circulated at that time, I do not find Mr. Langlois' evidence on this point credible. I find it more likely than not that the company he was referring to was PCS.

[189] Mr. Langlois asserts that he cancelled the Licence Agreement by sending a letter to 786 on March 1, 2012, in which he stated, "I hereby serve notice that as of the date of this letter I hereby cancel and terminate this agreement for conditions as specified in sections four and five of the Licence Agreement." In my view, this letter does not cancel or terminate the Licence Agreement in accordance with its terms. It would appear that Mr. Langlois' counsel at the time, or shortly thereafter, Gary Sugar, was similarly not persuaded. He, as counsel to Mr. Langlois wrote the more comprehensive April 19 Letter to Mr. Fram, who was representing 786, and attempted to terminate the Licence Agreement on various grounds. That effort, in my view, was also unsuccessful, as evidenced by Mr. Fram's replies. Mr. Fram replied that Mr. Langlois had misappropriated proprietary information and technology and that Gary Sugar was conspiring with Mr. Langlois in his efforts; that the Licence Agreement was in force; and that Mr. Langlois was in breach of his fiduciary duty to ACS.

[190] The plaintiffs contend that ACS did not terminate the Licence Agreement in any of the ways set out in the April 19 Letter and it did not terminate the Licence Agreement in the February 14 Email. The plaintiffs argue that when the parties negotiated the Licence Agreement, they specifically turned their minds to how the Licence Agreement could be terminated. The events

giving rise to the Licensor's right to terminate are set out at paragraphs 5 and 6 of the Licence Agreement. No evidence was adduced to show that any of these events triggering termination had occurred. Although the April 19 Letter included an allegation that ACS was insolvent, no evidence was adduced in support of that allegation.

[191] Accordingly, I find that Mr. Langlois who has the right (together with the co-Licensee, Mr. Mallozzi) to terminate the Licence Agreement, did not. The Licence Agreement does not give the Licensor, 786, the right to terminate the Licence Agreement, and I find that it did not – not through the issuance of the February 14 Email or through any other means. In my view, the February 14 Email did not have the effect of relieving Mr. Langlois of his obligations under the Licence Agreement or any fiduciary obligations he may have owed to ACS. I find that the February 14 Email was intended to clarify, for the benefit of the clients and customers of ACS and ASF, that Mr. Langlois and ACS were no longer working together, but there is no language in that communication that alters the legal and contractual relationships between the parties, and their rights and obligations to each other.

Unconscionability

[192] Gary Sugar asserts that irrespective of the provisions of the Licence Agreement relating to consideration, term and termination, the contract is unconscionable because it would prohibit Mr. Langlois from using his intellectual property and know-how in the powder-coating business with any entity other than ACS. Gary Sugar further asserts that it is unconscionable that Mr. Langlois would have given up all these rights in exchange for a one-third interest in a start-up company with Mr. Kosowan and Mr. Mallozzi who knew little about powder coating and had no experience in the industry.

[193] The plaintiffs assert that Mr. Langlois signed the Licence Agreement freely and willingly in a situation in which there was no inequality of bargaining power. If anything, the balance of power favoured Mr. Langlois, who knew considerably more about intellectual property, including his own alleged patents and his provisional patent applications, than either Mr. Kosowan or Mr. Mallozzi. Mr. Langlois was encouraged to seek independent legal advice on the Licence Agreement and declined to do so.

[194] The plaintiffs assert that the principles set out by the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, 447 D.L.R. (4th) 179, respecting unconscionability apply in this case. In *Uber*, at para. 65, the Supreme Court of Canada devised a two-pronged test for determining unconscionability. Based on this test, I must first determine whether there is any inequality of bargaining power between the parties. Second, I must determine whether an improvident bargain resulted from that inequality.

[195] On the evidence, I cannot say that there was an inequality in the positions of 786, on the one hand, and Mr. Langlois, on the other. It was Mr. Langlois who was university-educated. He held himself out as the world's leading expert in powder coating. He was known in the industry as "Mr. Plastic" and had been featured as such on the cover of an industry magazine. Before entering into the Licence Agreement, Mr. Langlois presented his erstwhile partners with the Luminos Plan, which represented that the business would be highly profitable with total net revenues (year 1) of $8,265,900. I accept the defendants' assertion that, as set out in the Plan, these revenues depended on an investment considerably greater than $50,000, but I also find that in reliance on Mr.

Langlois' representations, Mr. Kosowan and Mr. Mallozzi believed that a powder-coating business, with Mr. Langlois, would be highly profitable.

[196] Gary Sugar submits that there was economic inequality because Mr. Langlois was desperate for money when he entered into the Licence Agreement. Jeffrey Sugar agreed and testified that Mr. Langlois' desperate need for money would cause him to sign anything. However, Mr. Langlois did not testify that when he entered into the joint venture, he had no or little money. Nor does the evidence suggest that he insisted on a salary or any remuneration at the time ACS was formed. Later, when Mr. Langlois sought additional money in the way of shareholder advances, Mr. Kosowan and Mr. Mallozzi insisted that he provide security, and Mr. Langlois offered to mortgage his ski chalet. Mr. Kosowan and Mr. Mallozzi testified that at the time they entered into the Licence Agreement and the ACS Shareholders Agreement with Mr. Langlois, they did not perceive him to be impoverished. He owned a ski chalet and a large residence in the country estimated to have a value of $3 million. Mr. Langlois did not testify that there was any economic inequality between him and his ACS co-venturers.

[197] Gary Sugar also asserts that Mr. Langlois entered into an improvident bargain because he agreed to license all his powder-coating knowledge, among other things, to ACS in perpetuity or until the Agreement was terminated. The plaintiffs assert that the Licence Agreement was not improvident. While it covered a wide range of assets, including Mr. Langlois' intellectual property and know-how in the powder-coating business for a potentially very long time, in fact, there was a way out for either side of the bargain. Paragraphs 4 and 5 of the Licence Agreement set out the terms upon which the licence could be "cancelled for default" or "terminated", and the process to be followed in each case. At the time Mr. Langlois left ACS to start PCS, ACS had not earned a penny in revenue but had incurred considerable debt in funding Mr. Langlois' powder-coating efforts. It is more likely than not that ACS was insolvent at that time. If so, to terminate the Licence Agreement, Mr. Langlois could have relied on paragraph 5 and proven that ACS was insolvent. He did not. This opportunity was identified by his lawyer at the time, Gary Sugar, but it was not pursued.

[198] I find that the defendants have not met their onus to demonstrate that there was an inequality in the positions between the parties and that there was an improvident bargain. I adopt the statement made by Rouleau J.A. in *Conseil Scolaire*, at para. 70, citing *Northrock Resources v. ExxonMobil Canada Energy*, 2017 SKCA 60, 416 D.L.R. (4th) 321, at para. 21: "[i]t is not the court's role to 'save the contracting party from a bargain that proves improvident with hindsight.'"

No Shareholders' Resolution and No Schedule "A"

[199] Gary Sugar also alleged that the Licence Agreement was not duly authorized by a shareholders resolution, and that the Schedule "A", referred to at s. 11 of the Licence Agreement, was not attached or in existence at the time it was signed on July 15, 2011. They assert that without Schedule "A", the Licence Agreement was invalid for uncertainty, or alternatively ineffective because no rights had actually been licensed.

[200] The record shows that a shareholders' resolution authorizing the Licence Agreement was signed at a meeting with Mr. Fram.

[201] Throughout the trial, each of Mr. Langlois, Jeffrey Sugar and Gary Sugar took the position that the Licence Agreement was missing Schedule “A”, and as a result, the Licence Agreement was invalid and unenforceable. They alleged that the Schedule “A” binder had been assembled after ACS commenced the ACS Action. These arguments are not persuasive. Mr. Kosowan, Mr. Mallozzi and Mr. Fram all testified that a binder containing Schedule “A” was delivered to Mr. Fram on July 15, 2011, the day the Licence Agreement was signed. They also testified that it contained all of the provisional patent applications that Mr. Langlois had sent to Mr. Kosowan, and that Mr. Kosowan had forwarded to Mr. Fram on June 16, 2011. They further testified that Tab J of the binder was delivered to Mr. Fram at a later date because it did not exist on July 15, 2011. There is email evidence to show that Mr. Langlois emailed the documents relating to the Tab J provisional patent application to Mr. Kosowan on September 9, 2011, and Mr. Kosowan emailed them to Mr. Fram on the same date. Mr. Fram replied by email on September 12, 2011, stating: “We will add it to the binder.”

[202] Mr. Langlois sent another provisional patent application for a process and apparatus for powder coating a non-conductive pallet by email on September 16, 2011. Then, Mr. Kosowan, in turn, emailed that provisional patent to Mr. Fram and Mr. Fram’s assistant Mary DiStano on the same day. Mr. Fram responded on the same day with, “Mary will file and update the book as we did the last one.” It is unlikely that Mr. Fram would agree to update the book and file the provisional patent application if Mr. Fram did not have the binder. That said, it appears that this provisional patent application for powder coating a non-conductive pallet sent September 16, 2011 was never added to the binder.

[203] These email exchanges that make specific reference to the “binder” and “book” and the fact that it was in the custody of Mr. Fram all take place well before the litigation among the parties began. I find that Schedule “A” to the Licence Agreement existed in the form of a binder held by Mr. Fram, and that the binder contained all of the provisional patent applications that Mr. Langlois sent to Mr. Kosowan and Mr. Kosowan sent to Mr. Fram, except for the provisional patent application relating to a process and apparatus for powder coating a non-conductive pallet sent September 16, 2011.

[204] Mr. Langlois’ testimony in support of his position that there was no Schedule “A” to the Licence Agreement is not credible. On March 20, 2012, Mr. Langlois sent an email to Gary Sugar in which he refers to the Licence Agreement and states that the Schedule “A” items are provisional with little or no chance of becoming full-fledged patents. In the email, Mr. Langlois lists eight provisional patents that nearly match the list of provisional patents that Mr. Kosowan, Mr. Mallozzi and Mr. Fram say were included in the binder given to Mr. Fram on July 15, 2011. Mr. Langlois does not include in his list the provisional patent applications for which there is no content in Schedule “A.” In a subsequent email to Gary Sugar, with a copy to Jeffrey Sugar regarding the Licence Agreement, Mr. Langlois specifically acknowledges: “we have seen the schedule a …”

[205] Gary Sugar’s testimony in support of his position that there was no Schedule “A” to the Licence Agreement is also not credible. On April 12, 2012, Gary Sugar, then acting as counsel to Mr. Langlois and PCS, sent a letter to Philips/Shakespeare to alleviate concerns it had raised about doing business with PCS if the powder-coating technology actually belonged to ASF or ACS. Gary Sugar’s letter disclosed and attached the Licence Agreement, without Schedule “A”, but he attached an exhibit called “Architectural Coating Solutions Inc. – Schedule A Items”, which listed

the eight provisional patents that Mr. Langlois had sent to Gary Sugar on March 20, 2012. While this list is not identical to the list on the actual Schedule “A” to the Licence Agreement, it is close, and it is an acknowledgement and representation by Gary Sugar, based on information from Mr. Langlois, that the Licence Agreement had a Schedule “A” that set out the provisional patent applications that Mr. Langlois had licensed to ACS. Further, Gary Sugar prepared a letter of intent, dated July 27, 2012, for Mr. Langlois to sign personally and on behalf of PCS. That letter referenced all of the “intellectual property” that Mr. Langlois would be transferring from ACS to PCS, and it included all of the Schedule “A” items provided to Philips/Shakespeare in Gary Sugar’s April 12, 2012 correspondence.

[206] Gary Sugar also asserted that even if Schedule “A” existed, the licensing of the provisional patent applications by Mr. Langlois to ACS was not valid because the provisional patent applications were not signed by the parties, and a signature was required pursuant to paragraph 11 of the Licence Agreement. Section 11 of the Agreement provides that Schedule “A” may be “updated” from time to time and that updated materials intended to form part of Schedule “A” “shall be signed and identified by the parties from time to time as intended for this purpose and following which signing and identification shall be added to and form part of Schedule “A.” Based on this language, only “updates” to Schedule “A” would need to be signed. In this case, the “updates” were Tab J and the provisional patent application for a process and apparatus for powder coating a non-conductive pallet, sent September 16, 2011, the latter of which was inexplicably not added to the binder by Mr. Fram or his assistant. In my view, the lack of a signature of the parties on both the content at Tab J and the unfiled provisional patent application does not void the Licence Agreement. The content of Tab J is not a provisional patent application but an acknowledgement of receipt of a provisional patent application. The application to which it refers appears to be the application at Tab A, which relates to powder coating a plastic substrate. Further, Mr. Langlois, who sent these applications to Mr. Kosowan for the purposes of having them added to the binder clearly intended that they be licensed. In his own summary of the items that had been included in Schedule “A”, and licensed to 786, Mr. Langlois included both Tab J and the provisional patent application for a process and apparatus for powder coating a non-conductive pallet. Similarly, Mr. Kosowan, on behalf of 786, clearly intended these items to be included in the Schedule “A” binder, and asked Mr. Fram to add them.

