
CANADA / JUDGMENT

Consbec Inc. v. Walker

2014 BCSC 2070

COURT

Supreme Court of British Columbia

DECIDED

4 November 2014

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2014 BCSC 2070 Consbec Inc. v. Walker

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Consbec Inc. v. Walker,

2014 BCSC 2070

Date: 20141104

Docket: 44716

Registry: Kamloops

Between:

Consbec Inc.

Plaintiff

And

Peter Walker, Tracy Walker, Rock Construction & Mining Inc., P&T Walker Capital Ltd., 1627436 Ontario Limited, 0794940 B.C. Ltd., and Walker Investments Ltd.

Defendants

Before: The Honourable Madam Justice Hyslop

Corrected Judgment: The front page of the judgment was corrected
on November 6, 2014

Reasons for Judgment

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Place and Date of Trial:

Kamloops, B.C.

April 28 - 30, May 1, 2

and 5 - 9, 2014

Place and Date of Judgment:

Kamloops, B.C.

November 4, 2014

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Introduction

[1] The plaintiff, Consbec Inc. ("Consbec") hired the defendant, Peter Walker ("Peter"), to head an area division of its business located in eastern Canada and later transferred him to head the Western Division. After a period of employment, Peter left Consbec and set up a business in direct competition to Consbec. Family members of Peter, who worked for Consbec, were offended with Peter's decision to resign and with events that occurred after his resignation. Consbec brings this action against Peter, his wife, Tracy Walker ("Tracy"), and their companies, in response to the alleged economic wrongs that the defendants caused Consbec.

[2] Consbec seeks heads of damages in the following amounts:

Damages for breach of fiduciary duties:

\$1,820,000.00

Damages for loss on Sproule Creek Holdings Ltd. write-off:

\$28,669.94

Damages for false salary paid to Tracy Walker \$30,000.00 x 4 years:

\$120,000.00

Wrongful resignation/no notice upon quitting:

a) Trevor Walker (\$6,510.00 + \$4,625.00):

b) Stuart Mitchell (\$9,781.11 + \$5,000.00 + \$29,700) + moving expenses:

\$11,135.00

\$44,481.11+ moving expenses

Punitive damages:

\$250,000.00

[3] The defendants ask that Consbec's claims be dismissed. Peter in a counterclaim seeks damages for wrongful dismissal by Consbec.

[4] Consbec and Peter did not enter into a written contract of employment nor did Peter sign a non-solicitation or non-competition agreement.

[5] The following issues arise:

1. Was Peter in a fiduciary relationship with Consbec? If so, did he breach his fiduciary obligations to Consbec?
2. If Peter was not in a fiduciary relationship with Consbec, did he have contractual responsibilities to Consbec as an employee and did he breach those responsibilities to Consbec?
3. If Peter breached his responsibilities to Consbec, either as a fiduciary or an employee, what are those damages and how should those damages be calculated?
4. Was Peter obliged to give his employer, Consbec, notice terminating his employment? If insufficient notice was given, how should those damages be calculated?
5. Was Peter constructively dismissed from his employment with Consbec and, if he was, what damages ought to be awarded against Consbec?
6. Did Peter Walker and Tracy Walker engage in a fraudulent conveyance of property so as to avoid a potential judgment?

7. Costs.

Ontario Lawsuits

- [6] There were two lawsuits commenced by Consbec in Ontario against Peter and some of the defendants in this lawsuit. The first lawsuit was started on November 17, 2006. It was stayed as a result of an application brought by Peter.
- [7] The second Ontario lawsuit was started October 31, 2008. It was stayed as a result of an application brought by Peter. The Ontario court ordered that the issues in the Ontario actions be joined with the British Columbia action commenced by Consbec in which the sole issue was a remedy under the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 and the Fraudulent Preference Act, R.S.B.C. 1996, c. 164.

Cast of Characters

- [8] In these reasons, for the sake of clarity, I will refer to all persons who bear the surname of Walker by their first name. I intend to describe all those individuals who gave evidence, as well as others who played a role in this trial as employees of Consbec. In addition, I will describe each corporation who is either a plaintiff or defendant in this action.

Consbec

- [9] Consbec is a blasting and drilling company, incorporated under the laws of Canada. Its head office is in Val Caron, located in the Sudbury area of Ontario. The head office is described as the Central Division of Consbec. Consbec has offices in the Maritimes (Eastern Division) and in British Columbia (Western Division), the latter until 2009, when that division was shut down. Consbec offers its services to the mining industry (not underground), road builders, the construction industry, including pipelines, quarrying, and anything that requires rock excavation.

Reginald Frank Walker

- [10] Reginald Walker ("Rick") was born in 1948. He and his wife, Judith, are the sole shareholders of Consbec. Rick is the president and director of Consbec. Consbec has one outside director of whom information was not given at trial. Rick founded Consbec in 1980 and it started business in 1981. Rick is the father of Richard, Jeff and Trevor Walker. At the time of trial, Rick testified that his sons run the business and make all strategic decisions for Consbec and only involve him in large pipeline deals and deals in the tens or hundreds of millions of dollars.
- [11] Rick often attends monthly meetings with his son, Richard, and Consbec's accountant, Brian Sawdon.

Richard Walker

- [12] Richard Walker ("Richard") is the eldest son of Rick. He is the general manager and vice president of Consbec. The latter title he received two years ago based on Richard's observations that customers preferred to deal with a vice president rather than a manager.
- [13] Richard was born in 1970. From the age of 14 during summer months, Richard worked for Consbec, as did his brothers Jeff and Trevor when they were about the same age.
- [14] In 1992, Richard received a degree in civil engineering. He was awarded the gold medal in his graduating class. In 1996, he received a Masters of Business Administration (MBA), receiving special recognition among ten graduates out of 225. Both degrees were from the University of Western Ontario. Between the awarding of these degrees, Richard travelled and worked for Consbec. He has held the position of general manager since 1997.
- [15] Richard testified that if there was a disagreement between him and Rick, Rick would have the final say. He and Rick set management salaries.

Jeffrey Walker

- [16] Jeffrey Walker ("Jeff") is the second son of Rick. He is three years younger than Richard. He did not testify at trial. At the time of trial, he was a general superintendent, supervising area superintendent, and foreman on Consbec projects.

Trevor Walker

- [17] Trevor Walker ("Trevor") was born in 1977. He is the youngest of the Walker brothers. By 2010, he had received a Bachelor of Arts (BA) in Political Science with honours and an MBA that he received in 2010. Between degrees, he worked for Consbec. After completing his BA, Trevor worked for Consbec as a project manager and, in particular, on a hydroelectric project at Granite Lake in Newfoundland. At the time of trial, Trevor was the manager and president of Houston Lake Mines, a company listed with the Toronto Stock Exchange in which the family has a significant position.

Peter Walker

- [18] Peter is the nephew of Rick and a cousin to Richard, Jeff and Trevor. Peter's father is James, the eldest brother of Rick. James is a surveyor.
- [19] Peter was born in 1970. He grew up on a farm. Peter and his cousins lived approximately two and a half hours away by car, north of where his cousins resided as they grew up. They mainly saw each other at Christmas and rarely in the summer.
- [20] Peter left school before completing grade 10. Until age 18, he worked for a landscaping company and then he had a contract providing seedlings to the government. He then worked for a paving company, eventually working his way up to the position of foreman, making him responsible for employees, excavations and trucks. He ended his employment

with that company in 1994, when he started his own company - a construction layout company which involved surveying. His company contracted work with Placer Dome Inc. ("Placer Dome") that led to employment with them. When he ended his employment with Placer Dome, he was a manager of a construction site. His work with Placer Dome ended when Placer Dome was bought by another company who no longer intended on expanding in the manner in which Placer Dome had. Underground mining employment was offered to him by Placer Dome. He decided that this was not suitable for him. In July of 1997, he was offered and accepted employment with Consbec.

Tracy Walker

[21] Tracy Walker is the wife of Peter. She was called to testify by the plaintiff as an adverse witness. Tracy and Peter are married. Their relationship spans 17 years. They separated in September 2012. Tracy expects to be divorced soon. In June 2013, Tracy and their daughter left Kamloops to return to Tracy's hometown of Timmons, Ontario. Tracy is a registered nurse and, while living in British Columbia, she worked on-call in the operating room at the Royal Inland Hospital in Kamloops.

Stuart Mitchell

[22] Stuart Mitchell was born in 1967. He is married with four children. He is trained as a civil engineering technologist. He has been in Consbec's employment since April 2000. He was the manager of the Central Division, a position that he held until June 10, 2002 when he became manager for the Western Division to replace Peter. At the time of trial, Mr. Mitchell had returned to Ontario and was again the manager of the Central Division.

Brian Sawdon

[23] Brian Sawdon was born in 1956. He started employment with Consbec as its controller in 1990. He continues to work in that position and was working in that position when he testified at trial.

[24] As controller he is responsible for invoicing Consbec's customers, collecting the money, banking it, and paying Consbec's expenses and payroll. He prepares financial statements and provides monthly information to Richard relating to the cost per hour of the drills and other equipment associated with Consbec's drilling and blasting business.

Brent Ashby

[25] Brent Ashby is a chartered accountant. He is the chartered accountant for all of the defendants.

Robert Mackay

[26] Robert Mackay is a chartered accountant and business evaluator. He prepared an expert report on behalf of Consbec to assist the court in order to assess the alleged damages sought by Consbec.

P&T Walker Capital Ltd. / PA Walker Investments Ltd.

[27] On July 5, 2002, P&T Walker Capital Ltd. was incorporated in British Columbia under the name of Rock Construction & Mining Inc. ("Rock Construction"). It was the original operating company that Peter incorporated to operate its business along with Galina Contractors Ltd. ("Galina"). Peter and Tracy owned one-half the shares of Rock Construction. The other half of the shares were owned by Galina whose principal is Ralph Allen. In August 2003, Peter purchased Galina's interest in Rock Construction resulting in Peter and Tracy being the sole owners.

[28] For purposes of tax planning, Rock changed its name to P&T Walker Capital Ltd. on December 22, 2003. Its shares were owned by Peter and Tracy. Its sole shareholder is Peter who holds some of the shares in trust for the Walker Family Trust. Its name was changed to PA Walker Investments Ltd. at or around the time of Peter and Tracy's separation (as modified following the separation, "PA Walker Investments"). It holds the equipment that is used in Peter's blasting business that is leased to Rock Construction from which it receives payments.

Rock Construction & Mining Inc.

[29] On December 19, 2003, Rock Construction was incorporated federally. It is Peter's operating company, which contracts and performs drilling and blasting. He owns all of the shares and is its sole director.

A Note on 1627436 Ontario Limited, Walker Investments Ltd., and 0794940 B.C. Ltd.