[207] The Schedule “A” produced at the trial was the contents of a binder that contained an index and Tabs A to J. No expert evidence was given regarding any of the Tabs in Schedule “A”, or the status of any provisional patent application included in the binder. Based on the title assigned to each application in the binder, and a review of the “Field of Invention” section in each application, Tabs B, C, E, F, G and H appear to relate to processes involving powder coating to make surfaces reflective. Tabs H and I of the binder contain no contents.

[208] Tab A and Tab J are similarly described in the index to the binder as “A Method of Powder Coating to Make a Plastic Substrate Conductive” and “Method of Powder Coating Plastic”, respectively. However, the contents of Tab A and Tab J are not the same, as was argued by Gary Sugar. He made this argument in support of his assertion that Schedule A could not have been in existence before September 9, 2011 because Tab A and Tab J relate to the same provisional patent application relating to powder coating plastic, and the material at Tab J is dated September 9, 2011. I reject that argument. The Tab A document describes the patent that is the subject of the application, whereas the Tab J document is an acknowledgement of receipt of the application, which is dated September 9, 2011. The Tab A document does not bear a September 9, 2011 date.

[209] The plaintiffs acknowledge that Tab J was not in existence when Mr. Kosowan delivered what he thought were patents to Mr. Fram by email and when the binder of documents was delivered to Mr. Fram on July 15, 2011, the day the Licence Agreement was signed. Therefore, Tab J was sent to Mr. Fram later, after the September 9, 2011 filing date, and Mr. Fram updated the index and added Tab J to the binder. In his testimony, Mr. Fram confirmed that he received Tab J later, and he, personally, updated the index by hand to reflect the addition of Tab J, and Tab J was added to the binder, in his custody.

[210] Based on the totality of the evidence relating to Schedule "A", I am satisfied that it did exist, and it was delivered to Mr. Fram on July 15, 2011, when the Licence Agreement was signed. In an email message, dated June 24, 2011, from Mr. Fram to the parties to the Licence Agreement, after having just met them, Mr. Fram states that "[t]he technology shall be assembled in a binder, which will form part of the agreement, … The binder should be delivered to me, to hold as part of the original definitive copy of the agreement." Mr. Kosowan testified that he delivered the binder, in accordance with this instruction, on July 15, 2011 when the Licence Agreement was signed.

[211] The efforts of Mr. Langlois' and Gary Sugar to persuade that Schedule "A" did not exist, in their bids to void the Licence Agreement, must fail. It is clear from the evidence that both Mr. Langlois and Gary Sugar were prepared to argue that Schedule "A" did not exist to attempt to void the Licence Agreement and the rights of 786 under it, but they were quite prepared to share the contents of Schedule "A" with third parties as evidence of the provisional patents held by Mr. Langlois, and to have Mr. Langlois agree to license the provisional patent applications contained in Schedule "A" to PCS.

[212] All that said, it is agreed between the parties that Mr. Langlois and Mr. Mallozzi did not give ACS a licence over any patents. All Mr. Langlois had to offer for the purposes of Schedule "A" to the Licence Agreement were provisional patent applications, most of which, on Mr. Langlois' evidence, had been abandoned, or were close to being abandoned by the time PCS was being formed. Mr. Langlois also told Gary Sugar that because there was little value to anything on the Schedule "A" list, he was not breaching the Licence Agreement in commencing a new venture with PCS.

[213] In fact, Mr. Langlois had misled Mr. Kosowan, Mr. Mallozzi, Jeffery Sugar and Gary Sugar about the existence of his patents and patentable technology. In his testimony, Gary Sugar admitted that Mr. Langlois had duped both ACS and him about having patents that Mr. Langlois did not have. What Mr. Langlois and Mr. Mallozzi had were the provisional patent applications listed on Schedule "A".

[214] For the foregoing reasons, I find that the defendants have not met their onus to show that the Licence Agreement is invalid or unenforceable. Accordingly, I find that Mr. Langlois has not been discharged from his contractual obligations arising from the Licence Agreement.

Issue 2: Did Mr. Langlois breach his contractual obligations and fiduciary duties owed to ACS and his partners at ACS?

[215] The plaintiffs submit that the Licence Agreement is about far more than patents, of which there were none, and the provisional patent applications listed on Schedule "A" to the Licence Agreement. They submit that the real value that Mr. Langlois brought to ACS was in the other

"Licensed Rights" that Mr. Langlois had granted to ACS. Those included his knowledge, training, technical skills and know-how related to powder coating. The plaintiffs submit that when Mr. Langlois entered into the Licence Agreement, he agreed to, and did, license these things. The Licence Agreement states, at paragraph 1(1) that "[t]he parties agree, understand and intend that the Licensed Rights granted hereunder are broader than the contents of the patent applications, and shall continue to be broader than the patent applications". It was Mr. Langlois' intention to license these things. Under cross-examination, Mr. Langlois conceded that he brought no patents to ACS, and that the value he brought to ACS was his knowledge, training, technical skills and know-how related to powder coating.

[216] The plaintiffs assert that when Mr. Langlois dishonestly offered these Licensed Rights to PCS to the detriment of ACS, he breached his contractual obligations and his fiduciary obligations to ACS, including his duty of confidence to ACS, to the detriment of Mr. Kosowan and Mr. Mallozzi.

[217] Mr. Langlois asserts that he had and has no fiduciary obligations to ACS because he was not an officer and director of 786, Architectural Coating Solutions Inc., or Transreflect.

[218] Gary Sugar does not dispute that Mr. Langlois was a fiduciary. However, he asserts that any fiduciary obligation that Mr. Langlois had to ACS was severed early on when Mr. Langlois got involved in PCS, and Mr. Kosowan sent the February 14 Email. Therefore, he submits that Mr. Langlois did not compete with PCS while a fiduciary at ACS.

[219] The plaintiffs assert that despite the fact that Mr. Langlois was not an officer or director of any of 786, Architectural Coating Solutions Inc., or Transreflect, he was the "face of ACS" and the "face of powder coating." They assert that, of the three partners, it was Mr. Langlois who had all the information on how to make and deliver their powder-coating products and services, and on who the potential customers were. He was the only one receiving an income from the venture. Further, the plaintiffs submit that even though Mr. Langlois was not an officer of these ACS companies, he deliberately held himself out as the CEO and President of Architectural Coating Solutions Inc., even after Mr. Kosowan asked him not to do so.

[220] Mr. Kosowan and Mr. Mallozzi testified that they were aware of the vulnerability in the joint venture. They appreciated that success in the venture depended on Mr. Langlois and that if he left and took his patents, experience and know-how with him, their joint venture would fail. Accordingly, they assert that Mr. Langlois owed a fiduciary duty to ACS and to them as partners in the venture. The plaintiffs also assert that the Licence Agreement, by design, informed and defined the scope of Mr. Langlois' fiduciary duty to ACS.

Law With Respect to Fiduciary Duty

[221] In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, the Supreme Court of Canada outlined the test for the existence of fiduciary duties, at p. 579, as follows:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[222] In *Lac Minerals*, at p. 599, the Supreme Court held that the one feature that is considered to be indispensable to the exercise of the relationship, … is that of dependency or vulnerability.

[223] In *Can Aero v. O'Malley*, [1974] S.C.R. 592, at pp. 605-606, the Supreme Court of Canada held that an individual who acts as a senior officer or top management in a company owes fiduciary duties to the company, even if they are not appointed as directors and did not act as directors. In that case, the Court found that there was no doubt that the persons in question acted as president and vice-president, and that they were "top management" and not mere employees.

[224] Where a company is closely held between a small number of shareholders who act as partners in a joint venture, courts have found that those shareholders owe fiduciary duties. In *Tourangeau v. Taillefer*, 2000 CarswellOnt 212 (S.C.), the court held, at para. 21:

> [21] … I hold that the principles of the *Canaero* case apply to the relationship between the shareholders in a small corporation in the context of a sale by a departing shareholder of all his shares to the remaining shareholder. I base my decision on the fact that whether the Court is dealing with an employee as in the *Canaero* case or with a shareholder as in this case, the goal is the same in the context of, and the rationale for, the duty.

[225] This analysis was also applied in *Jordan Inc. v. Jordan Engineering Inc.*, 2004 CanLII 5863 (Ont. S.C.). That case involved principals that had a quasi-partnership relationship within a closely held corporation. At para. 35, the court held that as shareholders and directors, they owed fiduciary duties to the corporation. The court also observed that competition prohibited by the fiduciary duty includes not only competition by the fiduciary in her personal capacity, but also competition by a corporation in which the fiduciary has an interest.

[226] As set out in *Can Aero*, at p. 606, an individual does not have to be an officer and director to owe fiduciary duties. Senior management can owe similar duties, including those duties owed to a corporation by its directors. *Can Aero* also stands for the proposition that such duties can be owed by an individual after they have left the company. The Supreme Court held that holding an individual accountable in this way is an important corporate governance principle. At p. 610, Laskin J. stated as follows:

> It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgement of the importance of the corporation in the life of the community and of the need to compel

> obedience by it and by its promoters, directors, and managers to norms of exemplary behaviour.

Mr. Langlois was a Fiduciary

[227] I have no difficulty concluding that Mr. Langlois was a fiduciary who owed fiduciary duties to ACS and his former partners Mr. Kosowan and Mr. Mallozzi.

[228] Mr. Langlois had considerable scope for the exercise of discretion; he could unilaterally exercise that power or discretion so as to affect the interests of Mr. Kosowan and Mr. Mallozzi; and they were particularly vulnerable to Mr. Langlois and the exercise of his power.

[229] Mr. Langlois understood from the outset of the venture that Mr. Kosowan and Mr. Mallozzi did not possess any expertise, technical knowledge, know-how or training with respect to powder coating. It was a new concept to both of them. Mr. Langlois sought them out to provide financial backing, infrastructure and access to potential clients. Mr. Langlois conceded in cross-examination that they relied on him for his expertise and know-how to deliver ACS' powder-coating goods and services, as well as customers.

[230] Mr. Langlois was the company's operating mind, and the face of its product – powder coating. He was directly involved in all of the communications, meetings, sales pitches and negotiations with potential clients. He was the partner with the information with respect to each of the opportunities pursued by ACS. He set the agendas. He was also the only one who was being paid for the critical work being done, and the most significant opportunities or potential opportunities arose out of Mr. Langlois' contacts.

[231] Mr. Langlois acknowledged his importance to ACS and held himself out in communications to potential customers as the "President and Chief Executive Officer of ACS." This was the auto-signature on his email. Even when asked by Mr. Kosowan to stop using these titles in his correspondence with clients, Mr. Langlois declined to do so. Mr. Langlois explained to Mr. Kosowan that the titles gave him more credibility with customers and potential customers. I find that Mr. Langlois was the *de facto* President and CEO of ACS.

[232] ACS had a critical vulnerability, and Mr. Kosowan and Mr. Mallozzi appreciated it. Without Mr. Langlois, and his portfolio of skills and experience, the plaintiffs knew that the venture would have no chance of success. Each of them testified that their vulnerability motivated them to negotiate the broad Licence Agreement.

[233] Mr. Kosowan and Mr. Mallozzi were alive to the fact that if Mr. Langlois left, he would take his know-how and expertise with him, and ACS would essentially be gutted. Even if it could garner customers, it would be without the expertise to deliver powder-coating products and services. As it turned out, when Mr. Langlois left without warning, the plaintiffs were largely unsuccessful at pursuing customers and opportunities, even with the assistance of ASF. This was because Mr. Langlois continued to pursue those very same customers and opportunities, as the face of powder coating.

[234] Years later, Mr. Langlois was still holding himself out as "the" expert in powder-coating. On October 19, 2015, Mr. Langlois wrote to a potential customer, Chris Davies, setting out some powder-coating technology opportunities. Mr. Langlois included this note in red ink: "Remember

the only people in the world powder coating Plastic or Non-Conductive Substrates is my customers or myself" (referring to the customers to which PCS had sold a machine).

[235] The very vulnerability that the plaintiffs sought to guard against through the Licence Agreement became their reality. Their goal of mitigating the risk that Mr. Langlois would leave and take his know-how and expertise with him was defeated by Mr. Langlois' decision to conduct himself in a manner that he had specifically agreed not to.

[236] I find that the fiduciary obligations that Mr. Langlois owed to the plaintiffs and to his partners were not severed as Gary Sugar alleges. Mr. Langlois' conduct in leaving ACS and taking with him the Licensed Rights he had granted to ACS, including his know-how and expertise, with him struck at the very underpinning of the contractual mechanism between the ACS partners.

Breaches of the Licence Agreement, Fiduciary Duties and Duty of Confidence

[237] The plaintiffs submit that the facts that support Mr. Langlois' breach of the Licence Agreement, his breach of fiduciary duty, and his breach of confidence are similar.

[238] The plaintiffs submit that Mr. Langlois' breaches occurred through his dishonest conduct including a) surreptitiously starting the PCS venture while still a business partner of Mr. Kosowan and Mr. Mallozzi; b) directing the copying of the ACS Business Plan for the benefit of PCS; c) failing to return ACS's powder-coating gun and using it for the benefit of PCS; d) continuing to pursue every ACS opportunity for the benefit of PCS; e) breaching the terms of the Licence Agreement; f) taking the RM2 Contract for the benefit of PCS and eventually the benefit of VML and Mr. Langlois personally; g) ignoring every obligation owed to ACS and his partners Mr. Kosowan and Mr. Mallozzi.

[239] The plaintiffs submit that there is no dispute that Mr. Langlois breached the Licence Agreement. A licensor who provides an irrevocable and exclusive licence breaches the agreement when he goes into competition with the licensee: *EBF Manufacturing v. White*, 2009 NSSC 280, 284 N.S.R. (2d) 201, at para. 118.

[240] The plaintiffs also submit that in each of the identified breaches, Mr. Langlois breached one or more of the Licence Agreement, his fiduciary duties and his duty of confidence, whether or not he realized any profit as a consequence of the breach. However, they further submit that the contracts from which PCS did profit, including the RM2 Contract and the sales of automated powder machines, could only have come about as a result of Mr. Langlois' breaches of the Licence Agreement and his breaches of his fiduciary duty and duty of confidence. They assert that the common element in each of the cases in which there was a profit, was Mr. Langlois' experience, know-how and expertise in the field of powder coating, which he had licensed to 786 in perpetuity.

[241] The plaintiffs contend that Mr. Langlois granted that licence in perpetuity or until the Licence Agreement came to an end through default or it was terminated. He was not free to share that know-how with PCS without breaching the Licence Agreement even if the information was not absolutely secret. As noted by Hart and Bereskin, know-how that is essentially a compilation of information that is publicly available is still valuable because the more difficult it is to acquire the know-how, in terms of time and money, the more significant the competitive advantage, and hence the more valuable and protectable the information.

[242] I find that Mr. Langlois did breach the Licence Agreement through the use of his know-how and knowledge acquired over many years in carrying out powder-coating work for PCS and VML. In particular, this powder-coating work relied on Mr. Langlois' customization of the anti-skid formula for the coating of the skids as part of the RM2 Contract, and Mr. Langlois relied on his know-how and knowledge to train the workers to do the powder-coating work.

[243] I also find that Mr. Langlois' know-how was essential to the design and development of the three automated powder-coating machines sold by PCS. In doing this work, he was in violation of his grant of his future inventions, designs and equipment included as Licensed Rights under the Licence Agreement. Mr. Langlois had developed "a process and apparatus for the purposes of powder coating a fiberglass pultrusion" for which he had filed a provisional patent application at ACS, and for which he planned to file a "USA Provisional Patent" while at PCS. The defendants argued that the design of this machine, in respect of the later provisional patent application, was completely different than the machine that Mr. Langlois had designed at ACS because it used infrared heating, as opposed to a convection oven. However, on cross-examination, Mr. Langlois conceded that the later "invention" was his idea, design and concept based on a combination of knowledge he had acquired earlier powder coating parts using infrared heating as well as convection ovens. He conceded that it was basically the same process that he had used in the past but condensed into a smaller machine.

[244] Mr. Langlois' January 6, 2012 note to Mr. Wiles and Doug Copland of Philips, sent while Mr. Langlois was at ACS, makes clear that the design of an inline module to allow a pultrusion to be coated as it is being produced was in the works while Mr. Langlois was at ACS. In that note, Mr. Langlois described to Mr. Wiles and Mr. Copland "new technologies" being developed, including a powder-coating system that would be installed between the dye and the grippers. A machine matching this very description is described in the USA provisional patent application that Mr. Langlois prepared for PCS' benefit.

[245] Mr. Langlois conceded that he began to develop infrared heating technology at ASF and continued this work at ACS. Most of the provisional patent applications referred to in Schedule "A" to the Licence Agreement refer to infrared technology. Mr. Langlois' use of infrared heating was not unique to PCS.

Misappropriation of Corporate Opportunities

[246] In *Can Aero*, at p. 608, Laskin J. referred to certain statements by Viscount Sankey and by Lord Russell of Killowen in *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 as follows:

> The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect.

[247] In the same case, Laskin J. stated, at p. 620, that:

> The general standards of loyalty, good faith, and avoidance of conflict of duty and self-interest to which the conduct of senior officers must conform, must be tested in each case by many factors

> which it would be reckless to enumerate exhaustively. Among them are the factors of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

[248] In the case at bar, the corporate opportunities at issue are the RM2 Contract for powder-coating, and the sale of three powder-coating machines, based on Mr. Langlois' designs. The plaintiffs assert that Mr. Langlois breached his fiduciary duties to ACS and his partners Mr. Kosowan and Mr. Mallozzi when he became a director, officer and shareholder of PCS and misappropriated these opportunities for PCS as opposed to ACS. The plaintiffs assert that Mr. Langlois became a director, officer and shareholder of PCS while he was still bound by the Licence Agreement and prior to any termination of his relationship with PCS.

[249] In testing whether Mr. Langlois breached his duties of loyalty, good faith, avoidance of conflict of duty and self-interest, I must consider the ripeness of the corporate opportunities and the circumstances in which they were obtained, and the factor of time in the continuation of the fiduciary duty.

[250] In *Can Aero*, the Supreme Court refers to a "fresh initiative" as being the only opportunity a fiduciary could pursue without breaching his fiduciary duty to his former partners and shareholders of ACS.

[251] Since *Can Aero* was decided, in the case of *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (S.C.), the court held that in order to apply the rules of equity respecting the duty owed by a fiduciary, the corporate opportunity at issue must be a "prize ready for immediate grasping." In the *Pizza Pizza* case, there was no dispute that the defendant who left Pizza Pizza to start Chicken Chicken was a fiduciary, but the evidence did not establish any breach of duty. There was no substance to the allegation that the franchise agreement was confidential. The know-how necessary to implement the delivery system was personal to the defendant and not derived from confidential information, and he was free to use it so long as he did not make use of a trade secret, customer lists or ripening commercial opportunities of the plaintiff. Chicken Chicken was his own initiative and not the result of a corporate opportunity from Pizza Pizza.

[252] In *Pizza Pizza*, at p. 40, the court stated as follows:

> By "ripe" I understand the case law to mean that the opportunity available to the corporation is a prize ready for immediate grasping – not a general course of future conduct which is merely being explored as Overs was doing.

[253] "A prize ready for immediate grasping", as something the fiduciary is prohibited from taking, on its face, is at odds with the reasoning in *Can Aero* which refers to a "fresh initiative" as

being the only opportunity a fiduciary could pursue without breaching his fiduciary duty to his former partners.

[254] However, in cases decided since *Pizza Pizza*, such as *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, 288 O.A.C. 201 (C.A.), courts have held that the opportunity in question does not need to be an opportunity that the company would have obtained, in order for the fiduciary to be in breach of his fiduciary duty if he seizes that opportunity. Such reasoning is more consistent with the principles set out in *Can Aero.*

[255] The plaintiffs submit that the case law has evolved further such that for the rules of equity to apply, the opportunity in question does not have to be an opportunity that the fiduciary would have pursued or even could have pursued. Rather, if it is an opportunity that is not a fresh initiative on the part of the fiduciary, the fiduciary is banned from taking it. The plaintiffs submit that the corporate opportunities taken on by PCS and then by VML, as a result of Mr. Langlois' efforts, were not fresh initiatives for him, but a continuation of the work he was doing for ACS, while working for ACS. These efforts involved a client contact, Mr. Rokicki, with whom he had reconnected while at ACS, and with whom he had been working on an inline powder-coating machine for many months before and while forming his relationship with PCS.

[256] The plaintiffs assert that RM2 came to Mr. Langlois as a result of his close relationship with Mr. Rokicki. Accordingly, they assert that Mr. Langlois, in directing the RM2 Contract to PCS, as opposed to ACS, breached his fiduciary duty to the plaintiffs and should be accountable to them for the profits from the misappropriated corporate opportunity.

[257] The examination of the necessary causal nexus between a breach of fiduciary obligations and profits is a very fact-driven exercise. In considering this equitable remedy, the court must attempt to do justice between the parties and to be fair in all of the circumstances.

[258] Testing the general standard of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, I find that Mr. Langlois' conduct falls well short of the standard. He left ACS without notice to his partners to form a new company, PCS, which would compete with ACS.

[259] Mr. Langlois had already appropriated the ACS Business Plan for PCS before he told his partners that he would be leaving ACS to join Jeffrey Sugar and Gary Sugar.

[260] When Mr. Langlois left ACS for PCS, in addition to the ACS Business Plan, he took with him all of his alleged intellectual property, as well as and the rights that he had licensed to ACS, including his know-how, experience, and expertise in powder-coating, his related designs and products, and ACS equipment. When asked to return ACS' powder-coating gun, he simply refused.

[261] Mr. Langlois had all the knowledge relating to ACS' products and services. He admitted as much in his testimony. He reported to Gary Sugar that Mr. Kosowan and Mr. Mallozzi would not even have the ability to renew a provisional patent application. Mr. Kosowan and Mr. Mallozzi would agree; they knew next to nothing about powder coating. Anything they had learned about it, they learned from Mr. Langlois. Their dependence, and ACS' dependence, on him and his knowledge led them to seek the protection afforded by the Licence Agreement. Mr. Kosowan and

Mr. Mallozzi were prepared to, and did, make a substantial investment in Mr. Langlois' knowledge and know-how.

[262] Mr. Langlois left ACS at a time when he was consistently holding himself out as its President and CEO. He also left at a time when he was close to closing a deal with Inline Fiberglass, which he had been working on for months with its principal, Mr. Rokicki.

[263] The plaintiffs submit that ACS was very much in pursuit of opportunities with Mr. Rokicki and Inline Fiberglass. Based on the evidentiary record, Mr. Langlois solicited Mr. Rokicki as an investor in ACS. In November 2011, ACS was expecting Mr. Rokicki/Inline Fiberglass to invest $2 million in ACS, and Mr. Fram was engaged to prepare the paperwork relating to that proposed investment. The joint venture between ACS and Inline Fiberglass, on which Mr. Langlois was working when he left ACS to form PCS, would have involved installing an inline powder-coating machine at Inline Fiberglass. Mr. Rokicki was sufficiently committed to the project that he had even provided Mr. Langlois with an office at Inline Fiberglass' premises at 2365 Dixie Road.

[264] When drafting the ACS Business Plan, Mr. Langlois made reference to the potential joint venture with Inline Fiberglass. The ACS Business Plan included reference to its "negotiations to jointly own and operate a coating line to replace Inline Fiberglass' current liquid paint operations."

[265] Mr. Langlois deposed that this proposed joint venture with Inline Fiberglass, which was available for ACS, became an opportunity available to PCS, when Mr. Langlois joined PCS. He deposed that "it was on the basis of this joint venture, at least in part, that PCS was formed."

[266] The joint venture with Inline Fiberglass that Mr. Langlois was negotiating on behalf of ACS initially, and which continued to be available to PCS, ultimately fell through.

[267] However, within approximately a year from the incorporation of PCS in April 2012, Mr. Langlois, Jeffrey Sugar, and Gary Sugar met with RM2 at 2365 Dixie Road, being the same building in which Inline Fiberglass was situated, and where Mr. Rokicki had given Mr. Langlois office space. The purpose of the meeting was to discuss the sale of a powder-coating machine to RM2. At the same meeting, RM2 inquired into powder-coating services. Within days, the RM2 Contract was formed with PCS.

[268] Mr. Langlois and Jeffrey Sugar submit that RM2's interest in a powder-coating machine did not arise out of Mr. Langlois' business relationship with Mr. Rokicki. Rather, they submit that Martin Pultrusions, a U.S. company, referred RM2 to Mr. Langlois.

[269] Jeffrey Sugar deposed that Mr. Langlois and he visited Martin Pultrusions, in Cleveland, Ohio, in 2012, and provided them with samples of Mr. Langlois' anti-slip powder-coating technology, and a year later, RM2 contacted Mr. Langlois after seeing the samples left in Martin Pultrusion's showroom. Jeffrey Sugar also testified that, "At the time, RM2 was renting a facility from Mr. Rokicki, and Mr. Rokicki was assisting RM2 in designing various skids which required an anti-slip texture on their surfaces."

[270] Mr. Langlois testified that the genesis for RM2's interest in the powder-coating machine, and the RM2 Contract was a sales trip to Martin Pultrusions to discuss coating machines, and that the people he met with mentioned that they might have a contact who would be interested in a

machine. Mr. Langlois also testified that RM2 had seen a sample of the anti-slip technology that he had invented.

[271] The plaintiffs assert that the sale of a powder-coating machine and the RM2 Contract were a direct consequence of Mr. Langlois' long-time relationship with Mr. Rokicki and his work with Mr. Rokicki on a joint venture involving a powder-coating machine. In support of their theory, they rely on Jeffrey Sugar's evidence that: Mr. Rokicki was working with RM2 and assisting them by designing various skids which would require an anti-slip texture on their surface; RM2 was renting a facility from Mr. Rokicki; and the meeting between PCS and RM2 in April 2013 took place at 2365 Dixie Road, where Inline Fiberglass is also located. It is undisputed that the invoices from PCS and VML to RM2 for work done on the RM2 Contract were sent to RM2 at 2365 Dixie Road. Mr. Langlois testified that Mr. Rokicki owned the building at Dixie Road and leased it to RM2.

[272] Also, the plaintiffs rely on the evidence that Jeffrey Sugar gave when asked whether Mr. Langlois' business development work for PCS would sometimes result in business for VML. Jeffrey Sugar replied that "the RM2 Contract is the one example that I can point to that that would be true."