[30] 1627436 Ontario Limited was incorporated in Ontario to do business in Ontario. Its shareholder is PA Walker Investments Ltd.

[31] There was no information provided to the court regarding Walker Investments Ltd.

[32] 0794940 B.C. Ltd. is a company owned by Peter. Its activities were not described.

[33] The companies, 1627436 Ontario Limited, Walker Investments Ltd., and 0794940 B.C. Ltd., were not considered when Mr. Mackay determined the damages that Consbec is seeking in this litigation.

[34] When the court asked counsel for Consbec what role 1627436 Ontario Limited, Walker Investments Ltd. and 0794940 B.C. Ltd. had in this action, counsel stated that the two primary corporations were Rock Construction and PA Walker Investments.

[35] As to the other three, counsel for the plaintiff stated their inclusion was a precautionary approach against any improper attempt to move assets prior to or after judgment.

[36] So that there is no misunderstanding, Consbec and Peter's companies are not the only companies competing in the drilling and blasting business in British Columbia. Mr. Mitchell, after acknowledging Rock Construction was a competitor, was asked the following questions and gave the following answers:

Q Who else was a significant specialized drill blast contractor who was a competitor to Consbec in BC?

A One right here in Kamloops is Pashco Drilling and Blasting, Pacific drilling and blasting in Vancouver, HHS Drilling and Blasting in Victoria, Western Greater Drilling and Blasting in Victoria, Rock-Tech in Nanaimo. Do you want me to keep telling you some more?

Q So are those the primary competitors that come to mind?

A Here in BC, yes.

[37] From time to time in these reasons PA Walker Investments, Rock Construction, 1627436 Ontario Limited, Walker Investments Ltd., and 0794940 B.C. Ltd. are referred to together as the "Rock Companies".

Findings of Fact

Hiring of Peter

[38] Peter recognized that his position at Placer Dome would change as a result of Placer Dome being purchased by another company. In the fall of 1996, he mentioned this at a hunting camp located in Northern Ontario, owned by Rick and his father. Present at the camp were Richard, Richard's two brothers and a man whose first name was Harold. Rick mentioned to Peter that Consbec was looking to expand and that Peter should think about working for Consbec.

[39] Peter testified that many months after this conversation, he asked Richard whether the offer for employment was still open and he was hired.

[40] Richard testified that he and Peter talked several times about Peter coming to work for Consbec. Richard said that these discussions took place between late 1996 up to the time that Peter was hired in 1997. The talks revolved around what Consbec was looking for and where Peter was at that time in his career. Richard testified that Peter was "discouraged or displeased or frustrated" with his job at Placer Dome. Richard sensed that Peter was looking for a new challenge. Peter and Richard's account as to how Peter's employment occurred is not significantly different and that is not important other than I prefer and accept Richard's version as it makes the most sense.

- [41] Richard's opinion of Peter was that Peter was "very aggressive", "very competent", and "a hard worker".
- [42] Richard made Peter aware that it was important that Consbec grow, that it needed good people to "grow the business", and that Consbec wanted to expand to the east coast (Maritimes). Peter was hired as an area manager of the Eastern Division.
- [43] Richard sought his father's opinion about hiring Peter who saw no problem with the hiring. After receiving some head office experience, in June 1998, Peter was sent to Moncton, New Brunswick as manager of the Eastern Division of Consbec.
- [44] Peter remained in that position until May 1999 when Consbec decided to expand and establish the Western Division. He and Richard came out to British Columbia. Richard chose Kamloops as its head office, although Peter would have preferred Williams Lake. Prior to taking up his duties in the west, Peter was replaced in the Eastern Division with Jamie Gill, an engineer, who was familiar with the Maritimes. Peter testified that it was not a large learning curve for Mr. Gill, as he was familiar with the geography and knew a lot of the contractors. Richard testified that Peter was a good manager and that Mr. Gill learned skills from Peter.
- [45] Upon leaving Moncton, Peter and his family went back to Sudbury, where Peter worked on a few projects out of Consbec's head office. In May, Peter started work in Kamloops at the Western Division.
- [46] Richard, throughout his testimony, repeated that Peter, whether located at the Eastern or Western Division, was Consbec's most senior employee in each area and the eyes and ears of the company. In fact, whether in the Eastern or Western Division, Peter was the only employee of Consbec. Richard said that Peter operated each office without support staff. I find that Richard's description is an exaggeration given Richard's supervision of Peter which I will refer to later.
- [47] Peter remained manager of the Western Division until June 10, 2002, when he abruptly left his employment with Consbec without giving notice to them.
- [48] Peter alleges that prior to commencing his employment with Consbec, he was promised by Richard that he would eventually be appointed general manager of Consbec. At that time, Richard was 27 years old. Peter testified that Richard told him that Rick was looking to retire in the next five to seven years and that he intended on moving up to Rick's position and that "providing that I did a really good job and was a good producer, the second position would be mine". Both Richard and Rick flatly deny that such a promise was made. I accept their evidence.
- [49] It was Peter who drew it to his cousin and uncle's attention that he was unhappy at Placer Dome. It was Peter who after a discussion at the hunting camp raised with Richard the opportunity of employment with Consbec. Had this promise been made, surely Peter would have been able to pinpoint the time and circumstances as to when the promise was made.

Richard testified that his offer of employment to Peter was made on the telephone, after a period of discussions and after Richard discussed it with Rick. There is no evidence before me that Peter raised this promise with his cousin, Richard, or his uncle, or for that matter, anybody at Consbec during his period of employment with Consbec. Further, such a promise is unlikely to have been made prior to employment, as Peter's abilities had yet to be proven and tested.

- [50] However, Richard acknowledged that he and Peter had discussions about Peter becoming general manager when and if Richard became president of Consbec. I find that these discussions took place after Peter was employed by Consbec. The specifics of those discussions were not testified to by either Peter or Richard. On June 10, 2002, Richard was not president; Rick was and still is. There has been no change in the structure of the company, Rick is still director and he and his wife are still the sole shareholders of Consbec. I find that no promise of promotion was made either before or after the employment started.

Peter's Job Responsibilities

- [51] I find that Peter's job responsibilities were never reduced to writing. Those responsibilities did not change from the time he started with Consbec as manager of the Eastern Division to that of manager of the Western Division.
- [52] In the words of Richard, Peter's role was to "grow the business". Upon Peter going to the Maritimes and then on to British Columbia, it was the first time that Consbec had an office in each of these areas. Peter's main focus was to solicit blasting and drilling contracts. In doing so, he was to find construction, and quarry and road projects where blasting and drilling were required. Peter had to determine what projects were proceeding and figure out the contractors who were likely to obtain the project. In the Maritimes, it was readily available on an industry website. Peter would determine which individuals or companies paid for the plans as they were potentially contractors who had bid for the work. Peter would communicate with them by asking whether they would like a quote from Consbec. In his discussions, he would find out as much as he could about the job, including information such as the kind of rock to be blasted and drilled, a description of the surrounding area where the blasting and drilling was to take place, and the schedule for the job so as to make the bid. Peter would obtain a copy of the plans or the part of the plans pertaining to the drilling and blasting from which he could determine the requirements of the job.
- [53] Peter testified as to more particulars on bidding projects in British Columbia. He would obtain components relating to the drilling and blasting part or obtain a bid package from the owner of the project. He would talk to the general contractor, asking questions about the equipment they were using, as well as details about rock fragmentation (size of the rocks) and how much of the rock that they wanted moved by the hour or by the day.

- [54] It was Peter's role to get customers. It was occasionally the case that he performed what could be considered a supervisory role when a project was not assigned a specific supervisor for whatever reason. Such a supervisory role would include sending reports on the project to head office. At the time of Peter's employment with Consbec, there were a number of employees that could be assigned some level of project supervision, including Peter's cousin, Jeff.
- [55] Peter argues that with the arrival of Ron Thomas, a project supervisor working for Consbec in British Columbia, he was one of the two people that crews reported to and, at the time of his departure from Consbec, no one was reporting to him. I find that it was never the intention of Consbec that crews working on projects for Consbec would report directly to Peter. When it did occur, it related to times when there was insufficient business to have a supervisor. For example, the first contract that Peter had in the Eastern Division was the Grant Project on which Ron Thomas was a supervisor. On occasion, when there was not a supervisor on a project, one of the blasters or drillers would perform that role.
- [56] Peter cited the example of Ron Thomas, the supervisor of the Langvista 1 project that had been bid through Timber Construction Ltd. ("Langvista 1"). Instead of reporting to Peter, Ron Thomas reported to Jeff. Peter stated that this resulted in a heated conversation with Richard. This particular incident was not put to Richard.
- [57] If there were any changes to his employment, such as Ron Thomas reporting directly to Jeff rather than Peter, it was not done to demote, but rather to enhance the position for which he was hired; that is, to obtain successful bids for his employer.
- [58] I find that from the beginning to the end of his employment with Consbec, Peter always reported to Richard. I find, based on the evidence, that at no time was there a plan or notice given to Peter that he would be reporting to Jeff as opposed to Richard.
- [59] While working for Consbec, Peter earned, in his last full year, \$73,000.00. Bonuses were discretionary in which Peter had no input or say. This included wages and salaries of all other Consbec employees. Peter drove a company truck. Peter did not have a company credit card, and any Consbec expenses were charged to Peter's personal credit card and reimbursed promptly by Consbec. All contacts and expenses for Peter's vehicle and office space in the Western Division were paid for by head office. Rick and Richard set salaries for all Consbec employees. I find that the terms of Peter's employment with Consbec did not change during his employment.

Peter's Resignation from Consbec

- [60] On June 10, 2002, Peter sent Rick a letter of resignation dated with that date. The letter states:

Dear Rick:

I trust this finds you well.

In assessing my future with Consbec I have determined that my continued involvement in my current capacity is not a career I will be happy with. As I continue to grow frustrated in my position, it brings stress and pressure on family relations. At this time I am going to step down immediately as a Consbec employee and search for opportunities elsewhere. This decision has not come easily, however I believe it is the only way to keep peace within the Walker family.