[273] The plaintiffs also assert that the defendants do not have any documentary evidence to support a referral by Martin Pultrusions, or even the trip to Ohio that Mr. Langlois and Jeffrey Sugar are said to have taken.

[274] While both versions of the source of the RM2 contact are plausible, on a balance of probabilities, I find it probable that Mr. Langlois' relationship to Mr. Rokicki, nurtured over the duration of Mr. Langlois' tenure at ACS, led to RM2, which led to the opportunity to sell a powder-coating machine to RM2 and to the RM2 Contract. These opportunities, in turn, led to profits for PCS, VML, and Mr. Langlois personally.

[275] The plaintiffs submit that this conclusion is sound in light of the facts because: Mr. Langlois had been actively pursuing a joint venture with Inline Fiberglass for the whole time he was at ACS, his pursuit was so significant that he had an office at Inline Fiberglass, RM2 was renting space on Dixie Road from Mr. Rokicki, RM2 was in the same building at 2365 Dixie Road as Inline Fiberglass by at least April 2013, if not earlier, and Inline Fiberglass was assisting RM2 with an anti-slip solution for its skids.

[276] The plaintiffs acknowledge that the RM2 opportunity was not available while Mr. Langlois was at ACS but submit that it was not a "fresh initiative" for Mr. Langlois. Inline Fiberglass had been helping RM2 to develop the skids that would be powder-coated, and Mr. Langlois was actively engaged in pursuing a powder-coating venture with Inline Fiberglass that would have involved the installation of a powder-coating machine. It is reasonable to conclude that the RM2 Contract was an extension of the Inline Fiberglass opportunity which Mr. Langlois had been pursuing while at ACS.

[277] In my view, the RM2 opportunity was not a fresh initiative for Mr. Langlois. Instead of directing the RM2 opportunities to ACS, to which Mr. Langlois continued to owe a duty of loyalty, good faith and contractual obligations, Mr. Langlois delivered the RM2 Contract to PCS, and then to VML. This misappropriation of corporate opportunities was a breach of his fiduciary duties to

ACS and his former business partners. Through breaches of his fiduciary duty to ACS, PCS and, ultimately VML, and Mr. Langlois personally, became entitled to profits from the RM2 Contract, and from the sale of the RM2 powder-coating machine.

Causal Nexus

[278] The plaintiffs submit that Mr. Langlois also committed three separate, specific breaches of fiduciary duty, in respect of which there is a causal nexus between the breaches and the profits earned by Mr. Langlois with respect to the RM2 Contract and the sale of three powder-coating automated machines. This assertion is based on the following facts.

Anti-skid Formula

[279] Mr. Langlois was working on a specific anti-skid technology for pallets while he was at ACS. On September 16, 2011, Mr. Langlois sent to Mr. Kosowan a provisional patent application for this anti-skid technology – a *process* and apparatus for powder coating a non-conductive pallet. Though this application was never added to the Schedule "A" binder, Mr. Langlois believed that it had been and reported to Gary Sugar that this application was part of Schedule "A."

[280] The marketing materials for ACS that Mr. Langlois sent to Wade Kosowan on September 22, 2011, featured "Lumi NoSlip", a patent pending process for the application of an anti-skid technology available in powder and liquid. Anti-skid powders were also featured in the Innovation and Solutions section of the ACS Business Plan.

[281] In October 2011, Mr. Langlois wrote to a potential client, Gary Henshue and offered, on behalf of ACS, a licence for the exclusive use of ACS' "Anti-Skid technology which uses some proprietary addatives [*sic*]."

[282] Mr. Kosowan and Mr. Mallozzi, who had little knowledge of powder coating relied on Mr. Langlois and believed him when he made statements like this. Mr. Langlois also gave evidence that he had "invented" this technology. They believed that Mr. Langlois had intellectual property and that he had assigned it to ACS, together will all his expertise and know-how in the field of powder coating.

[283] Under cross-examination, Jeffrey Sugar admitted that the anti-skid technology referred to in the PCS Business Plan, copied from the ACS Business Plan, was the same or very similar to the kind of powder that PCS applied to the RM2 pallet components. However, he added that this powder could be purchased from a number of different suppliers. The plaintiffs acknowledge that both Jeffrey Sugar and Mr. Langlois testified that the anti-skid powder formula was in the public domain. However, they submit that Mr. Langlois had nonetheless communicated to the plaintiffs, and to third parties, while he was working at ACS, that the formula (which adds rubber and glass to powder paint) was proprietary, in the sense that he had "invented" it. He made the same claim in sworn evidence in these proceedings.

[284] What is less clear is whether Mr. Langlois actually had any proprietary interest in the technology and whether the anti-skid technology later became part of the public domain, or whether anything could have been done to protect the provisional patent application. Jeffrey Sugar and Mr. Langlois testified that Mr. Langlois' representation was solely for marketing purposes, because the formula was already in the public domain. Gary Sugar testified that PCS played with

the amount of rubber and the amount of glass and that he believed that the formula adjustments were proprietary to PCS. No expert evidence was adduced on this subject. Based on the evidentiary record before me, it is likely that this anti-skid technology was not patentable and that the formula was not confidential information. However, Mr. Langlois was promoting it as proprietary.

[285] Mr. Langlois' ACS partners testified that when Mr. Langlois told them that the technology was proprietary, they believed that it was patentable. Mr. Langlois' conduct would not disabuse them of their belief. In his September 10, 2015 affidavit, Mr. Langlois stated: "By way of background, … RM2 reached out to me in and around spring 2013 after they had seen samples of the anti-slip powder coating technology that I had invented." This evidence is consistent with the representations that Mr. Langlois made to Mr. Kosowan and Mr. Mallozzi. Mr. Kosowan and Mr. Mallozzi assert that Mr. Langlois told them that this type of powder coating was proprietary, and they relied on that representation. The plaintiffs therefore assert that Mr. Langlois' use of the anti-skid formula on the RM2 project, which Mr. Langlois had told them was proprietary to ACS, was in breach of his fiduciary duty to ACS to ensure that the proprietary powder was not shared with a competitor like PCS, or at a minimum, not shared without the benefit of a licence agreement.

[286] I agree that Mr. Langlois was in breach of the Licence Agreement and his fiduciary duty to ACS when he promoted the anti-skid technology as his invention and used it at PCS and VML to earn a profit to the detriment of ACS. Whether the technology was patentable or not, PCS had a competitive advantage over ACS because it had the advantage of Mr. Langlois' know-how and ability to adjust the anti-skid powder to create the desired result.

Powder-Coating Machines

[287] The evidence is clear that Mr. Langlois was working on a powder-coating machine concept for Philips/Shakespeare and Inline while at ACS. From his ACS email account, with an auto-signature including the title of "President & CEO", he sent an email dated January 6, 2012 to Mr. Wiles of Philips. In that email, he described the installation of a powder-coating system between the dye and the grippers for powder-coating pultrusions, and he estimated a preliminary cost of $150,000, installed.

[288] In a matter of months, on April 3, 2012, Mr. Langlois sent an email to Jeffrey Sugar and Gary Sugar at PCS regarding a patent for an "inline pultrusion" described as "a process and apparatus for the purpose of powder coating a fiberglass pultrusion." He wrote, "I will apply for the USA provisional patent tomorrow, this will secure our philips technology for a year pending a full patent, we will have 28 months to file global protection from tomorrow."

[289] As noted above, Mr. Langlois' evidence is that the inline powder-coating machine was his design, his concept, and his idea. At his cross-examination, he testified that the idea was a combination of knowledge he had acquired powder coating parts using infrared and convection ovens. He testified that it was not a new type of technology used for the first time at PCS. At trial, while Mr. Langlois submitted that there is no intellectual property in the processes and technology used in the development of powder-coating machines, he did prepare a provisional patent application to protect the concept. Further, he led Gary Sugar and Jeffrey Sugar, just as he had led Mr. Kosowan and Mr. Mallozzi, to believe that by filling the provisional patent application, the technology would be secure "pending a full patent."

[290] When Mr. Langlois was asked during the trial whether the process for the machines sold by PCS was the same process that had been used at ASF, except that the former machines were condensed into shorter, smaller machines, Mr. Langlois testified that the machines were "completely different." However, Mr. Langlois was inconsistent in his testimony. On his examination for discovery, when asked about the process relating to the inline powder-coating machine that was the subject of the U.S. patent application, he deposed that "[i]t was basically the same process that I had done at ASF. But condensed into a shorter, smaller machine."

[291] I agree with the plaintiffs that by disclosing his processes, designs, and knowledge relating to powder-coating machines that he had licensed to ACS, with PCS, he gave PCS the competitive advantage that ACS had had while Mr. Langlois was working for ACS. Such conduct evidences a breach of Mr. Langlois' duty of loyalty to ACS and his business partners there. They were dependent on his processes and knowledge regarding the manufacturing, installation and operating of powder-coating machines if they were to succeed in that market. Accordingly, I find that there is a causal nexus between the breach of Mr. Langlois' fiduciary duty and the profits earned at PCS from the sale of the powder-coating machines within a few years of his departure from ACS.

Training the Workers

[292] In December 2011, while Mr. Langlois was still working for ACS, he signed a memorandum of agreement with Jeffrey Sugar in which he agreed to source powder coating for VML, to train workers on the use of powder-coating equipment, and to refer powder-coating contracts to VML. This memorandum was entered into at a time when Mr. Langlois had agreed to work full-time for ACS. The workers he would train would, potentially, be available to execute the RM2 Contract when Mr. Langlois and Jeffrey Sugar transferred it from ACS to VML. With the benefit of Mr. Langlois' expertise, the workers could effectively carry out the powder-coating work required by RM2, which would benefit PCS, VML, and Mr. Langlois, personally, but not ACS to which Mr. Langlois had licensed his powder-coating know-how. Jeffrey Sugar conceded that Mr. Langlois' role was critical to the execution of the RM2 Contract at VML. He testified that VML "hadn't any experience before that, so [Robert] would have had to get us started, yes, initially."

[293] In acting in his own self-interest to the detriment of ACS, Mr. Langlois breached his fiduciary duty to ACS and his former business partners.

[294] I am satisfied that but for Mr. Langlois' know-how, expertise and technical skill in each of the above areas relating to powder coating, PCS and VML would not have been able to execute the RM2 Contract, oversee the manufacture of the powder-coating machines, and sell the powder-coating machines for the benefit of PCS, VML and Mr. Langlois, personally. However, in conducting himself as he did with respect to his know-how, expertise and technical skills, he was acting in breach of the Licence Agreement and in breach of his fiduciary duties to ACS and his former partners. I find these breaches to be causally linked to the profits ultimately realized by PCS through the sale of three powder-coating machines and the RM2 Contract.

Issue 3: Did Mr. Langlois breach his duty of confidence?

[295] The plaintiffs submit that Mr. Langlois also breached his duty of confidence when he shared with PCS all of the information and know-how that he had acquired relating to powder

coating over many years, as well as information confidential to ACS. Included in this sharing of information was the ACS Business Plan, and related *pro forma* financial statements. Mr. Langlois had been tasked to draft the ACS Business Plan for the purposes of soliciting investors and business for ACS. Before ACS had an opportunity to put the ACS Business Plan into action, Mr. Langlois directed Jeffrey Sugar to convert it to the PCS Business Plan by changing “ACS” to “PCS” throughout the document. The PCS Business Plan would then be used by PCS to solicit investors and business for PCS, and Mr. Langlois would participate in PCS as a shareholder, director, officer and employee.

[296] The plaintiffs also submit that Mr. Langlois breached his duty of confidence in order to obtain the RM2 Contract. They submit that ACS’s equipment (including the anti-skid powder), processes (making the powder and applying the coating), trade secrets, and manufacturing knowledge were all ACS’s confidential information used in order to obtain and perform the RM2 Contract and to design the PCS powder-coating machines.

[297] The elements of the tort of breach of confidence are as follows:

(a) the information conveyed was confidential

(b) the information was communicated in confidence; and

(c) the confidential information was misused by the party to whom it was communicated, to the detriment of the party communicating it: *Lac Minerals*, at pp. 635-636: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142.

[298] Mr. Langlois and Gary Sugar submit that Mr. Langlois had no confidential information. Mr. Langlois admitted that his provisional patent applications were just that, applications, and not actual patents, and that all the information he was relying on to powder coat was already in the public domain. Mr. Langlois conceded that the anti-skid powders that he developed while at ASF, and which were available to ACS, were included in ACS’ marketing materials. He testified that while he might have been adjusting certain formulas regarding the anti-slip technology used by PCS and VML, the powder was not engineered to meet the PCS process. He confirmed that the powder could be customized based on colour, resin or base, but it was not proprietary. For the RM2 Contract, he testified that he was not creating any new product or process, rather he was relying on his experience and know-how. Jeffrey Sugar testified that the coating technology used on the RM2 Contract was know-how as the powder-coating technology was in the public domain, and the powders were commercially available.

[299] In response, the plaintiffs argue that despite what Mr. Langlois now says about the proprietary nature of the technology, Mr. Langlois led Mr. Kosowan, Mr. Mallozzi, and the potential customers they were hoping to attract, to believe that Mr. Langlois had proprietary information, and had invented powder-coating products and processes.

[300] The plaintiffs rely on *Claim Analytics v. Polon et al.*, 2016 ONSC 2235 as support for the proposition that if otherwise confidential information becomes public, and it would provide a spring board for an unfair advantage over others, it can be protected as confidential information. In such a case, the original process of the mind can be protected against persons who wish to use

the confidential information without spending the time, trouble and expense of going through the same process to prevent them from getting an unfair start.

[301] It is fair to say that the ACS Business Plan and accompanying financial information related to potential customers was given to Jeffrey Sugar in confidence. The plaintiffs could reasonably expect that Mr. Langlois would not provide the ACS Business Plan, which contained potential and target customers to a competitive entity, which would then pursue the same potential and target customers.

[302] In theory, the ACS Business Plan could have served as a spring board for PCS without the need to invest the time and money in developing their own plan and identifying the potential customers already listed in the ACS Business Plan. It follows that the information in the ACS Business Plan ought to be considered confidential.

[303] However, the defendants submit that Mr. Kosowan first saw the ACS Business Plan around January 30, 2012, and they contend the ACS Business Plan was always in draft and there is no evidence that it was ever circulated. Mr. Mallozzi testified that it was not circulated, and Mr. Langlois testified that Mr. Kosowan and Mr. Mallozzi could have circulated the ACS Business Plan to customers or potential customers. The defendants submit that even if the customers listed in the plan were being pursued simultaneously by ACS and PCS, it matters not because PCS did not earn any profit from any of these potential customers. None of the customers shown in the ACS Business Plan became customers of PCS. The defendants also submit that the ACS Business Plan was not confidential to ACS in that it was, in substance, a replica of the ASF Business Plan and the Luminos Plan.

[304] Each of Mr. Langlois and Jeffrey Sugar testified that the anti-skid technology referred to in the ACS Business Plan was technology that was already in the public domain. Though Mr. Langlois had his own methods of customizing the powder, and he used those methods in carrying out powder-coating work for PCS, in my view, these efforts are more in the nature of know-how, which is not confidential information.

[305] The plaintiffs do not dispute that the anti-skid powder technology was in the public domain. If Mr. Langlois' adjustments to the formula are know-how, which can be licensed but not protected as a confidential information, then there is no evidence to show that any of the information that the plaintiffs assert was confidential information was misused by PCS to ACS' detriment. The plaintiffs concede that Mr. Langlois had no patents. Mr. Langlois testified that the provisional patent applications would protect the intellectual property related to each application for one year, unless the applications were renewed. Mr. Langlois also testified that all of the provisional patent applications listed on Schedule "A" to the Licence Agreement had been abandoned, with the result that the information contained in those applications had become part of the public record. No expert evidence was called on the status of the provisional patent applications, but the plaintiffs did not dispute Mr. Langlois' evidence on the subject.

[306] I agree that Mr. Langlois was in breach of the Licence Agreement in using his know-how to the detriment of ACS, and his former partners. However, in my view, the plaintiffs have not met their onus to show that Mr. Langlois was in possession of confidential information that belonged to ACS, which he conveyed to the defendants, and which they used to the detriment of the plaintiffs.

Issue 4: Did Gary Sugar and Jeffrey Sugar knowingly assist Mr. Langlois to breach his fiduciary duties?

[307] The plaintiffs assert that Jeffrey Sugar and Gary Sugar knowingly assisted in Mr. Langlois' breaches of fiduciary duty including his duty of confidence and contractual obligations. As such, the plaintiffs assert that, notwithstanding that Jeffrey Sugar and Gary Sugar are strangers to the fiduciary relationship, they should be personally liable, and PCS and VML should be vicariously liable, for the damages suffered by the plaintiffs. They further assert that this liability should be joint and several.

[308] Gary Sugar asserts that the plaintiffs cannot argue that he and Jeffrey Sugar knowingly assisted Mr. Langlois to breach fiduciary duties or contractual obligations because the plaintiffs have not pleaded this tort.

[309] The plaintiffs contend that their pleadings contain the necessary statements of the material facts on which they rely in support of their claim of knowing assistance. Further, they contend that they seek equitable relief (which includes knowing assistance) and joint and several liability (a hallmark of knowing assistance). I agree. The plaintiffs' statement of claim sets out the facts upon which the plaintiffs rely in support of their allegation that Jeffrey Sugar and Gary Sugar assisted Mr. Langlois in his breaches of fiduciary duty, confidentiality and the Licence Agreement. These include the plaintiffs' allegations of Jeffrey Sugar's and Gary Sugar's involvement in misappropriating the ACS Business Plan; misappropriating ACS's confidential information; contacting ACS' potential clients; and seeking business and soliciting clients and potential clients with the PCS Business Plan, which was a replica of the ACS Business Plan, and using ACS' confidential information in the process; and Gary Sugar's attempt to terminate the Licence Agreement on Mr. Langlois' behalf.

Law

[310] The elements of the tort of knowing assistance are set out in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, at p. 825. To establish knowing assistance:

a) there must be a fiduciary relationship or the existence of a trust;

b) the fiduciary must have fraudulently and dishonestly breached the equitable duty;

c) the stranger to the fiduciary relationship must have had actual knowledge of the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and

d) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

[311] The fiduciary's fraudulent and dishonest conduct does not require criminal behaviour, only dishonesty and "morally reprehensible" conduct, as set out in *Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650, 355 D.L.R. (4th) 333, at para. 27, leave to appeal to S.C.C. refused, 320 O.A.C. 396., at para. 27:

> [27] … In the context of a claim for knowing assistance in the breach of a fiduciary duty, dishonest and fraudulent conduct signify a level of misconduct or impropriety that is morally reprehensible but does not necessarily amount to criminal behaviour. The term fraudulent does not signify that an additional degree of corruption is necessary to make out the tort; it simply emphasizes the required dishonest quality of the fiduciary's act. …
>
> In *Air Canada*, at p. 826, Iacobucci J. described the type of conduct captured by the two terms used together as "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary." By extension, liability for knowing assistance requires only that the assister knew of the dishonest nature of the fiduciary's conduct.

[312] "Dishonest and fraudulent" refers to the nature of the breach of trust, rather than the intent or knowledge of the stranger to the trust. It is unnecessary to demonstrate that the stranger themselves acted in bad faith or dishonestly in order to establish knowing assistance in breach of trust: *Air Canada*, at pp. 825-826.

Analysis

[313] The plaintiffs assert that Mr. Langlois breached the Licence Agreement, and his duty of confidence, in a way that was dishonest, deceitful and morally reprehensible. They also assert that Jeffrey Sugar and Gary Sugar assisted Mr. Langlois in this regard because they either knew or were willfully blind to the fact that Mr. Langlois was breaching his fiduciary duties to ACS.

[314] Gary Sugar's involvement at the outset of this litigation was as legal counsel to Mr. Langlois, Jeffrey Sugar and VML. By March 19, 2012, Gary Sugar was responding to the plaintiffs' claims that Mr. Langlois was breaching his fiduciary obligations, confidentiality, and the Licence Agreement. At the same time, Gary Sugar was negotiating to become Mr. Langlois' business partner in PCS, which would compete with ACS. Gary Sugar had the PCS Business Plan by February 22, 2012 and saw the ACS Business Plan by March 9, 2012. He would have known then that the PCS Business Plan was a copy of the ACS Business Plan. Gary Sugar's evidence about the business plans is inconsistent. He testified that he only reviewed the ACS Business Plan to see if the technology described in it matched Schedule "A" to the Licence Agreement. However, Gary Sugar also argued strenuously that there was no Schedule "A" to the Licence Agreement, that he was not provided with Schedule "A", despite his requests for a copy of it. The two Business Plans were nearly identical in substance respecting the mission statements, technology, and business opportunities, and included nearly all the same images and graphics, apart from the corporate logo. It is not credible that Gary Sugar would not have reviewed them in the context of ACS's allegations that Mr. Langlois and Jeffrey Sugar had misappropriated the ACS Business Plan and that Mr. Langlois was in breach of his fiduciary obligations and the Licence Agreement.

[315] Under cross-examination, Gary Sugar conceded that he reviewed the PCS Business Plan from an investment perspective and not a legal perspective and that he relied on the PCS Business Plan when deciding to become a partner in PCS. He also conceded that all of the plans "were very much the same" until 2015, and therefore conceded that the PCS Business Plan continued to promote the same technology as the ACS Business Plan and that the two Plans set out the exact

same opportunities. Gary Sugar also testified that Jeffrey Sugar told him that the ACS Business Plan had "not been presented to ACS" and therefore PCS was entitled to use it. Gary Sugar also gave direct evidence that the ACS Business Plan had not been shown to ACS. The evidence of both Gary Sugar and Jeffrey Sugar conflicts with Mr. Langlois' testimony that he had shown the ACS Business Plan to the plaintiffs in November 2011 and that they could have shown it to other people.

[316] Gary Sugar admitted under cross-examination that he was given a copy of the Licence Agreement on March 12, 2012 and that he reviewed it, albeit not that carefully.

[317] Although Gary Sugar maintained throughout the trial that there was no Schedule "A" to the Licence Agreement, this position is not supported by the record, as set out above. On April 18, 2012, Mr. Langlois sent an email to Gary Sugar with a copy to Jeffrey Sugar, in which he stated, "we have seen the schedule a", to which neither Gary Sugar nor Jeffrey Sugar responded to say they had not. And, under cross-examination, Mr. Langlois testified: "There certainly was a Schedule A that was produced for Gary." In an email dated September 11, 2012, which was not produced by the defendants until the trial, Gary Sugar wrote an email to Mr. Langlois and to Jeffrey Sugar in the context of a motion being brought by ACS. In that email, Gary Sugar wrote, "Given the delay, I think we should just deny that there was any Schedule A to the Licence Agreement and file our defence and counterclaim."

[318] Gary Sugar's awareness of the contents of the Licence Agreement was apparent in his email to Mr. Langlois on March 19, 2012 regarding a potential investor in which he described the "hair on the deal" as the "IP and the threatened litigation in that regard."

[319] Gary Sugar had actual notice of Mr. Langlois' breaches of fiduciary duty. As Mr. Langlois' lawyer, Mr. Fram was writing to Gary Sugar directly in an effort to have Mr. Langlois return to ACS the powder gun that Mr. Langlois had in his possession, and which he refused to return. In Mr. Fram's letter dated March 9, 2012, he alleged that Mr. Langlois disclosed to Jeffrey Sugar "proprietary knowledge and information", and that the ACS Business Plan, "a proprietary document containing proprietary information and technology" had been misappropriated by Mr. Langlois. In the same letter, Mr. Fram alleges that Jeffrey Sugar and Mr. Langlois are engaged in a conspiracy to misappropriate property belonging to ACS and that Gary Sugar "appear[s] to have taken on a role in this conspiracy" by assisting them to obtain financial backers. Mr. Fram's letter clearly states that Mr. Langlois' rights to "assign or convey or even use the technology, other than for the benefit of [ACS] in accordance with the [Licence] agreement, are entirely discharged." Mr. Fram emphasized that the Licence Agreement is "in force, has not and will not be released", and that Mr. Langlois will be the subject of a claim for damages for, among other things, breach of the Licence Agreement, and for the "breach of further and other duties" owed to ACS.

[320] In the April 19 Letter, Gary Sugar denied the allegations set out by Mr. Fram and alleged that the Licence Agreement was void or had been terminated. No evidence was called in the trial to support the allegations made in that letter. Mr. Langlois conceded under cross-examination that there was no evidence to support the allegations in the April 19 Letter. At the same time, April 2012, Gary Sugar incorporated PCS. Jeffrey Sugar joined PCS in September 2012 when he became a shareholder and signed a shareholders agreement.

[321] Gary Sugar would have known that the plaintiffs were dependent on Mr. Langlois' powder-coating skills and know-how. In an email to Gary Sugar about the provisional patent applications listed on Schedule "A", Mr. Langlois reported that he didn't believe that the plaintiffs had "the resources both cash or ability" to draft a full-fledged patent.

[322] Further, Gary Sugar was keenly aware of the plaintiffs' vulnerability in their relationship with Mr. Langlois. Gary Sugar was focused on avoiding the same vulnerability, personally, and in the context of PCS. In his communications to Jeffrey Sugar on August 20, 2012, Gary Sugar stated that Mr. Langlois' non-competition agreement with PCS should be world-wide so that Mr. Langlois could not "just quit and compete." In a letter to Jeffrey Sugar on May 27, 2014, Gary Sugar wrote that both of them were at risk because Mr. Langlois had all the technology and experience; he had no money; he needed significant cashflow to support his lifestyle; he had failed in the powder-coating business and had "taken his expertise with him to the detriment of his previous partners on two previous occasions (and 2 law suits)."

[323] Under cross-examination, Gary Sugar conceded that he sought to protect Jeffrey Sugar and himself from Mr. Langlois and the possibility of him abandoning them, and that he trusted Jeffrey Sugar not to be dishonest, but he did not have the same confidence in Mr. Langlois. In other words, he knew of the dishonest nature of Mr. Langlois' conduct vis à vis ACS.