Sincerely

Peter Walker

- [61] Neither Rick nor Richard anticipated that Peter would resign, nor was it hinted to them that he might take that step.
- [62] Rick testified that he attempted to reach Peter by telephone. After several unsuccessful attempts, Peter days later. Rick testified that he asked Peter to go back to the office as he was concerned about Consbec's liability as to explosives being used on the site of one of its projects. Peter refused and, when asked by Rick what led to his resignation, Peter responded with a loud tirade as to how he hated Jeff.
- [63] Peter testified that he had no conversation with Rick. In addition, Rick was completely ignorant as to the distance between Kamloops and Victoria where the Langvista 1 project was, making an immediate demand for Peter's attention to a problem onsite potentially unreasonable. Peter testified that the blaster is the person responsible onsite for the explosives. Without corroborating evidence for either version, I cannot make a finding of fact either way. In any event, it is of little importance to this litigation.
- [64] Peter left the Consbec office in Kamloops, did not return, and had no further contact with Consbec as an employee.
- [65] As a result of Peter's resignation, Consbec sent Trevor to take short-term charge of the Kamloops office. In doing so, Trevor went to the Consbec office where he found the company truck parked and locked. In the office was office equipment belonging to Consbec, but missing was a camera, a Sharp organizer, and a blast machine. Trevor made a complaint to the RCMP resulting in Peter returning the camera and the Sharp organizer. Peter denies taking the blast machine and denies Trevor's claim that the RCMP returned the blast machine. I find that Peter did not take the blast machine.
- [66] Trevor testified that there was a lack of records, such as listed projects and bids that were under way. He stated that the computer was "wiped clean" as was the Sharp organizer. He stated the following in direct examination:

Q [W]hen you turned it on, what was on the computer? Was there any under lying software system?

A Yeah, no. So the operating system was still working on the computer. It was a Windows-based computer. But, you know, the essence of this is there was no information on the computer. So at that moment zero value for me in that moment on the computer for information or data concerning our operations.

Q I just want to be very clear about what you just said there was zero data or information on the computer?

A Yeah.

Q Just so we're very clear, were there any Excel spreadsheets that had been filled out for previous bids that Peter had done?

A On the computer, no.

Q Was there any email correspondence you could find on the computer?

A No zero. There was no information. The computer was clean of any information. So that was -- that kind of made a little flag go up in my mind as something suspicious obviously when I arrive to a computer with no data on it.

Q All right. Just going back a step, did you -- prior to the assignment to go out [w]est to Kamloops, did you when you were in the field have any type of electronic data organizer or contact organizer provided by Consbec?

A Yeah, yeah. It was typical for project managers on large projects through to area managers, Richard and superintendents to have the small black organizer that flipped open.

Q Now, did that type of device, prior to getting to Kamloops, have the capability to your knowledge to be synchronized or connected to share data with laptop computers?

A Yes.

Q Then why was that the case?

A Why was it the case?

Q What was the purpose behind that kind of connectivity?

A Oh, backup.

Q Backup?

A Yeah, yeah, definitely. As everyone here knows I'm sure everyone's lost some data so you need to have backup from both the hardware device to another device on your computer.

Q So when you get to the Consbec office in Kamloops do you see this electronic contact data device in the office?

A No.

- [67] Peter testified that he did not wipe the computer and the organizer clean. He stated that when he initially received the organizer, he used it for storing contacts (customers), but found it difficult to use and eventually used it only as a calculator. Peter testified that the Sharp organizer and his laptop computer did not communicate with each other.
- [68] I conclude that Peter did not wipe the computer clean or the Sharp organizer clean.
- [69] Mr. Mitchell testified that he came to Kamloops in either late June or early July. He testified that was the first time he went to the Consbec office in Kamloops. He testified that the filing system in the Kamloops office was not like the one they had in Ontario. He observed that Peter's filing for the first year and a half, when Peter was in Kamloops, was fairly well maintained. The last six months were not well recorded. He stated that the last six months prior to Peter's leaving lacked information. He did not find a memo or list from Peter of ongoing projects. There was no list of bids for which Peter was waiting to hear the results. There was no contact customer list in the office, nor was there a list of prospects or potential customers.
- [70] I prefer Mr. Mitchell's description of the office to that of Trevor's.
- [71] I conclude that, given the supervision of Peter by head office and Richard, Consbec would have known who the Western Division's customers were and the bids that were outstanding.
- [72] Trevor found in the storage area of the office what appears to be a to-do list dated June 5, 2002, identified in evidence as Peter's handwriting and acknowledged by Peter as prepared by him (the "Resignation List") that included the following items: letter of resignation, and information package for Ralph.
- [73] There was also a second resignation letter prepared by Peter that was retrieved at a later date from Peter's work computer. It states:

Dear Rick,

I trust this letter finds you well.

In assessing my future with Consbec I have determined that the promised position of General Manager is not going to materialize. I further believe that was I given this position it would not be structured to place myself in a solid management or financial position. To that end, I will be resigning from your firm in search of new interests, effective immediately.

Sincerely

Peter Walker

[74] Trevor made notations on the Resignation List that he identified. I conclude from reading this list, reading the unsent resignation letter, and the evidence before me, that Peter was making plans to go into the drilling and blasting business with Ralph Allen, or perhaps on his own. The name "Ralph" on the list could have been Ralph Allen or Ralph Larsen, who was looking for commercial office space for Peter. He was preparing a truck for his use. He was to buy some insurance; its kind is unknown.

Consbec's Operations

- [75] The manner in which Consbec obtains bids is firstly to be aware of the projects in which its services as blasters and drillers are required. Peter described how the projects are located. These projects are government or private projects. Blasting and drilling contractors are likely to place a bid to the owner of the project or to the general contractor who has the contract to do the project with the owner. More often than not, the lowest price takes the bid. However, other factors are also taken into consideration; that is, the bidder's ability to do the job, which includes its experience and equipment and can it do the job safely. A good example of this is the Brilliant Dam contract that Consbec bid. As part of its bid, it was required to answer a questionnaire that considered many of these factors and described as a "Level I - Prequalification". Obviously, in this particular project, those who wished to make bids had to be screened so as to determine their abilities to perform the project.
- [76] Richard testified as to the importance of establishing relationships with unions and those individuals who were employed in key positions in construction companies. I accept that this is one of the many factors involved in making bids; that is, obtaining as much information about the project to make a successful bid. It is not a factor in having the bid accepted. Its importance was over-emphasized by Richard. Its importance is to the bidder so that the bidder can obtain reliable information from these relationships in order to make its bid. Peter, as I stated earlier, sought out these relationships in order to make a bid. Throughout his testimony, Richard referred to those companies to whom Consbec had made successful bids as clients, as if Consbec somehow was entitled to further drilling and blasting contracts without having to resort to the bid process. That simply is not the nature of the business. Peter testified that in the entire time he was working in British Columbia, all contracts were obtained by bid. He never received a direct award of a contract.
- [77] . An example of the lack of exclusivity in the bidding process was when Consbec was invited to place a bid on Taitinger Developments Ltd.'s Langvista 2 project ("Langvista 2") in Victoria. Rock Construction was also invited to submit a bid.

Proprietary and Confidential Information

- [78] Consbec alleges that Peter took and used proprietary and confidential information so that the Rock Companies could compete against Consbec. This information consists of the bid document, the client list, and the Microsoft Excel spreadsheet.
- [79] Peter testified that the bid document was created by him for Consbec in about 1997 or 1998, when he was working in the Eastern Division. He stated that it was a formatted document that Microsoft put in all its computers. The Consbec bid document and the Rock Construction bid document are virtually the same, except in Consbec's it is clear that it is Consbec's document and in Rock Construction's document it is clear that it is Rock Construction's bid. I find that the bid document is not proprietary to Consbec and it is hardly confidential. As I have mentioned earlier, there was no evidence given on which to ascertain that Peter maintained a client list, never mind that he stole one.
- [80] Richard developed Consbec's Microsoft Excel spreadsheet. It was referred to as Consbec's "playbook". Its purpose was to make bids quickly and present them in a timely fashion. Bids could be calculated by hand, but the spreadsheet reduced the time in making the calculations.
- [81] Richard testified that inserted in the spreadsheets were formulas for four categories of costs: labour, equipment, material, and miscellaneous. An amount for overhead was not in the spreadsheet's formulas.
- [82] Richard acknowledged that the figure spit out by the spreadsheet after the addition of the gross profit was not the final figure. If the job was riskier, an additional percentage was added. If the job was strategic or opportunistic, then the margin would be lowered "a bit".
- [83] Richard testified that a lot of information went into the spreadsheets. He stated that 20 or 30 variables, together with the 30 percent profit margin, affected the price of the job. In summary, he stated:

The price, essentially the formulas, the internal rates, the engineering project parameters that you can see up at the top. All of this data is input to provide you with the resulting price up on the top right.

- [84] Richard claimed that 90 percent of the time in Consbec's accepted bids it made a 30 percent margin. However, the defendants were able to demonstrate that the 30 percent margin varied in contract bids in British Columbia in excess of 30 percent. That was not particularly helpful as there was no evidence whether the 90 percent included other regions for Consbec.
- [85] Richard testified that he would not show the formulas in court as they are "where some of our costs were today". These costs changed from month to month. Each month the controller would update the costs. They were not significant changes, but over a period of time they could be.

- [86] Richard stated that Peter would know the production rates of Consbec drills. He testified that the largest cost component for drilling and blasting is equipment. According to Richard, anyone seeing these rates, such as explosive rates, drill hole diameter, patterns and the necessity of matting, and the use of large or small drills would know what Consbec would bid.
- [87] Richard testified that labour costs in the spreadsheet would be either union or non-union rates based on either a 10-hour or 12-hour day.
- [88] Under material, explosives are a cost item. Monitoring the engineering cost is sometimes a cost when a contractor or owner requires an independent firm to monitor the project. This is also contained in the spreadsheet.
- [89] Richard stated that as a result of using the spreadsheet repeatedly, you would know all of Consbec's costs.
- [90] Richard stated that Consbec's drilling capability is not the same as every other drilling and blasting contractor. Consbec's drills firstly are hydraulic and, secondly, the bids have been modified by Rick. In the spreadsheet, the capabilities of the drills are reflected.
- [91] Consbec alleges that Peter took the spreadsheet. Richard acknowledged that he had no direct evidence as to Peter taking the spreadsheet. The court is asked to draw an inference based on Trevor's evidence and that of Mr. Mitchell that Peter took the spreadsheet. Trevor's evidence is that he travelled to Kamloops to take over management of the office and he determined that the computer had been wiped clean. Peter denies taking the spreadsheet and wiping clean the computer. Trevor's evidence is not sufficient to find that Peter took the spreadsheet. There was sufficient technology in existence at that time to determine the truth of this allegation. There is a difference between wiping a computer clean and deleting items. Further, no one has explained how Peter's resignation letter - the one that was not sent, came from Peter's computer, if the computer was wiped cleaned. Richard testified explaining how the letter of resignation that was not sent had the date September 24, 2007 on it. He stated:

Q And to start at the top, the date is curious. This appears to be another resignation letter so it says September 24th, 2007. Can you help us understand what that date indicates?

A My understanding that is the date that was placed on that document. It was the date that it was extracted, I guess, from a laptop that had been scrubbed. So a forensic firm of some sort had pulled this off of that laptop and that was the date that was put on that.

- [92] No such expert evidence was presented by Consbec. I can only conclude that this expert evidence would not have supported Consbec's allegations that Peter wiped the computer clean and took the spreadsheet.

- [93] Mr. Mitchell's evidence is based on suspicion. Both Consbec and Rock bid on the Langvista 2 project, which was near the Langvista 1 project. Rock's bid was successful. Consbec's bid was second to Rock's and \$46,000.00 more than Rock's. Mr. Mitchell testified that he recalculated the bid using Consbec's Excel spreadsheet. By performing this task, the end result of his calculations was that the Rock bid on the Langvista 1 project was about \$4,000.00 more than the recalculation Mr. Mitchell performed. Mr. Mitchell testified that he used the spreadsheet to calculate the Langvista 2 project for Consbec. He stated that upon completing the calculation, he made a secondary calculation, pinpointing the number he wished to bid.
- [94] I take from this that Consbec could have had the bid had they used the numbers that the spreadsheet spit out.
- [95] Spreadsheets are not exclusive to Consbec. Mr. Mitchell stated that prior to being employed by Consbec, he worked for a construction firm. He worked with his employer's spreadsheets. He stated he would never think of taking it with him and he viewed it as belonging to his former employer. Peter agreed with that principle.
- [96] Peter testified that he did not have the same drilling equipment as Consbec and initially relied on Galina's equipment. He then rented drilling equipment from Finning, an equipment parts and service company, and it was not until 2006 that he purchased his own equipment. Any formulas relating to drilling equipment in the spreadsheet would not be relevant. Further, Peter's evidence is that he does not use a spreadsheet to prepare his bids. He demonstrated, when he was on the stand, that he could do a bid by hand. Peter also testified, while working for Consbec, that in most instances he did a hand calculation, then tested that hand calculation against Consbec's spreadsheet before presenting his proposed bids to Richard.
- [97] Based on all of the evidence, I cannot conclude that Peter had Consbec's Excel spreadsheet and used it to compete against Consbec.

Rock Companies Contracts

- [98] Consbec seeks that Rock Construction disgorge itself of profits on a number of drilling and blasting contracts that the Rock Companies undertook with companies that Consbec alleges are their clients. Consbec alleges they lost income from each of these contracts.
- [99] Mr. Mackay provided an expert report assessing the loss of profits that Consbec says they lost. They relate to the following projects: Sproule Creek Holdings Ltd. ("Sproule"), Galina, Taitinger Developments Ltd. ("Langvista 2"), Selkirk Paving Ltd. ("Selkirk"), Skanska-Chant Joint Venture ("Skanska-Chant"), I.G. Machine and Fibres Ltd. ("I.G. Machine"), Campbell Construction Ltd. ("Campbell Construction"), and Ledcor Civil Mining Ltd ("Ledcor").

- [100] Mr. Mackay reviewed financial records of the Rock Companies and various memorandums and documents, as well as the pleadings in this action and discussions with Mr. Sawdon, which are listed in Appendix A.
- [101] Mr. Mackay provided two approaches to the court in assessing Consbec's alleged damages. Using the Rock Companies revenues from the projects listed above, less direct costs for each of the fiscal periods from May 31, 2003 through to May 31, 2006, with adjustments described in paragraphs 8.04 and 8.05 of Mr. Mackay's report, he concludes that the loss to Consbec was \$1,490,000.00.
- [102] The second approach Mr. Mackay undertook, assumes that if Consbec undertook the projects, it would have earned an average gross profit percentage of 30 percent. It was assumed that Consbec's overhead expenses and amortization expense that would have been incurred by Consbec would not necessarily have been the same as was incurred by the Rock Companies. Using this method, the projected loss of income to Consbec would have been \$1,820,000.00.
- [103] These two approaches are summarized in Schedule 9 of Mr. Mackay's report.
- [104] The period of time that the Rock Companies earned this money and on which Mr. Mackay bases his conclusions are 11 months ending May 31, 2003 and 12 months each ending May 31, 2004, 2005 and 2006. These revenues are specifically set out in Schedule 3 of Mr. Mackay's report.
- [105] I make the following findings of fact on each of the projects that the Rock Companies bid and secured.

Sproule Creek Holdings Ltd.

- [106] Richard testified that Consbec bid and obtained a contract with Sproule while Peter was employed by Consbec. He stated that Consbec lost money on the project because Sproule did not pay its account.
- [107] Rock Construction bid a project for Sproule which appeared on B.C. Bid. Mr. Allen was aware of this project as it was in the East Kootenays. The project was a forestry contract - a logging road. Peter testified that he was unfamiliar with this kind of contract, so Ralph Allen and George Pete bid the project. The labour and equipment used for the project belonged to Galina. Rock Construction succeeded in its bid. Richard testified that Consbec also bid on the contract.

Galina Contractors Ltd.

[108] Galina's principal was Ralph Allen. Galina was the successful bidder on the Pingston Creek Hydro Electric project outside of Revelstoke. Galina had the capacity to do the drilling and blasting as it had its own equipment but instead of doing the drilling and blasting work itself, Consbec was asked to submit a bid and the bid was successful. This bid was prepared by Peter. It was during this project that Peter came to know Ralph Allen.

[109] In Mr. Mackay's report, Rock Construction received a payment of \$1,292.00 from Galina. Given the small amount, it does not appear to be a drilling and blasting contract. Peter speculated that this amount might have been a payment relating to equipment transferred between Rock Construction and Galina. After Peter's departure from Consbec, Rock Construction did not enter into any contracts with Galina and did not perform any physical work for them.

I.G. Machine and Fibres Ltd.

[110] While Peter was with Consbec, he had never bid a project for I.G. Machine. I.G. Machine requested that Galina make a bid on a project. At that time, Galina, Peter, and Tracy were the shareholders of Rock Construction. Peter calculated the bid. The bid was successful. The work was completed between October 2002 and January 2003.

[111] Mr. Mitchell testified that Ralph Allen telephoned him and asked him to make a bid on behalf of Consbec for the I.G. Machine project. Consbec placed a bid to Galina. Mr. Mitchell alleges that Ralph Allen called him for the sole purpose of finding out what Consbec's bid was so that Rock Construction could beat it. Ralph Allen was never called to testify, nor was there any evidence to support this theory presented by Mr. Mitchell.

Campbell Construction Ltd.

[112] There were three projects that Rock Construction bid to Campbell Construction resulting in contracts: the Astoria Hotel, the Marriott Hotel and the Belvedere. These projects consisted of three lots in a row. Richard testified that he did not know whether Consbec had done any work for Campbell Construction when Peter was at Consbec. Mr. Mitchell stated that he submitted, on behalf of Consbec, a bid to Campbell Construction. There was no documentation or any other evidence to support this.

The Marriott Hotel

[113] Peter learned of this job as Campbell Construction had contacted Ralph Allen. Ralph Allen passed the bid documents to him. Peter testified that Ralph Allen did this because he primarily worked in the Kootenays and, at that time, he was busy with several large forest companies in the Kootenays.

The Astoria Hotel

[114] The Astoria followed the Marriott. Peter testified that George Zimmer of Campbell Construction asked him to submit a bid. Peter testified that he prepared his bid based on the information described by Mr. Zimmer. Rock Construction had the successful bid.

The Belvedere

[115] As with the Astoria, Peter learned of this job through Mr. Zimmer. He compiled his bid based on information provided by Mr. Zimmer, which is how he says he bid all three properties.

Taitinger Developments Ltd., also known as Langvista 2

[116] Consbec won the bid to perform the Langvista 1 project. The contract was with Timber Construction Ltd. The owner was Taitinger Developments Ltd. The project was on Vancouver Island. Peter prepared the bid. During the performance of the contract for Langvista 1, Peter left his employment with Consbec.

[117] Langvista 2 was a separate project from Langvista 1 and it required a separate bid. Consbec, through Mr. Mitchell, was contacted by Timber Construction Ltd. to place a bid for Langvista 2. Timber Construction Ltd. was replaced on the project by Draycor following a disagreement between Taitinger Developments Ltd. and Timber Construction Ltd. A few days later, Mr. Mitchell was contacted by Draycor to provide a bid for Langvista 2. Consbec had never worked for Draycor.

[118] Peter was working on the Marriot project when the owner of Draycor asked him if he, on behalf of Rock Construction, would put in a bid on Langvista 2, which was right across the road Langvista 1. Rock Construction had the successful bid. Peter testified that he calculated the bid by hand, as he demonstrated it in the courtroom. Consbec's bid position was second, as I mentioned earlier in these reasons.

Selkirk Paving Ltd.

[119] Consbec alleges that, while Peter was employed by them, Consbec was successful in bidding and receiving three Selkirk projects. One of those contracts was not a project, but rather the leasing of equipment to Selkirk.

[120] To put it in perspective, while Peter was working in the Western Division, he bid and received for Consbec 14 projects. Of those 14 projects, three were Selkirk, which includes the lease. While working for Consbec, Peter dealt with Sante Pulice at Selkirk. As shown in Schedule 3 of Mr. Mackay's report, after Peter left Consbec, Rock Construction bid Selkirk projects.

- [121] Richard testified that Consbec, through Peter, learned of a drill and blast project called Long Hill Quarry. Consbec submitted the same bid to two different contractors, one of whom was Selkirk. In the end, Consbec contracted with Selkirk to do the Long Hill Quarry project. That was the same bidding situation as when Consbec bid Langvista 2 project (however, with a different outcome).
- [122] This illustrates that Consbec was prepared to make bids to contractors who were attempting to bid the project with the owner. Simply put, they did not prefer Selkirk as a contractor; it was the job that they wanted.
- [123] After Peter quit Consbec, and at different times, Trevor met Mr. Pulice as did Mr. Mitchell. Both of them described the reception from Mr. Pulice as being "cool". Mr. Pulice did not tell Trevor or Mr. Mitchell that they did not want to receive Consbec's bids. There was no evidence before the court that Consbec bid Selkirk projects following Peter's departure from Consbec.
- [124] Selkirk had a project called Kabatoff Pit in Castlegar, B.C. in 2006. The project was quarry production and Peter learned of it through Mr. Pulice. Peter testified that he calculated the bid by hand and in the manner he demonstrated in court. The bid was successful.