[324] All of this evidence leads me to conclude that Gary Sugar and Jeffrey Sugar were very aware of the vulnerability of the plaintiffs and their dependence on Mr. Langlois. They also knew that Mr. Langlois had exploited this vulnerability, by breaching his fiduciary duties to them, breaching the Licence Agreement, and taking property that belonged to ACS. This dishonest conduct caused Gary Sugar to be concerned and to take steps to protect his brother and himself from the same fate.

[325] I am also satisfied that Gary Sugar and Jeffrey Sugar knew, or were willfully blind, to the fact that Mr. Langlois was pursuing the same opportunities as PCS as he had pursued at ACS. Even a cursory review of the ACS Business Plan and the PCS Business Plan would reveal lists of business opportunities that were remarkably similar. Under cross-examination, Gary Sugar testified that he never talked to Mr. Langlois about what he was doing at ACS, or about any of the joint ventures listed in the ACS Business Plan (which were virtually identical to those listed in the PCS Business Plan). Gary Sugar's evidence was that he was "concerned about moving forward with PCS." I do not find it credible that Gary Sugar, who was then Mr. Langlois' lawyer in the litigation commenced by ACS, would not have discussed with Mr. Langlois what he had been doing at ACS.

[326] Gary Sugar testified that he did not see any of the opportunities that PCS was pursuing as "ripe." However, on April 4, 2012, he sent Debbie Weinstein, a lawyer with connections to potential investors, an email reporting that a "major international" company had asked PCS to install three powder-coating lines, with up to seven more to come. On March 28, 2012, Gary Sugar reported to Ian McLelland, of Proactive Investors, that "another joint venture has arisen for PCS with Philips", which wanted to install three powder-coating lines "ASAP." In the same email Gary Sugar refers to three joint venture projects: Inline, Teel and Philips. Around this time, Gary Sugar began to negotiate with Mr. Langlois to invest in PCS personally. It is not credible that Gary Sugar did not see the opportunities that Mr. Langlois had been working on at ACS with Inline Fiberglass, Teel and Philips, which he was pitching to potential investment brokers, as "ripe." Mr. Langlois

and Mr. Kosowan had just visited Philips in January 2012, and Mr. Langlois had been working on the Inline Fiberglass joint venture with Mr. Rokicki for months before joining PCS.

[327] It is uncontested that Mr. Langlois shared the ACS Business Plan and *pro forma* financial information with Jeffrey Sugar in December 2011 and January 2012. Jeffrey Sugar was aware of the opportunities that ACS was pursuing, and he knew the financial details of the pursuits. Jeffrey Sugar sent Gary Sugar an email on March 29, 2012, which set out an executive summary and complete business plan reflecting "Phillips numbers." Attached to the email were more than 100 pages, including the PCS Confidential Business Plan 2012, valuation calculations, a design for a powder-coating machine, and financial projections for "Newco 1" (i.e. Philips). This email was sent at the time Gary Sugar was representing Mr. Langlois in his dispute with ACS, and Mr. Fram had sent his March 9, 2012 letter, in which he stated that Mr. Langlois was bound to ACS, contractually and as a fiduciary. In a further communication, on March 12, 2012, Mr. Fram sent another warning to Gary Sugar: "You are on notice as to what is going on, and you have sufficient documentation to know who holds ownership of the equipment, and who has exclusive rights to the technology. If 5:00 pm today passes and the equipment is not at that time in the hands of my client, your client will be the subject of a lawsuit." Jeffrey Sugar conceded under cross-examination that by early March 2012, he was comfortable getting involved in the business PCS was contemplating, notwithstanding the allegations against Mr. Langlois and the threat of a lawsuit regarding Mr. Langlois' breach of fiduciary duties and the Licence Agreement.

[328] Despite the warning, none of Jeffrey Sugar, Gary Sugar or Mr. Langlois returned to ACS its powder-coating gun that Mr. Langlois had wrongfully taken. Jeffrey Sugar knew that keeping the powder-coating gun that Mr. Langlois had wrongfully taken from ACS was dishonest. In an email dated March 10, 2012, Jeffrey Sugar suggested to Gary Sugar: "If we give them the machine they will probably go away once and if Robert pays them back what he owes them [*sic*]." They never returned the powder-coating gun, Mr. Langlois did not pay the money he owed to ACS, and ACS did not go away. Mr. Fram warned Gary Sugar, as Mr. Langlois' legal counsel, that Mr. Langlois would be facing a lawsuit respecting his obligations to ACS. Nevertheless, Jeffrey Sugar and Gary Sugar cooperated with Mr. Langlois to launch PCS, which would compete with ACS, using the ACS Business Plan drafted by Mr. Langlois for ACS. In particular, they pursued the opportunity with Philips, which Mr. Kosowan and Mr. Langlois had been discussing only a few months earlier, and the proposed joint venture with Mr. Rokicki and Inline Fiberglass, which Mr. Langlois had been negotiating for months while at ACS.

[329] Jeffrey Sugar must have known that Mr. Langlois was deceiving his ACS partners when Mr. Langlois told him to change the name in the Business Plan from PCS to ACS in January 2012. Jeffrey Sugar made the change.

[330] On February 3, 2012, Mr. Langlois sent Jeffrey Sugar an email with "Notes to the Business Plan" and he asked Jeffrey Sugar to correspond with him using Mr. Langlois' g-mail account. In response, Jeffrey Sugar questioned whether Mr. Langlois' abandonment of ACS and resumption of activities under PCS would result in friction and possibly legal issues initiated by ACS' benefactors. Mr. Langlois was dishonest in his response when he suggested that one of his ACS partners was interested in participating in the new venture, and that the "other is out as he is consumed with his own business, we may want to as discussed include him with some shares and recognition, but he has no further interest in the business." Under cross-examination, Jeffrey Sugar admitted that in this email, Mr. Langlois was referring to Itolo Mallozzi and Wade Kosowan. Based

on these email exchanges between Mr. Langlois and Jeffrey Sugar, it is evident that Jeffrey Sugar and Mr. Langlois had already agreed to a new venture and discussed its share structure. It is also evident that Jeffrey Sugar was alive to the possibility that Mr. Langlois' plan could negatively impact ACS' "benefactors" and could result in litigation. Jeffrey Sugar's reply suggests that Mr. Kosowan ought to be compensated in some way for Mr. Langlois' breaches of contractual obligations and fiduciary duties; for example, "some shares in recognition." Notwithstanding this awareness, Jeffrey Sugar sent the PCS Business Plan to Gary Sugar for the purposes of raising funds for PCS. Jeffrey Sugar conceded that by early March 2012, Mr. Langlois, Gary Sugar and he had agreed to the terms of their partnership in PCS. By May 2013, the PCS Business Plan listed both Gary Sugar and Jeffrey Sugar as vice presidents of PCS. In June 2013, they both became officers and directors of PCS. Neither of Mr. Mallozzi or Mr. Kosowan was given any role or other "recognition" in the PCS organization. With the assistance of Gary Sugar and Jeffrey Sugar, Mr. Langlois had abandoned ACS, Mr. Kosowan and Mr. Mallozzi, to their detriment.

[331] In an email to Gary Sugar and Mr. Langlois, dated August 5, 2012, Jeffrey Sugar makes reference to the Licence Agreement and the fact that they, at PCS, felt comfortable "ignoring it."

[332] Jeffrey Sugar conceded at trial that he was fully aware of the opportunities that ACS was seeking in the fall of 2011, and he acknowledged that they were the same opportunities sought by PCS in the winter of 2011 and the spring of 2012.

[333] At trial, it was shown that Jeffrey Sugar nurtured his relationship with ACS because he wanted VML to get into the powder-coating business. Eventually, he was successful. He assisted Mr. Langlois to shift business opportunities from ACS to PCS and then to shift the RM2 Contract from PCS to VML. As an MBA graduate, it ought to have been obvious to Jeffrey Sugar that Mr. Langlois was breaching his duty of loyalty to ACS and that Gary Sugar, and he were participating in that breach.

[334] In my view, as Mr. Langlois' counsel, Gary Sugar did not take reasonable steps to confirm that Mr. Langlois was not subject to an ongoing fiduciary duty to ACS. Instead, Gary Sugar went into business with Mr. Langlois to compete with ACS.

[335] Gary Sugar's defence is that he read the Licence Agreement, the letter from ASF and the Bennett Jones Letter in response. He testified that he had satisfied himself that "there was nothing there." He also took the February 14 Email to mean that the relationship between ACS and Mr. Langlois was over. As a corporate lawyer, Gary Sugar ought to have recognized that the February 14 Email was a necessary but unsuccessful attempt by Mr. Kosowan to mitigate the impact of Mr. Langlois moving to PCS to unfairly compete with ACS in breach of the Licence Agreement and his fiduciary duties. Mr. Langlois' duties to act in good faith, with loyalty and in ACS' best interest continued.

[336] In my view, this approach does not reflect the due diligence one would expect of a corporate lawyer. Gary Sugar's conduct further demonstrates that he was more focused on advancing his own self-interest in assisting Mr. Langlois to launch PCS than he was interested in resolving Mr. Langlois' legal dispute with ACS. Gary Sugar was in a conflict of interest.

[337] In my view, both Gary Sugar and Jeffrey Sugar were prepared to assist Mr. Langlois in the breach of his fiduciary duties to ACS and his former business partners in the formation of a new

business in which they hoped to benefit despite any detriment to ACS, Mr. Kosowan and Mr. Mallozzi.

Joint and Several Liability Flowing from Knowing Assistance

[338] The doctrine of knowing assistance is concerned with fault and correcting matters related to the furtherance of fraud, as opposed to unjust enrichment or restitution. As a result, damages for knowing assistance do not depend on the knowing assistant's receipt of property: *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, 419 D.L.R. (4th) 409, at para. 117.

[339] The plaintiffs submit that a finding of knowing assistance ought to result in the disgorgement of PCS' profits from the sale of the powder-coating machines, as if the sale of those machines properly belonged to ACS. They also submit if PCS obtained little profit on the machines, the faithless fiduciary should not be rewarded for that ineffectiveness. The plaintiffs also seek disgorgement of the profits from the RM2 Contract and, other powder-coating work and the SR&ED tax refunds from the defendants on a joint and several basis.

[340] In *Enbridge*, the motion judge found knowing assistance and held the strangers to the trust jointly and severally liable for the breach of fiduciary duties. The Court of Appeal reaffirmed this principle despite the defendants' different roles and unequal receipt of misappropriated funds.

[341] On the totality of the evidence, I am satisfied that both Gary Sugar and Jeffrey Sugar knowingly assisted Mr. Langlois in his breaches of fiduciary duty. Accordingly, I find them jointly and severally liable for profits earned by PCS and VML, together with PCS and VML whose liability is vicarious.

Issue 5: Does Gary Sugar have other defences to the plaintiffs' claims?

[342] Gary Sugar raises a number of additional defences to the plaintiffs' claims. They are as follows.

Prejudice

[343] Gary Sugar asserts that his position was prejudiced because ASF was not added as party to the proceeding. I disagree. In the course of Mr. Kosowan's examination, he gave evidence of an agreement between ASF and ACS in which ASF assigned both its intellectual property and technology, and its claim against Mr. Langlois to ACS. I accept the plaintiffs' submission that this was not a revelation as these facts were known among the parties for years, including in answers to undertakings made in 2018. By August 2019, all parties knew that the assignment agreement was made in writing. Despite knowing about the assignment agreement, none of Mr. Langlois, Gary Sugar or Jeffrey Sugar pleaded anything related to it.

[344] I am also satisfied that it was not necessary to add ASF as a party to these proceedings. ACS is not pursuing a claim or cause of action as an assignee of the ASF assignment. ACS is pursuing its own claims and causes of action that do not include the assignment. Gary Sugar did not plead that ACS was suing over technology that belonged to ASF. Despite being aware of the assignment agreement years before the trial, none of Gary Sugar, Jeffrey Sugar or Mr. Langlois took any step to amend their pleadings, to seek production, or to seek to join ASF as a party. The onus was theirs to do so.

[345] Gary Sugar also asserts that because the assignment agreement was not produced until the trial, he was prejudiced because he did not know what ASF had assigned to ACS. The assignment agreement, produced in the course of the trial, sets out that ASF assigned powder-coating technology processing and know-how under the agreement. Mr. McLaughlin testified at the trial that what was recited in the assignment agreement was what was assigned.

[346] Gary Sugar also asserts that he was prejudiced because after February 11, 2012, ASF was booking the powder-coating sales made by ACS. Both Mr. Kosowan and Mr. McLaughlin gave evidence about the relationship between ASF and ACS and whether they made any profits. Mr. Kosowan's evidence was that they made little money from little powder-coating work, and he had heard from their customers that Mr. Langlois had told them not to do business with ASF and ACS. Eventually, they stopped trying to get powder-coating work. Mr. Kosowan's evidence is that they tried to get business for several months before giving up. Mr. McLaughlin testified that they stopped doing any powder-coating work in 2015.

Res Judicata

[347] Gary Sugar also argues *res judicata*, though he did not plead it. He argues that because Miller J. made a dismissal order on August 28, 2011 of claims brought by ASF against Mr. Langlois, this dismissal bars the claims that are made by ACS. I disagree. ACS is not suing in respect of ASF's claims or causes of action. It is suing over its own claims and causes of action that have not been adjudicated. Further, the assignment took place at the latest in 2015/2016, which was years before the 2018 consent dismissal. Therefore, at the time of the dismissal, ACS was the owner of the subject matter assigned to it. Mr. Langlois was barred from doing wrong in respect of that subject matter on which there had been no adjudication as between ACS and Mr. Langlois.