Skanska-Chant J.V. and the Brilliant Dam Project

- [125] The Brilliant Dam project in B.C. was a hydroelectric project.
- [126] Richard testified that Brilliant Dam was identified by him as a corporate opportunity for Consbec after he received a telephone call from John Mulcahy, the senior manager of McNamara Construction in Eastern Canada. Mr. Mulcahy told Richard that they would be bidding the Brilliant Dam project. At a later date, Mr. Mulcahy called back and indicated they had changed their mind and they were no longer going to bid it. At this time, it was unknown as to who the general contractor would be.
- [127] In the second telephone conversation that Richard had with Mr. Mulcahy, Mr. Mulcahy told Richard that two other general contractors or engineering groups were going to bid Brilliant Dam. Mr. Mulcahy gave Richard the names "Kiewit" and "Chant -Skanska". Consbec had not worked for Kiewit. Richard believed that it did its own drilling and blasting subcontract work and did not contract such work out. Consbec had no business relationship with Kiewit. Richard testified he knew nothing of Chant. He had heard of Skanska as it was known as an international company based out of one of the Scandinavian countries. Consbec had never worked for either Skanska or Chant.
- [128] Richard testified that he told Peter of his conversations with Mr. Mulcahy. Richard claims that with Peter's input, he developed a strategy to work closely with Selkirk so as to achieve the Brilliant Dam bid. Richard did not say when he had these conversations with Mr. Mulcahy.

[129] Richard testified that he met Mr. Pulice in early 2002 on one of his trips out west. Richard testified that the meeting with Mr. Pulice took place for about 20 to 30 minutes. Peter was present. There is no evidence before me from Richard that he, Peter and Mr. Pulice discussed the Brilliant Dam project.

[130] Richard testified that, after the meeting, he and Peter discussed the Brilliant Dam project. He testified that Peter agreed with his strategy.

[131] Counsel for Consbec asked Richard this question and Richard gave this answer:

Q Any thought when you're talking to him about Brilliant Dam at any point in time that he was going to leverage his personal relationship with Selkirk and Sante Pulice and compete with you on Brilliant Dam as a former employee? Did that thought ever cross your mind?

A Never crossed my mind. He was family. He'd been with us for five years. We opened up the Eastern Division together. He was moving out [w]est. He was opening the Western Division. Never crossed my mind.

[132] Peter has a different version of events. He testified that the Brilliant Dam project was very public, it had been on B.C. Hydro's website from 1999 forward. He said everybody was waiting for this project, but it could not go forward until environmental permits, design completion and public hearings were completed so that a general contractor could be announced. The ultimate successful general contractor was Skanska-Chant.

[133] Peter had no contact with either Skanska-Chant. Peter testified that he was uncertain whether Richard brought Brilliant Dam to his attention or whether it was in the news in British Columbia, as it was a big job. Peter had no recollection of Richard telling him of his conversation with Mr. Mulcahy of McNamara Construction.

[134] Peter acknowledged that Richard talked about Brilliant Dam, but no action had been taken as the general contractor had not been chosen.

[135] Peter testified that when he learned who the general contractor was, he travelled to Castlegar in January 2003. The contractor had opened an office near the river. Peter spoke to Matts Alexanderson, the project manager, whom he had never met before. They discussed fishing and the project.

[136] Peter came away with a bid package. Peter testified that the calculations were a lot more technical than he had done before. He testified that he had used Ralph Allen's equipment rates. Finning supplied one piece of equipment to start the job and another piece of equipment part way through. Peter testified that his explosive rates were from Explosives Limited. Peter testified there was no involvement with Selkirk.

[137] Consbec, through Mr. Mitchell, placed a bid for Brilliant Dam. It was made directly to Skanska-Chant, who selected the drilling and blasting contractor.

[138] Rock Construction's bid was successful.

[139] I reject Richard's evidence regarding the bidding strategy as it was not until about six months after Peter resigned from Consbec that the general contractor became known.

[140] At the time Peter left his employment with Consbec, the general contractor was unknown. Brilliant Dam was not the mature opportunity as that in *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, discussed below. A mature business opportunity is described in *Pizza Pizza Ltd. v. Gillespie*, [1990] O.J. No. 2011 (QL) at paras. 81-82, 75 O.R. (2d) 225 (Gen. Div.) 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. Moreover, all the evidence indicates that a substantial amount of initiative was taken by Gillespie in preparation and development of the chicken business. He retained Luke Sklar to do market research; he retained Robert Gorrie to design his marketing; he raised money through private placement (the partners herein). The evidence demonstrates that the Chicken Chicken business is a result of Gillespie's initiative and planning, not the result of appropriation of a corporate opportunity from Pizza Pizza.

In summary, the evidence of Mr. Gillespie and other evidence tendered by him establishes that the distinctive marketing characteristics of Pizza Pizza and the terms of its franchise system are in the public domain and are of a generic nature. This is not rebutted by specific facts adduced by Pizza Pizza which show the use of confidential information by Gillespie in the development of Chicken Chicken's marketing methods, its franchise agreement or in the selection of its franchise locations.

Brilliant Dam Viewpoint

[141] Peter testified that he learned of this project through B.C. Bid. It was right across the river from the dam. Its purpose was a widening in the road where the dam could be viewed.

[142] Peter testified that he sent his bid for the Viewpoint to Acme Contractor, Civil Tech Services, and. After submitting a bid, Rock Construction was invited to a post-tender meeting. It was at this meeting that Peter learned that Selkirk had the excavation part of the contract. Rock Construction's bid was successful.

Ledcor

[143] Richard testified that when Consbec first came west to establish its division in British Columbia, he and Peter went to see a man named George Hoar of Ledcor. The visit took place in Vancouver. The purpose of the visit was to introduce Consbec to Ledcor. There was no project on offer at that time. Peter testified that he had no memory of that meeting. That does not mean that it did not take place.

Rutherford Project

[144] Consbec has never done work for Ledcor. There was some suggestion that, while Peter was working for Consbec, there was a job called the Rutherford Project. Mr. Mitchell testified that a bid was put in for this project while Peter was working for Consbec. Mr. Mitchell testified that he assisted Peter in putting this bid together. He testified that Peter was in a helicopter for the purpose of looking over the job. Peter denies that he was ever in any helicopter for any Consbec job. Peter testified that he had no recollection of Mr. Mitchell assisting him, but he made it clear that he is not denying that may have happened. However, there is no documentation before me that Consbec ever received the contract from Ledcor.

Brandy Wine Creek

[145] Ledcor had a small drilling and blasting job to do relating to Brandy Wine Creek. Ledcor called Finning to rent a drill to deal with the creek that was overflowing its banks. Ledcor learned that the drill had been rented to Rock Construction and that it was not available to it. Ledcor asked Rock Construction to bid. Rock Construction's bid was accepted. The job took a couple of days.

Tumbler Ridge

[146] Ledcor called Peter and asked that Rock Construction submit a bid on a project called Tumbler Ridge. Rock Construction was successful with the bid in November of 2005, and the job started that month. The job was drilling and blasting overburden off of coal seams.

[147] Peter testified that it was his belief that he was asked to submit a bid appreciation for assisting Ledcor on the Brandy Wine project.

[148] Peter testified that to his knowledge all projects that Rock Construction bid went to the lowest bidder.

[149] There was no evidence before me that Peter, while employed by Consbec, learned of projects which he bid for Rock Construction.

Employees of Consbec

[150] Peter is accused of hiring Consbec employees to work for Rock Construction. Those employees named by Consbec are drillers, blasters, and labourers who worked on drilling and blasting projects for Rock Construction and for Consbec.

[151] When Consbec hired these employees, they were hired for a project and then laid off. They were not exclusive employees of Consbec. They were union workers. There was no evidence produced by Consbec that Peter, on behalf of Rock Construction, enticed any of these people to work for Rock Construction while they were working for Consbec. Richard testified that he knew of no occasions where Rock Construction hired employees when they were working for Consbec.

[152] I find that Rock Construction did not hire the hourly drillers, blasters and labourers away from Consbec.

Ron Thomas and Dave Fisk

[153] At the completion of Richard's cross-examination, I asked Richard some questions relating to Ron Thomas and Dave Fisk as follows:

Q So Ron Thomas. Now, did he move around in Canada from project to project on which Consbec had contracts?

A Yes, he did.

Q And he was on salary?

A He was not on salary. He was an hourly foreman.

Q Would he have been laid off between projects?

A He would rarely be laid off between projects. We would have him working from project to project.

Q Then he wasn't free to go off and work for somebody else?

A I guess he would be free, but he stayed and continued to work for us.

Q Okay. Now I think you answered this question yesterday, but I'm going to ask it just to make sure I understood it, were the[re] projects in British Columbia where an area supervisor such as Ron Thomas was not used?

A Yes, some of the initial projects in British Columbia, Ron Thomas would not have been the supervisor. My sense it would have been a BC supervisor. There would have been a gentleman out here that would have been on that job site such as a Dave Fisk.

Q Okay. So you did run with a Dave Fisk?

A Yeah, there would have been a supervisor on the jobs.

Q Okay.

A Yes.

Q Now, we talked about Dave Fisk this morning?

A Yes.

Q So he would be laid off from time to time; is that correct?

A Yes, he would.

Q And he'd be free to go work with others?

A He would.

[154] Peter best described these workers in his discovery of October 16, 2009 as follows:

Q Were any of them discharged from Consbec that you're aware of for anything other than lack of work?

A Not that I recall.

Q Did any of them, when they were employed by Rock Construction or a successor company, quit Rock?

A Quit?

Q Quit.

A Yes.

Q And what were their reasons?

A These fellows are opportunistic. They'll work for whoever is paying the highest, whichever job has the longest duration. I've had -- of the six of them, I can count -- Keith Burroughs, for one, has quit on me twice and is now back on working for me.

[155] I find that Rock Construction did not hire Ron Thomas and Dave Fisk or any other works away from Consbec.

Stuart Mitchell

[156] Consbec alleges that Rock Construction on two occasions attempted to hire Mr. Mitchell while he was working in the Western Division for Consbec.

[157] Mr. Mitchell testified that the first occasion Peter offered him a job was when Peter came to Consbec's office and they went for coffee. Mr. Mitchell did not recall why Peter was there. Mr. Mitchell testified that it was after the I.G. Machine contract. He recalls that Peter slapped him on the shoulder and said "Don't worry Stu, you will get the next one".

[158] The second occasion was in Trail, B.C. at a pre-tender site meeting for general drill, blast, and subcontractors. Mr. Mitchell testified that Peter came up to him, gave him a shot in the arm, and put his arm around him and said "if you ever get tired of those guys, come and see me".

[159] Peter has no memory of meeting for coffee. He denies that he made such an offer to Mr. Mitchell. I conclude that Peter and Mr. Mitchell did meet on the two occasions. However, the alleged offers of employment were made in jest. On the first occasion, Peter had a successful bid and on the second occasion, Peter was being competitive and had an audience.

[160] I find that Peter did not try to hire Mr. Mitchell away from Consbec.

Was Peter in a fiduciary relationship with Consbec and did he owe a fiduciary duty to Consbec?

The Law

[161] There is no definition on which an individual can be said to be a fiduciary that does not rely on examining the role they played in the relationship. The most obvious fiduciary relationships are senior employees and directors of corporations, lawyers and clients, and trustees and their beneficiaries.

[162] In Canadian Aero Service, the plaintiff had identified a project which it wished to eventually bid. There was no assurance that the plaintiff would receive the contract. The two defendants who were senior management employees had been working on behalf of the plaintiff corporation, and visiting the foreign country where the contract was to be performed. Over two years had been expended by the plaintiff company planning and preparing for seeking the contract. Political conditions caused the plaintiff to suspend its efforts to obtain the contract. About a year later, the plaintiff resumed its interest. The plaintiff, along with others, was invited to bid.

[163] After the plaintiff resumed its interest in the business opportunity, two of the defendants became major shareholders, directors, and officers of a company whose purpose was to pursue the contract that had been developed and pursued by the plaintiff. The defendant employees had resigned after taking up the shares and the positions with the new company. The new company, along with another company, were invited to bid. In the end, they were successful in obtaining the contract in an amount that one of the defendant employees had recommended to its employer, the plaintiff.

[164] The court concluded at 605-606 that it did not matter that the defendants were not directors of the company:

Like Grant J., the trial judge, I do not think it matters whether O'Malley and Zarzycki were properly appointed as directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted respectively as president and executive vice-president of Canaero for about two years prior to their resignations. To paraphrase the findings of the trial judge in this respect, they acted in those positions and their remuneration and responsibilities verified their status as senior officers of Canaero. They were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty

which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what is said on this point by Gower, *Principles of Modern Company Law*, 3rd ed., 1969, at p. 518 as follows:

... these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorized to act on its behalf, and in particular to those acting in a managerial capacity.

[165] In *Canadian Aero Service*, the court concluded that the defendant employees were, though subject to supervision of the officers of the company, in a fiduciary relationship with the plaintiff. The court went on to say at 620:

The general standards 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, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificity 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.

[166] *Frame v. Smith*, [1987] 2 S.C.R. 99 is frequently cited when considering whether a relationship is fiduciary. It describes a fiduciary relationship as possessing three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power,
- (2) That discretion or power can be exercised unilaterally so as to impact the beneficiary's legal or practical interests, and
- (3) The beneficiary is particularly vulnerable to the fiduciary holding the discretion or power.

[167] *Frame* is a family law case in which the court had to determine whether existing fiduciary principles should be extended to family law matters relating to custody and the access of parents, in the face of family law litigation.

[168] In *Physique Health Club Ltd. (c.o.b. Physique Fitness Store) v. Carlsen*, [1995] 192 A.R. 330 (Q.B.), rev'd on other grounds, 1996 ABCA 358, an uncle, the principal of the plaintiff, hired his nephew to operate and manage a store in Calgary, Alberta. The other store was located in Edmonton, which the uncle primarily operated.

[169] The nephew was given considerable latitude in operating the Calgary store. He prepared bids for institutional customers. He wrote cheques, negotiated product prices and had cheque signing authority, including writing his own pay cheques and commission cheques. He decided when to take trips to check equipment and to attend trade shows. In running the Calgary store, the nephew purchased 40 percent of the inventory for it. He hired and

fired employees, determined the advertising and promotions, and negotiated a lease for the Calgary store. The court found that the nephew had considerable information about the business, which included the plaintiff considering relocation of the Calgary store.

- [170] Within two weeks of March 15, 1992, the nephew quit his employment and the nephew and his wife set up a competing business to that of the uncle, 18 blocks from the Calgary store.
- [171] On the facts of the case, the court found the nephew to be a fiduciary despite his managerial role due to the nature of the duties he performed and the extent of the authority and latitude given to him as well as the initial relationship of trust that existing between the uncle and the nephew. Further, the court found the nephew did not give the uncle proper notice of his resignation.
- [172] The Court of Appeal set aside the finding that the nephew breached those fiduciary obligations by concluding that the nephew did not take a maturing business opportunity from the plaintiff, take confidential business information, or actively solicit his employer's clients or acquire special or unique knowledge of the industry, making his employer more vulnerable to competition.
- [173] In *Barton Insurance Brokers Ltd. v. Irwin*, 1999 BCCA 73, the defendant, Marion Irwin, was employed by the plaintiff holding the title and position of general office supervisor, a position she held for quite some time. The plaintiff had acquired the shares of her previous employer. The plaintiff and her previous employer sold a large volume of household insurance.
- [174] Ms. Irwin was on salary. She was often referred to in the litigation as a manager. However, the court viewed her position more as "office administrator" or "supervisor". She did not have the power to hire or fire. She was not a corporate officer, director or shareholder of the plaintiff or its predecessor. She required the permission of the regional administrator for significant expenditure or decisions related to the plaintiff's business.
- [175] Ms. Irwin quit her position, taking a position with a competing business. She used her memory to solicit customers of her former employer. It was argued that Ms. Irwin was a fiduciary and that she had breached those duties. The appellate court upheld the trial judge's finding that Ms. Irwin was not a fiduciary. She was an employee instead of a manager, she had minor supervisory duties, and she had no dealings with or responsibility for anything beyond the branch in which she worked. The trial judge found that Ms. Irwin was a "mere employee" and she owed her employer a duty not to take client lists and confidential information, but she was entitled to use her memory and a telephone book to ask people she had dealt as an employee whether they wished to do business with her: para. 20.
- [176] In *Barton Insurance*, Mr. Justice Hall, writing for the Court of Appeal observed at para. 18:

Clearly, an employee has duties to a present employer not to divulge trade secrets or to work against the interests of his or her employer but the duty is not just limited to current employment. After leaving employment, an employee may be obligated not to pursue certain activities to the detriment of the former employer. For instance, it has been usually reckoned to be unfair conduct to permit a former employee to take with him or her customer lists to use for solicitation of business or to divulge trade secrets or to seek to appropriate maturing business opportunities of the former employer. On the other hand, I suppose to avoid what might otherwise be a condition of almost involuntary servitude, it has long been held that an employee is free to compete for [customers] with a former employer. As usual in human affairs, the difficulty is in the details and it is often difficult to know where to draw the line.

[177] In *Cariboo Press (1969) Ltd. v. O'Connor*, [1996] B.C.J. No. 275, 1996 CanLII 1553 (C.A.), two employees, Mr. O'Connor and Mr. Campbell, and their company were sued by their former employer, the plaintiff. Mr. O'Connor was the publisher and he had the responsibility for two of his employer's newspapers. Mr. Campbell was described as publisher and marketing director for the plaintiff and for another newspaper. The court stated:

[4] While [their] titles connote considerable power and authority, and O'Connor's employment contract is framed in expansive terms, there was evidence that these two men were closely controlled by Mr. Grainger. In fact, there is ample evidence to support the following findings of the learned trial judge that:

Similarly, with the authority of Mr. O'Connor and Mr. Campbell they could not write cheques, they had no company credit cards and they did not even have a petty cash float. Mr. O'Connor and Mr. Campbell were controlled by Mr. Grainger and no[t] one of them had any independent discretion on company policy or direction.

Neither O'Connor nor Campbell were either officers or directors of the company and they were not even under the direction of an officer or director since Mr. Grainger was not a director of the company at that time. The evidence is clear that neither Mr. O'Connor nor Mr. Campbell were top management or senior management, and they were management in name only.

[178] A business opportunity arose while Mr. Campbell and Mr. O'Connor were working for their employer to purchase a newspaper with which the plaintiff competed. Both Mr. Campbell and Mr. O'Connor were enthusiastic about an offer of sale of that newspaper and provided Mr. Grainger with pro forma projections based on the amalgamation of the newspapers in which they were involved. The plaintiff company rejected the offer and Mr. Grainger told Mr. O'Connor and Mr. Campbell to work harder and "blow them out of the water through competition". The plaintiff ceased any interest in purchasing this newspaper. About six months later, Mr. O'Connor and Mr. Campbell purchased the interest in the business. Mr. O'Connor did not disclose at the time he had an interest in the newspaper and remained with his employer for another six months.

[179] The trial judge concluded, because of their limited authority, Mr. Campbell and Mr. O'Connor were not fiduciaries. The Court of Appeal agreed with the trial judge's findings. The court found that Mr. O'Connor and Mr. Campbell were not prohibited from pursuing the business opportunity of purchasing the newspaper as the court found the plaintiff was not intending to pursue it. What troubled the court was the failure of Mr. O'Connor to disclose his interest in the newspaper while continuing to work for the plaintiff. The court awarded nominal damages against Mr. O'Connor.

Analysis

- [180] Peter initially worked exclusively in the Eastern Division. Upon his transfer to the Western Division, he worked exclusively there. Peter had no influence in and did no work in the other divisions of Consbec.
- [181] All documents, bids, payrolls, payables, and receivables were sent to and from head office. Peter had no influence over payments, other than to sign off from time to time, as did the superintendent, Ron Thomas, as to the hours worked by the hourly employees on a project. Through Richard, Consbec was aware of all bids that Peter was making.
- [182] Peter made no corporate decisions, nor was he asked to participate in corporate meetings. Peter was not party to corporate decisions, making policy for Consbec, hiring and firing employees of Consbec, determining salaries or bonuses, or determining non-union wages in his division. He received no company financial records, or financial statements, and he was not entitled to do so. On behalf of Consbec, Peter could not sign cheques. He could not direct the payment of accounts electronically, or move and transfer Consbec's money from its bank accounts. Peter could not influence the payment of accounts or the transfer of funds. Nor could he direct Consbec employees, such as Mr. Sawdon, to make payments or transfer funds. Peter had no corporate credit card.
- [183] Richard and Peter were in telephone communication, at minimum, daily. Peter was required to prepare a bid for a project he had located using the Excel spreadsheet. He would provide Richard with other information about the project. Richard, using the Excel spreadsheet, would, independent of Peter, calculate a bid. They then discussed their respective bids with each other, made the necessary adjustments and agreed on a bid to submit. If there was a disagreement, Richard made the final decision.
- [184] Richard testified that a contract less than \$50,000.00 did not require Peter to pass it by him. Richard was unable to identify any such contracts that Peter bid. Mr. Mitchell describes it differently. He testified that the standard practice of Consbec was that Richard allowed managers to take on close, small projects.