Clean Hands

[348] Gary Sugar also asserts that the plaintiffs should not be granted equitable relief because they have failed to come to court with clean hands. Both Mr. Kosowan and Mr. Mallozzi testified that when they met Mr. Langlois, he told them that ASF private investors were no longer interested in investing in ASF, that ASF was winding down, and that Mr. Langlois wanted to start a new company. The plaintiffs testified that Mr. Langlois also told them that the technology was proprietary to him and not to ASF.

[349] In the cross-examination of each of the plaintiffs, Gary Sugar attempted to show that Mr. Kosowan and Mr. Mallozzi were not told that the technology was proprietary to Mr. Langlois. Rather, they knew that the technology was proprietary to ASF and to Halo, but they nonetheless proceeded to go into business with Mr. Langlois regardless. In other words, the plaintiffs were accusing Mr. Langlois, Jeffrey Sugar and Gary Sugar of doing the same thing with PCS that Mr. Kosowan and Mr. Mallozzi had done with ACS and, therefore, they do not come to court with clean hands.

[350] Gary Sugar's argument is not persuasive. At trial, under cross-examination, Mr. Langlois admitted that in his initial discussions with Mr. Kosowan and Mr. Mallozzi, he did say that ASF was winding down. In evidence, there are email exchanges from Mr. Langlois to Mr. Kosowan and to Mr. Mallozzi about work for potential customers and that "ASF can't meet these obligations." There is also a letter from ASF to Mr. Kosowan warning him not to do work with

Mr. Langlois. Mr. Langlois allays this concern by providing the Bennett Jones Letter which disputes ASF's claims and quells Mr. Kosowan's concerns. There is also an email message from Halo to Mr. Langlois and Mr. Kosowan, dated October 4, 2011, in which Halo complains that Mr. Langlois is using their technology. Mr. Langlois disputes Halo's claim and states in an email to Mr. Kosowan and Mr. Mallozzi: "As Patricia is in agreement with us, he has nothing and [his assertion is] built upon a lot of misdirection rather than fact." This correspondence lends credence to the belief held by Mr. Kosowan and Mr. Mallozzi that Mr. Langlois, as opposed ASF or Halo, had the proprietary interest in the technology as claimed by Mr. Langlois. Mr. Kosowan and Mr. Mollozzi were unskilled in the fields of powder coating and intellectual property. They took Mr. Langlois at his word and trusted their friend and business partner.

Issue 6: If Mr. Langlois breached his contractual obligations or his fiduciary duties, or both, what are the plaintiffs' damages?

Remedies for Breach of Fiduciary Duty

[351] In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 77, the Supreme Court of Canada held that "[a] causal relationship between the breach of fiduciary duty and the profits is required in order for an accounting to be ordered. The onus is, therefore, on the plaintiffs to demonstrate a causal nexus between Mr. Langlois' wrongdoing and the defendants' gain. If the causal nexus can be established, then compensation for breach of fiduciary duty can be awarded on a contractual basis, on the principle that the party wronged is entitled to be put in as good a position as it would have been in had the breach not occurred. In my view, for the reasons given above, the necessary causal nexus has been established on the facts of this case.

[352] Also, in *Strother*, the Supreme Court of Canada also held that there are two equitable purposes to a disgorgement remedy: first, a prophylactic purpose described as appropriating for the benefit of the person to whom the fiduciary duty is owed the benefit gained by the fiduciary in circumstances where there was a conflict of personal interest and fiduciary duty; and second, restitution, to restore to the beneficiary profit which properly belongs to the beneficiary but has been wrongly appropriated by the beneficiary in breach of his fiduciary duty.

[353] In *Mulligan v. Stephenson*, 2016 BCSC 1941, 71 R.P.R. (5th) 286, at para. 133, the court referred to equitable remedies as being flexible, powerful and highly fact specific. Discretionary in nature, they are based on what is just in the circumstances of each case. At para. 135, the court stated: there are two common remedies for a breach of fiduciary duty. The first compensates the plaintiff for any loss caused by a fiduciary breach. The second deprives the defaulting fiduciary of any profit associated with the breach.

[354] Courts in Ontario and British Columbia have affirmed that there must be a nexus between the breach of fiduciary duty and the profits sought to be disgorged for an accounting to be ordered: *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744, 87 O.R. (3d) 321, at paras. 53 and 58; *Mulligan*, at paras. 129 and 147.

[355] On the subject of disgorgement, in its recent decision in *Extreme Venture Fund I LP v. Varma*, 2021 ONCA 853, 24 B.L.R. (6th) 38, at para. 112, the Court of Appeal held:

> In my view, it is evident that the disgorgement order was imposed to serve a prophylactic purpose. Indeed, the trial judge stated explicitly that a "disgorgement order is required to serve a deterrent purpose in this case." Further there is a clear nexus between the breach of the fiduciary duties and the gains as the profits were secured as a direct result of the breach. Thus, the necessary causal connection has been established.

[356] In *Extreme Ventures*, the lower court held that it did not matter that the injured party had not been pursuing any new investment opportunities. The obligations on the fiduciary who pursued those investment opportunities still existed and the causal link was established.

[357] Disgorgement of profits is a remedy available for the breach of a fiduciary duty, where a fiduciary earns a personal advantage at the expense of a beneficiary. A beneficiary is not required to demonstrate that it would have obtained the corporate opportunity or the same amount of profit but for the fiduciary's breach: *GasTOPS Ltd.* and *Can Aero*, at pp. 621-622.

The Expert Report on Accounting of Profits

[358] Mr. Stulberg was qualified as an expert witness. His Accounting Report relies on PCS's and VML's own financial records as well as reasonable and necessary assumptions.

[359] According to the Accounting Report, which is the only report on damages in this matter, the PCS venture went on to become profitable. The report shows that profits were derived from the sale of three powder-coating machines, the RM2 Contract, additional powder-coating services post-2016, SR&ED credits related to powder coating for the period 2012-2016, and improper remuneration payments made to Mr. Langlois from PCS and VML for the period 2016 to 2019. These improper payments were payments in excess of the payments that PCS shareholders had agreed to pay Mr. Langlois for his work.

[360] The Accounting Report shows the total estimated economic profits of PCS and VML to be $3,018,702 generated through all powder-coating activity between 2012 and 2019, including estimated profit from PCS and VML, the latter of which includes profit from powder-coating and SR&ED tax credits.

[361] Mr. Stulberg testified that of the total net profits from PCS and VML, each of Jeffrey Sugar and Mr. Langlois received approximately $1,500,000, being approximately one-half.

[362] Mr. Langlois and Jeffrey Sugar have had both the Accounting Report and the Valuation Report since January 2020. Neither submitted any responding report, and neither served any evidence in response to these Reports or the assumptions made by Mr. Stulberg.

[363] Jeffrey Sugar did challenge the Accounting Report at the trial, and he cross-examined Mr. Stulberg. Jeffrey Sugar claimed to have performed a "physical audit" of documents, and he produced the results of his audit for the parties and the court. This evidence is uncorroborated, unreliable and inadmissible. The documents underlying his conclusions were not produced to the parties in the discovery process.

[364] I do not doubt that Jeffrey Sugar, who has an MBA and who has worked as a controller, is knowledgeable in accounting. However, he is a party to the proceedings and a fact witness. As such, he is not permitted to give opinion evidence or expert accounting evidence.

[365] Although both Jeffrey Sugar and Mr. Langlois are self-represented in this trial, they were both represented by experienced counsel when the Expert Reports were served.

[366] The plaintiffs seek an order for the payment of $3,018,702 in disgorgement of profits by Mr. Langlois, PCS, Jeffrey Sugar and VML, jointly and severally. Despite Gary Sugar's knowing assistance, which exposes him to joint and several liability for the disgorgement of profits, the plaintiffs have confirmed that they are not seeking any disgorgement payment from Gary Sugar on the basis that he received no share of the profits from PCS or VML.

[367] The plaintiffs agree with Gary Sugar and assert that the majority of these profits were improperly diverted to VML but in fact were PCS profits. Gary Sugar also lays claim to the diverted profits. However, the plaintiffs claim that the profits were ACS profits in the first place, and only became the profits of PCS/VML through Mr. Langlois' breaches of fiduciary duty and his breaches of the Licence Agreement, and the knowing assistance of Gary Sugar and Jeffrey Sugar in Mr. Langlois' dishonest conduct. Accordingly, they assert that they are the rightful beneficiaries to the entire amount of the damages they seek.

Analysis

[368] In *GasTOPS Ltd.*, at para. 31, the Court of Appeal noted with approval the trial judge's approach of ordering a single damages award to redress the plaintiff's loss from the combined effect of the fiduciary breach, breach of confidence, and breach of contracts, rather than assessing the consequences of each breach squarely, on account of the intertwined facts informing each breach.

[369] The goal in equity is to fashion an order that ensures fairness in all of the circumstances. The plaintiffs seek full prophylactic disgorgement because they assert that anything less would reward Mr. Langlois' misconduct and not deter it.

[370] Included in the Accounting Report, in the total estimated profit of $3,018,702, is a total amount for "Powder Coating (Other Customers 2016-2019)" of $352,652. I would remove this amount from the total damages award. The plaintiffs have not shown that this work was sourced by Mr. Langlois or that it necessarily involved his know-how, and they have not shown any causal nexus between this amount and breaches of Mr. Langlois' fiduciary duty to ACS. The evidence is that VML was attempting to expand into the powder-coating business, and it is conceivable that some or all of these profits relate to business that Jeffrey Sugar or persons other than Mr. Langlois were able to attract to VML.

[371] Also included in the "Summary of Estimated Profit" is a total amount of $328,128 for SR&ED credits accepted by the Canada Revenue Agency (the "CRA") and refunded during fiscal years 2012 to 2016. Gary Sugar asserts that the SR&ED applications are fraudulent and do not reflect work actually done by VML. Whether this statement is correct or incorrect is not for this court to determine. Mr. Stulberg noted that the credits were accepted by the CRA. In my view, any review of the legitimacy of the claims would fall to the CRA.

[372] Mr. Stulberg assumed that the SR&ED credits earned by VML in fiscal 2012 to 2016 were due to its use of powder-coating technology for those years, and therefore included the entire $328,128 in his calculation of VML's incremental profit related to powder coating during those years. It is clear from the SR&ED claim forms that some of the experimental projects to which the tax credits relate involved powder coating, and Mr. Stulberg identified a number of such projects. However, it is also clear that some of the projects do not appear to relate to powder-coating work but, rather, to vacuum metallizing. I am not satisfied that the total amount refunded to VML during this period can be properly claimed by the plaintiffs, especially since the RM2 revenues ceased in 2015.

[373] The plaintiffs submit that all of the experiments referred to in the claims made during the period relied on Mr. Langlois' know-how, expertise and past experience. However, a review of the SR&ED expenditures claim forms in evidence for 2012 to 2016, in my view, does not support this conclusion.

[374] The plaintiffs assert that the work done with regard to the claim made for the 2011-2012 year was done while Mr. Langlois was at ACS and that the ACS powder-coating gun was used in the experiments. This evidence is not disputed and would suggest that ACS ought to be entitled to at least a share of that credit. While no expert evidence was adduced with respect to the subject matter of the experiments, it is clear from the claim forms that at least some of the ten projects undertaken in that period related to powder coating, while others related to vacuum metallizing and possibly the Diageo contract, which was being pursued by VML. The CRA refunded $79,167.24 in respect of this claim. However, based on the evidence, ACS would not have had the income in 2011-2012 necessary to take advantage of the SR&ED credit for fiscal 2011-2012 year. It may also not have had the employees to carry out the experiments.

[375] For fiscal 2012-2013, 2013-2014, and 2014-2015, it is arguable that if ACS had had the income from the RM2 Contract and had sold the powder-coating machines in those years, it may have been able to take advantage of the SR&ED tax credits, or its share thereof. Mr. Langlois is not listed as a "key employee" on any of the projects in respect of which claims were submitted in those years, and there is no record of the hours he logged, as there is for each key employee who appears to have worked on the project. However, it is evident that he, and his expertise, were engaged in at least some of the projects in respect of which the credits were sought. These projects included experiments relating to powder coating, the use of infrared technology and the anti-slip technology. There is evidence to show that Mr. Langlois rented equipment to run some of the experiments and was using parts supplied by potential customers identified in the ACS Business Plan and the PCS Business Plan.

[376] Considering these facts, I would allow 50 per cent of the SR&ED tax credit refunds in those years, being $164,064, to be included in the damages award payable to the plaintiffs.

[377] With these adjustments, I find that the total amount of the profits earned by PCS and VML related to powder-coating, including the additional renumeration payments made to Mr. Langlois from PCS (which Gary Sugar submits were unauthorized) and payments from VML (e.g., on account of commissions and consulting fees), to which the plaintiffs ought to be entitled is $2,501,986.