- [185] There were two exceptions to Peter acting only under Richard's authority. Firstly, Peter sold explosives to Sproule. He asked head office to send an invoice to Sproule for \$581.81. Secondly, Peter also sent a letter to Sproule encouraging them to purchase a rock truck. However, Richard testified that providing explosives directly to a customer and encouraging a customer to purchase a truck were not company policy. In other words, Peter was not authorized to take these actions independent of Richard.
- [186] In summary, Peter can best be described as an estimator, though Consbec described him as a manager. His duties were limited to managing his own daily activities of work and sometimes project site management and making arrangements for labour.
- [187] Prior to working for Consbec, Peter had knowledge and experience in the construction industry. He learned the blasting and drilling business while working for Consbec. In bidding for contracts for Consbec, the information as to Consbec's costs were determined solely by Consbec and Peter had no influence. Peter's job was to identify projects, to obtain bid plans, and to obtain as much information as possible as to the area where the blasting and drilling was to take place, which would then be measured by Consbec's costs, pre-determined by them.
- [188] In April of 2001, the Western Division sales of Consbec were three percent of Consbec's total sales. By April of 2002, they were five percent of Consbec's total sales.
- [189] I find that Peter was not a fiduciary. Peter's obligations to Consbec were that of an employee.

Was Peter free to compete with his former employer upon terminating his employment with Consbec?

- [190] Peter, together with his wife, Tracy, and Galina incorporated Rock Construction on July 5, 2002. This was a drilling and blasting company that would compete directly with Consbec and other companies in British Columbia. Peter and his wife, Tracy, held fifty percent of the shares and Galina held the other fifty percent. Tracy and Peter were both employed by Rock Construction. Tracy was on the payroll, but did not provide services to Rock Construction.
- [191] Galina operates mainly in the Kootenays. Early on, when operating Consbec's Western Division, Peter successfully bid a drilling and blasting contract with Galina on behalf of Consbec. Peter relayed to Richard that Ralph Allen had offered him a job. Peter did not pursue this and, at that time, I conclude he had no intention of pursuing this offer. In one of the discoveries where Peter was questioned, he was asked whether Ralph Allen offered him a business opportunity. Peter said "Yes." This question was really two questions in one: whether Peter had been offered a job and/or a business opportunity. Based on this evidence and Richard's testimony, I have concluded that Ralph Allen did not offer him a business opportunity, but rather offered him a job, a fact that Peter reported to Richard. There was no evidence that Peter pursued it.

The Law

- [192] A former employee is entitled to compete with his former employer so long as they are not a fiduciary, are not subject to a restrictive covenant, and do not use confidential information. In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, Chief Justice McLachlin for the majority of the court stated at paras. 17-19:
- [17] The trial judge took the view that the employees continued to be under a general duty not to compete with their former employer during the notice period.
- [18] The majority of the Court of Appeal, by contrast, held that once the investment advisors left RBC, they were no longer under a duty not to compete with it. Generally, an employee who has terminated employment is not prevented from competing with his or her employer during the notice period, and the employer is confined to damages for failure to give reasonable notice (Southin J.A. for the majority). To this general proposition Rowles J.A. may be read as adding the qualification that a departing employee might be liable for specific wrongs such as improper use of confidential information during the notice period. This appears to be consistent with the current law, which restricts post-employment duties to the duty not to misuse confidential information, as well as duties arising out of a fiduciary duty or restrictive covenant: see G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), vol. 2, s. 11.141. Neither of the latter duties is at issue here.
- [19] For the purposes of this case, the law may be accepted as summarized by the preceding paragraph. The contract of employment ends when either the employer or the employee terminates the employment relationship, although residual duties may remain. An employee terminating his or her employment may be liable for failure to give reasonable notice and for breach of specific residual duties. Subject to these duties, the employee is free to compete against the former employer.
- [193] Competition and mobility is favoured among employees. The court in *Barton Insurance* stated at para. 39:
- [T]he general interest of the public in free competition and the consideration that in general citizens should be free to pursue new opportunities, in my opinion, requires courts to exercise caution in imposing restrictive duties on former employees in less than clear circumstances. Generally speaking, as I noted from the earlier authorities referred to, the law favours the granting of freedom to individuals to pursue economic advantage through mobility in employment.
- [194] All employees are free to take away with them the skill and knowledge that they learned and acquired on the job. In *Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312, the Court of Appeal stated at para. 72:
- [72] A former employee, other than a senior or key employee with fiduciary-like obligations, is free to compete with his or her former employer and to make use of the knowledge and experience acquired while employed so long as he or she does not disclose or make use of

the former employer's confidential information, including customer lists removed from the former employer's premises. However, a former employee is entitled to solicit customers of the former employer recalled from his or her memory: see *TOS Insurance Services Ltd. v. Dale & Co. Ltd.*, [1988] B.C.J. No. 504 (S.C.), quoted with approval in *Barton*, supra, at para. 37.

[195] An employee cannot use confidential business information of the employer obtained either before or after the employment has ended. This is exemplified in *Barton Insurance*, where the Court of Appeal, at para. 20, adopted a statement of the trial judge that when Ms. Irwin's employment ended:

In short, Ms. Irwin was, for the purposes of this case, a mere employee. As such, she owed her employer a duty not to take client lists and confidential information, insofar as these items were recorded in documents and not to make unfair use of the information she acquired while employed by Howat/Barton. She was, however, entitled to recall the people she had dealt with, aided by a telephone book, and ask them if they wished to do business with her in her new location.

[196] Hall J.A. added that "[i]t should not be forgotten that the relationship of employer and employee is based on contract": para. 21.

[197] The test as to whether information is confidential is set out in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, where Mr. Justice La Forest stated at 635-636:

I can deal quite briefly with the breach of confidence issue. I have already indicated that Lac breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows at p. 47:

In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it...

This is the test applied by both the trial judge and the Court of Appeal. Neither party contends that it is the wrong test. Lac, however, forcefully argued that the courts below erred in their application of the test. Lac submitted that "The real issue is whether Corona proved that LAC received confidential information from it and [whether] it should have known such information was confidential".

[198] As to the third element of the test, there must be proof of the information's misuse of confidential information, and there must be real evidence of its misuse: *Chevron Standard Limited v. Home Oil Company Limited*, [1982] 3 W.W.R. 427 (Alta. C.A.) at 443-444.

[199] Although not automatic, it is possible for employee conduct that fits into the category of future planning to be considered a breach of fiduciary duty to the employer. In *Restaurnics Services Ltd. v. Nicolas*, (sub nom *Restaurnics Services Ltd. v. Forster*), 2004 BCCA 130, Madam Justice Ryan for the court found the defendant's conduct in bidding on a BCCW contract while employed with Restaurnics had crossed the line into a breach of fiduciary duty. At para. 50, citing *Geoffrey England*, the court set out where the line must be drawn:

[50] The authors of *Employment Law in Canada* note at [s.]11.131:

Difficulties have arisen in determining the exact point at which planning and preparation by an employee who is still employed to set up himself or herself in competition with the employer will violate his or her implied duty of fidelity. . . . After all, if it is lawful for an employee to engage in post-termination competition with an employer, it hardly makes sense to hold it unlawful to plan the form that such competition will take. In more recent decisions on point, the courts have held that merely planning to establish a competing business does not ipso facto violate the duty, unless it is clear that the employee has already determined to abuse the employer's confidential information or trade secrets in his or her future business or has already begun to canvass the employer's customers or entice fellow employees of the employer to join him or her in the new business. [*Corporate Classic Caterers v. Dynapro Systems Inc.* (1998), 33 C.C.E.L. (2d) 58 (B.C.S.C.); *Leith v. Rosen Fuels Ltd.* (1984), 5 C.C.E.L. 184 (Ont. H.C.J.), esp. at 195.]

[Emphasis in the original].

[200] In *Zoic Studios BC Inc. v. Gannon*, 2012 BCSC 1322, Madam Justice Russell stated:

[198] In any case, I do not find it particularly important when the defendants contemplated the purchase of equipment or when the equipment was actually purchased. I do not find either of these acts fall within the rubric of competition with Zoic BC, even if done by a current employee. They are mere planning.

[199] Counsel for the plaintiff also attempted to establish that in fact Leviathan was negotiating to lease a studio around February 15, well before March 11, 2010, when a lease was actually signed. Again, even if true, this is mere preparation.

[200] Support for this position can be found in *Aquafor v. Whyte, Dainty and Calder*, 2010 ONSC 2733. While the court here was determining whether the personal defendants had breached a fiduciary duty, it discussed what constituted "mere planning." Three engineers who were employed by the plaintiff had leased a premise, commenced building improvements and prepared a business plan in order to establish a new engineering firm. After resigning, but while still employed, they incorporated their company, registered a domain name and applied for the proper authorization certificate. They also advertised for

an office assistant. The court found this to be mere planning.

[201] In Ms. Gannon's case, mere planning turned into competition with Zoic BC when Leviathan signed a contract with GEP Productions on February 17, 2010, for work on Eureka season 4. While the contract was signed on behalf of Leviathan by Mr. Adams, Ms. Gannon became an officer and director of Leviathan when it was incorporated on February 22. She was still employed by Zoic BC until March 4, 2010. Certainly, by February 22 at the latest Ms. Gannon was in competition with Zoic BC.

[Emphasis added].

Analysis

- [201] I found that Peter did not sabotage Consbec's computer in the Kamloops office, nor did he destroy Consbec's contact list. Consbec provided no proof that Peter took the Excel spreadsheet or the contact list. In fact, it was never established that there was a contact list, or who or what information was on such a list.
- [202] Consbec makes much of Peter, through Rock Construction, competing with its customers and clients for whom it has provided drilling and blasting services. However, a successful bid does not make the client or customer the property of Consbec, thus preventing Peter and his companies from making bids for that client or customer's work. Peter testified that approximately 95 percent of the projects for which he bid came from B.C. Bids. A successful bid did not secure repeat business in the blasting and drilling business.
- [203] Even where a business concerns contracts such as insurance that are likely to be renewed, an employee may be entitled to solicit business from its former employer's customers: Barton Insurance. However, an employee cannot compete with his or her employer during the employment relationship: Cariboo Press.
- [204] At the same time, this does not prevent the employee from planning for future employment. Although, some actions taken by an employee may impose liability: Restauronics Services.
- [205] I conclude that Peter, prior to leaving his employment with Consbec, intended to continue in the drilling and blasting business. The "Ralph" on the list found by Trevor could have been Ralph Larson or Ralph Allen, the latter to join in business, the former seeking commercial property for a new business. Peter was in the mere planning stage: See Restauronics Services Zoic Studiod . There is no evidence that Peter started to look for work when he was still employed by Consbec. Nor is there any evidence that Peter knew of drilling and blasting opportunities that he was in the process of bidding for Consbec, or knew that Consbec would bid, that he took for Rock Construction. Nor is there any evidence that he was canvassing Consbec's past customers for whom it had done drilling and blasting. I conclude that Peter, after leaving Consbec, relied on B.C. Bids and Ralph Allen to obtain work for Rock Construction. In Restauronics Services Ltd., the court sets

out where the line must be drawn:

[206] I dismiss Consbec's claim for damages that Peter breached his contractual responsibilities as an employee.