[378] The plaintiffs submit that because of his knowing assistance, resulting in his failure to come to court with clean hands, Gary Sugar is not entitled to share in the remedy for the powder-coating corporate opportunity taken by VML from PCS. I acknowledge that in the PCS Action, Gary Sugar also lays claim to the profits earned in PCS and VML and that he was denied any share of these profits by Mr. Langlois and Jeffrey Sugar. Gary Sugar also relies on the Accounting Report in support of his claim for damages. However, having found that ACS was deprived of the powder-coating opportunities enjoyed by PCS, VML and Mr. Langlois personally, as a result of Mr. Langlois' breaches of fiduciary duties to ACS and his former partners, and his breach of the Licence Agreement, and having also found that Gary Sugar knowingly assisted in Mr. Langlois' in those breaches, I find that ACS' claim for the profits ranks ahead of Gary Sugar's claim.

[379] I award damages in the amount of $2,501,986 to the plaintiffs as a disgorgement of profits and damages based on Mr. Langlois' breaches of fiduciary duty and his breaches of the Licence Agreement, all of which were intertwined in this case. I find this award to be fair in all of the circumstances.

[380] The plaintiffs' entitlement to $2,501,986 in disgorgement of profits shall be payable by Mr. Langlois, PCS, Jeffrey Sugar and VML, jointly and severally, provided that the liability of Jeffrey Sugar and VML shall be limited to $1,250,000, based on Mr. Stulberg's conclusion that Jeffrey Sugar profited from approximately 50 per cent of the estimated profits as set out in the Accounting Report.

[381] PCS and VML should be held to be vicariously liable for the conduct of its officers and directors regarding the powder-coating work done by those companies under the direction of Mr. Langlois and Jeffrey Sugar: *Flag Works Inc. v. Sign Craft Digital (1978) Inc.*, 2007 ABQB 434, 427 A.R. 206, at para. 120 and *Clayburn Industries Ltd. v. Piper* (1998), 62 B.C.L.R. (3d) 24 (S.C.).

Other damages

$22,282.20 from Reflectionight

[382] The plaintiffs also seek damages in the amount of $22,282.20 in respect of monies that they allege were misappropriated by Mr. Langlois and Carrie Ferguson, carrying on business as Reflectionight, for the sales of retro reflective powder-coating powder. The plaintiffs allege that Mr. Langlois misappropriated this opportunity to sell this powder through Reflectionight for the benefit of Ms. Ferguson and himself, as opposed to ACS, to the detriment of ACS, in breach of his fiduciary duty to ACS and in breach of the Licence Agreement. The plaintiffs arrive at these alleged damages by totalling the amounts shown on a number of invoices for the sale of retro reflective additive powder by Reflectionight for the period December 16, 2013 to November 1, 2017. Mr. Langlois denies that any amount is owing to the plaintiffs on this account. Ms. Ferguson has not defended the ACS Action.

[383] Based on the evidentiary record before the court, the plaintiffs' evidence in this regard consists only of copies of the invoices. They have not met their burden to show that the amounts on the invoices represent "profits" that would otherwise be available to ACS. They have not shown that the powder sold was a product of Mr. Langlois' know-how or processes. They have also not shown that Carrie Ferguson knowingly assisted in any alleged breach of fiduciary duty by Mr.

Langlois in respect of the sales of this powder, which could expose her to liability. I decline to award any damages in respect of this claim.

Loans to Mr. Langlois

[384] On July 25, 2012, ACS served notices of demand on Mr. Langlois regarding the $40,000 promissory note he executed in favour of 786 in September 2011 and the $2,250 promissory note he executed in favour of Mr. Mallozzi in January 2012. As of the end of the trial, these amounts remained unpaid. The $63,500 shareholders' advance in the form of monthly "salary" payments to Mr. Langlois also remained outstanding.

[385] Based on the evidentiary record, I cannot find that Mr. Kosowan and Mr. Mallozzi delivered to Mr. Langlois $40,000 in cash, and that the promissory note he executed in the principal amount of $40,000 related to such a cash payment. In most cases, when Mr. Langlois required a loan or an advance, he specifically requested the amount he was seeking in an email message and explained why he needed the money or advance. There is no documentary evidence in support of an alleged request by Mr. Langlois for $40,000 in or around September 2011. Further, around that time, there were ongoing discussions among the ACS co-venturers about security arrangements. Mr. Langlois was suggesting a mortgage against his ski chalet. Following the execution of the $40,000 promissory note, Mr. Kosowan sent an email to Mr. Fram advising Mr. Fram about the promissory note, stating that Mr. Langlois was putting up $40,000 against shareholder advances. There was no mention of a cash loan. On a balance of probabilities, I find that the promissory note was security for the advances that ACS had been making to Mr. Langlois up to that time and for the additional $63,500 in weekly payments that Mr. Langlois then requested, and Mr. Kosowan and Mr. Mallozzi had reluctantly agreed to make until the end of 2011.

[386] Accordingly, the repayment of the $40,000 secured by the promissory note should be deducted against the $63,500 owing in respect of payments made to Mr. Langlois as "salary." This deduction would leave a net loan repayment amount of $23,500 owing by Mr. Langlois after the $40,000 repayment. Mr. Langlois is also required to repay the $2,250 loan made by Mr. Mallozzi and secured by a promissory note. Mr. Langlois does not dispute liability in respect of this loan.

Expense Brief Expenses

[387] The plaintiffs submitted a brief called ACS' Brief of Monies Spent (the "Brief"). The Brief sets out the contributions to ACS by Mr. Kosowan and Mr. Mallozzi for the period June 2011 – August 2012. It includes various invoices, proof of payment documents, and related documents. The total expenses shown in the Brief is approximately $355,000. This amount includes the $40,000 cash that Mr. Kosowan and Mr. Mallozzi allegedly lent to Mr. Langlois, as well as the $63,500 lent as salary for Mr. Langlois to the end of 2011, and Mr. Mallozzi's loan of $2,250. Apart from those loans, the monies spent, as set out in the Brief, include rent, legal fees for the ACS venture paid to Mr. Fram, labour costs, travel expenses, Mr. Langlois' phone, computer and car expenses, and the costs of the powder-coating gun and supplies for samples, among other expenses.

[388] I am satisfied that the defendants were given the opportunity to properly challenge the expenses in the Brief during the course of the trial. Mr. Kosowan made himself available for this purpose. Having heard Gary Sugar's and Mr. Langlois' objections to certain claims, the plaintiffs

adjusted certain expenses downward by $41,142.34. I accept their reduction in the expenses claimed, and I find that the expenses incurred by the plaintiffs, not including amounts lent by each of them to Mr. Langlois, including the amounts lent as salary, total $208,107.66. Because Mr. Kosowan, Mr. Mallozzi and Mr. Langlois are, indirectly, equal shareholders in ACS, I find that Mr. Langlois is liable for $69,369.22, being his one-third of these expenses.

[389] The following is a summary of the damages owing to one or more of the plaintiffs[1]:

1. Mr. Langlois, Jeffrey Sugar, PCS and VML are jointly and severally liable to the plaintiffs for $2,501,986 as prophylactic disgorgement of profits from PCS and VML, but the liability of Jeffrey Sugar and VML for this amount is capped at $1,250,000.

2. Mr. Langlois is liable for the repayment of a) $40,000, secured by the September 16, 2011 promissory note; b) the loan from Mr. Mallozzi in the amount of $2,250, secured by the January 13, 2012 promissory note; and c) the loan from the plaintiffs in the amount of $23,500 for unpaid shareholder draws as "salary" (being $63,500 - $40,000).

3. Mr. Langlois is liable to ACS for damages in the amount $69,369.22 on account of his share of expenses related to the operation of ACS as described in the Brief (as revised).

The plaintiffs are also entitled to an order permitting them to trace the said profits.

The Counterclaim in the ACS Action

[390] Mr. Langlois and PCS did not specifically address their counterclaim other than to reiterate their plea that the ACS Action be dismissed, and that they be awarded their costs, interest, and punitive damages.

[391] Given my decision in the ACS Action, I find the counterclaim to be without merit. The counterclaim is dismissed.

<u>THE PCS ACTION</u>

[392] The PCS Action, tried together with the ACS Action, is the action brought by Gary Sugar against VML, PCS, RJG Labs Inc., Pultracoater Inc., Jeffrey Sugar and Mr. Langlois.

[393] Having decided the ACS Action as I have, the PCS Action becomes moot.

[394] In the ACS Action, I found that the sale of three powder-coating machines by PCS and the RM2 Contract were corporate opportunities that would have been available to ACS but for Mr. Langlois' breach of the Licence Agreement, and his breaches of fiduciary duty to ACS and his former partners. I also found that Gary Sugar and Jeffrey Sugar knowingly assisted Mr. Langlois in the breach of his fiduciary duties.

[395] In the ACS Action, I also found that Mr. Langlois, in breach of the Licence Agreement, and in breach of his fiduciary duties, wrongfully appropriating the RM2 Contract, with the result

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[1] If there are any arithmetical errors in the calculations, they may be addressed at a scheduling appointment before me on notice to all parties.

that the profits from the RM2 Contract were realized by PCS, and later by VML and Mr. Langlois personally, as opposed to ACS. On the same basis, I found that Mr. Langlois wrongfully appropriated the opportunity for ACS to sell three powder-coating machines, which were ultimately sold by PCS.

[396] Had I decided the ACS Action differently, I would have found that Mr. Langlois and Jeffrey Sugar breached the duties they owed to PCS as directors and senior officers of PCS. I would also have found that they caused PCS' affairs to be conducted in a manner that was prejudicial to Gary Sugar and unfairly disregarded his interests. I would also have found that Mr. Langlois and Jeffrey Sugar wrongfully transferred the RM2 Contract to VML without any notice to Gary Sugar, to his prejudice, and that Jeffrey Sugar misled Gary Sugar by telling him that the RM2 Contract was not profitable, when it was. In view of these breaches of fiduciary duty, I would also have ordered an accounting and a prophylactic disgorgement of the net profits from the powder-coating work done by PCS and VML to Gary Sugar, payable by the defendants, jointly and severally. This remedy would have been appropriate in this case in which, in addition to their breaches of fiduciary duty and oppressive conduct, Mr. Langlois and Jeffrey Sugar did not, until ordered to do so by Hainey J., disclose important and relevant documentary evidence, which was materially adverse to their case.

[397] The PCS Action and Counterclaim are dismissed.

Costs

[398] If the parties are unable to agree on costs, they may submit, serve and file written submissions, not exceeding ten pages, double spaced (excluding bills of costs and offers to settle, if any).

[399] In the ACS Action, the costs submissions of the plaintiffs/defendants by counterclaim shall be served and filed within 21 days, and the costs submissions of the defendants/plaintiffs by counterclaim shall be served and filed within 21 days thereafter. Reply submissions, not exceeding five pages may be delivered seven days thereafter.

[400] In the PCS Action, the costs submissions of the defendants/plaintiffs by counterclaim, if any, shall be delivered within 21 days, and the costs submissions of the plaintiff/defendant by counterclaim shall be delivered within 21 days thereafter. Reply submissions, not exceeding five pages, may be delivered seven days thereafter.

Dietrich J.

Dietrich J.

Released: August 29, 2022

CITATION: 7868073 Canada Ltd. v. 1841978 Ontario Inc. and Sugar v. Vacuum Metallizing Limited, 2022 ONSC 4557
COURT FILE NOS.: CV-12-9795-00CL and CV-15-10971-00CL
DATE: 20220829

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:

CV-12-9795-00CL

7868073 CANADA LTD., 1841979 ONTARIO LIMITED, 1636833 ONTARIO INC., ARCHITECTURAL COATINGS SOLUTIONS INC., TRANSREFLECT INC., and ITOLO MALLOZZI

Plaintiffs

– and –

1841978 ONTARIO INC., POWDER COATING SOLUTIONS INC., VACUUM METALLIZING LIMITED, ROBERT W. LANGLOIS carrying on business as REFLECTIONIGHT, CARRIE FERGUSON, carrying on business as REFLECTIONIGHT, ROBERT W. LANGLOIS, CARRIE FERGUSON, JEFFREY STEVEN SUGAR, GARY SUGAR, RJG LABS INC. and PULTRUCOATER INC.

Defendants

AND BETWEEN:

POWDER COATING SOLUTIONS INC., ROBERT W. LANGLOIS, and 1841978 ONTARIO INC.

Plaintiffs by Counterclaim

– and –

7868073 CANADA LTD., 1841979 ONTARIO LIMITED, 1636833 ONTARIO INC., ARCHITECTURAL COATINGS SOLUTIONS INC.,

TRANSREFLECT INC., ITOLO MALLOZZI, WADE KOSOWAN and LOW RISK LOGISTICS INC.

Defendants to the Counterclaim

– and –

CV-15-10971-00CL

GARY SUGAR

Plaintiff

– and –

VACUUM METALLIZING LIMITED, POWDER COATING SOLUTIONS INC., RJG LABS INC., PULTRUCOATER INC., JEFFREY STEVEN SUGAR and ROBERT W. LANGLOIS

Defendants

AND BETWEEN:

VACUUM METALLIZING LIMITED, POWDER COATING SOLUTIONS INC., RJG LABS INC., PULTRUCOATER INC., JEFFREY STEVEN SUGAR and ROBERT W. LANGLOIS

Plaintiffs by Counterclaim

– and –

GARY SUGAR

Defendant to the Counterclaim

REASONS FOR JUDGMENT

Dietrich J.

Released: August 29, 2022