Was Peter constructively dismissed from his employment with Consbec?

The Law

[207] In order for the court to find that an employee was constructively dismissed, the court must find that the employer made a unilateral change to the essential terms of the employment contract. The question is whether a change was made, and whether the change or breach made was a repudiation of the contract of employment.

[208] In *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at 858-859, Mr. Justice Gonthier for the court stated:

Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.

To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.

[209] In *Farber*, the defendant eliminated 11 of the 12 regional managers' positions, one of which was Mr. Farber's position. The company offered Mr. Farber some money and a managerial position in a branch that had problems that would cause significant decrease in Mr. Farber's income. The court found that Mr. Farber had been constructively dismissed.

Analysis

[210] I have found that the purpose of Peter's job was to obtain contracts by bidding. His job was not to supervise Consbec's projects, although that occurred from time to time. The only time that this became an issue was when Peter learned that Ron Thomas would report to head office rather than to him. Peter acknowledged that no other terms or conditions of his employment changed during the course of his employment.

[211] I find that Peter was not constructively dismissed.

Was Peter obliged to give Consbec notice of his resignation?

[212] Peter was obliged to provide Consbec with notice of his resignation. He did not give notice.

The Law

[213] The purpose of notice is to provide time for the employer to make arrangements to have the work that the departing employee looked after by others, or to find another employee.

[214] In *Aquafor Beech Ltd. v. Whyte*, 2010 ONSC 2733 at para. 36, the court stated:

[36] The obligation to give reasonable notice is a general obligation of all employees. Failure to give reasonable notice is not in itself a breach of fiduciary duty, nor does it give rise to the remedies which flow from a breach of fiduciary duty.

[215] In *Aquafor Beech*, the defendants were senior engineers and partners in the business who left the plaintiff company and established their own firm and the court found them to be fiduciaries based on their seniority, responsibilities, and authority to deal with clients. In that case, the plaintiff failed to establish that the three to four weeks period of notice of resignation was insufficient in the circumstances to establish breach of fiduciary duty with respect to notice or breach of general employee duty to give reasonable notice.

[216] In *Sure-Grip Fasteners Ltd. v. Allgrade Bolt & Chain Inc.*, [1993] 45 C.C.E.L. 276 (Ont. Gen. Div.) at 281-282, Mr. Justice Chapnik found:

An employee is obligated by law to give reasonable notice of termination to his or her employer, even absent a written contract of employment. If the resignation is voluntary, the notice to which the employer is entitled becomes a matter of law, not merely a matter of conscience or responsibility on the part of the employee. The main purpose of the notice of resignation is to allow the employer a reasonable time to find a replacement.

[217] At the appellate level, in *Physique Health Club*, the Alberta Court of Appeal dealt with the notice required of a fiduciary. Citing the principles in *Sure-Grip*, the court found the appellant was obliged to give his employer six weeks' notice. This was despite the fact that the appellant was not replaced, other employees took on some of the appellant's responsibilities, and a second sales person was hired.

- [218] In RBC Dominion Securities, the court accepted the trial judge's finding that the investment assistant's notice period should be two and a half weeks.
- [219] The length of notice is dependent upon the employee's responsibilities, length of service, salary, and the time it would reasonably take the employer to replace the employee, or steps to adapt to the loss as a result of the employee's departure: Sure-Grip at 282.

Analysis

- [220] Peter worked for Consbec for approximately five years. He was hired to "grow the business", and that never changed during the entire time that Peter worked for Consbec. He was dispatched to the Maritimes and later to the Western Division to open up opportunities for Consbec in the drilling and blasting business. In order to do so, he was required to look for business. After locating a project and searching for information about the project, in consultation with Richard, a bid was made. The bid was made based on Consbec's cost. Although Peter was the only employee, both in the Maritimes and in the west, it was necessary to have an employee in the area so as to do the work that I have described.
- [221] Peter owed Consbec notice to give Consbec sufficient time to replace him. As a result of Peter's abrupt exit, Consbec sent Trevor to assess the situation and make sure that potential customers knew that, despite Peter's departure, Consbec was still doing business in the west. Mr. Mitchell was moved in quickly and took the position that Peter held. Had Peter given the notice that he was required to give, at law, Consbec may have hired a new employee. They argue that they were left with no other choice but to move Mr. Mitchell, who was experienced in the Central Division, to Kamloops to look after Consbec's business interests.
- [222] There is no point in trying to determine the proper notice that Peter should have given Consbec. All that would do would lead to speculation as to what Consbec would have done and whether the notice was sufficient, given the factors set out in Sure-Grip.
- [223] Consbec seeks damages on the cost of bringing Trevor to Kamloops and moving Mr. Mitchell and his family to Kamloops.
- [224] Peter argues that Consbec must prove its damages. He argues that the notice he should have been required to give is two weeks. He argues that there was little disruption in business for Consbec as all the information for active projects was known at head office. The foreman was on site at the Langvista 1 project and was reporting to Jeff Walker. I conclude that there was no disruption to the Langvista 1 project. Further, Peter pointed to the fact that there is no loss of earnings as a result of his not giving reasonable notice.
- [225] However, that is not the test. The test is one of opportunity, as stated in Sure-Grip and demonstrated in Aquafor Beech at para. 40:

The notice period gave Mr. Maunder an opportunity to work through transition matters with Mr. Whyte and Mr. Dainty. It gave him an opportunity to retain Brad Beech to take over some of Mr. Whyte's projects. It gave him an opportunity to retain a headhunter to hire new employees, although it is clear to me that Mr. Maunder did not do so until well after the notice period. There is nothing to suggest that a longer notice period was required or would have made any difference.

[226] This opportunity was not given to Consbec.

[227] Consbec has been unable to provide the receipts for travel for Trevor and Mr. Mitchell to Kamloops. When Consbec moved its office in 2012 to its present location, the documents were accidentally thrown out. Mr. Sawdon, in consultation with Mr. Mitchell and Trevor, was able to estimate those expenses.

[228] Peter objects to these estimates since, knowing that these documents existed, at no time in its list of documents, did Consbec list them. I am prepared to consider Mr. Sawdon's evidence as to these costs, as well as Mr. Mitchell's evidence, who was able to recall his expenses and their specifics as reimbursed by Consbec.

[229] What I must assess are the damages that Consbec suffered as a result of Peter leaving his job without notice.

[230] Mr. Sawdon estimated the cost of having Trevor come to British Columbia at \$11,135.00. It took Trevor two and a half days to drive from Sudbury to Kamloops. He remained in Kamloops for approximately one month. Mr. Sawdon calculated Trevor's costs in his testimony as follows:

Q And what types of expenses did you include in those calculations?

A Beginning with Trevor, Trevor drove to British Columbia. It's approximately 3600 kilometres. Our per kilometre payment is about well it is at that time 40 cents.

Q 40?

A 40.

Q 40 cents per kilometre?

A 40 cents per kilometre.

Q Okay?

A He would have been unproductive as he was driving out and he would have been paid at approximately \$40 per hour, assuming he drives a hundred kilometres an hour it would have been 36 hours and he would have had a per diem of approximately \$125 a day to cover his room and board for the three days that it took him to come out. And that simply would be multiplied by two to reflect his return to Sudbury. And while he was in Kamloops, I believe his Sudbury to Sudbury time was 43 days, I believe, and so 37 of those days he would have been actually in Kamloops, and I simply went by the per diem of \$125 a day which appears reasonable.

- [231] I find Mr. Sawdon's calculations and estimations reasonable Consbec incurred a cost of \$11,135.00 to place Trevor in British Columbia.
- [232] Mr. Mitchell testified that Consbec reimbursed him \$9,781.11 for expenses he incurred in selling his house in the Sudbury area. Those expenses consisted of \$8,167.00 for a commission he incurred and the balance was for legal expenses. These expenses were documented. Mr. Mitchell testified that he incurred moving expenses in the amount of \$12,000.00 to \$13,000.00 with AMJ Campbell Movers to move the Mitchells' possessions to British Columbia. Mr. Mitchell said he paid for these expenses and was reimbursed by Consbec. Mr. Mitchell said he incurred the sum of \$5,000.00 for the land transfer tax for the purchase of his home in Kamloops and Consbec reimbursed him. Mr. Mitchell said he was paid approximately \$29,700.00 for travel expenses between Sudbury and Kamloops. That amount represents nine trips by air, six of which were promised by Consbec to the six-member Mitchell family to return to Ontario for Christmas. The Christmas trip represents about \$12,000.00. This totals \$56,981.11. Taking an average of the proposed moving expenses and excepting flying the Mitchell family back to Ontario for Christmas, I find that, as a result of Peter's departure and failure to give notice to Consbec, that Consbec incurred damages in the amount of \$44,981.11 to replace Peter with Mr. Mitchell.
- [233] Had Peter given reasonable notice to Consbec of his resignation, this amount might have been less. Consbec may have hired somebody in British Columbia. Peter's actions prevented them from making that choice and considering other options.
- [234] I assess damages against Peter for the failure to give reasonable notice in the amount of \$56,116.11.

Did Peter and Tracy engage in a fraudulent conveyance of properties so as to avoid a potential judgment?

- [235] When the Ontario lawsuits were started, Tracy and Peter were married. Tracy was not named as a defendant in the lawsuits. At that time, they owned two pieces of real property (together, the "Old Stage Coach Road Property"), their principal residence located in Knutsford, near Kamloops, British Columbia. On October 30, 2008, Peter and Tracy transferred the Old Stage Coach Road Property to Tracy.
- [236] Tracy testified that she recalled the transfer of the property to her, but had no recollection as to why the real property was transferred to her. There was no consideration for the transfer from Tracy to Peter. She testified to receiving no independent legal or accounting advice.

[237] Peter claims that the transfer to Tracy was a result of accounting advice received by Peter and Rock Construction's chartered accountants, KPMG. KPMG became Peter and Rock Construction's accountants after he purchased Galina's interest in Rock Construction. To support his claim that the transfer occurred as a result of accounting advice, Peter entered as an exhibit a letter dated November 2, 2010 from KPMG and signed on behalf of KPMG by Brent Ashby, a partner of KPMG. The letter is addressed to Peter. The letter states:

We confirm that on October 31, 2008 the property located at 5877 Old Stage Coach Road in Knutsford, BC, held jointly by Peter Walker and Tracy Walker, was transferred to full ownership by Tracy. We had advised the Walkers to complete this transfer as part of personal tax planning for them.

The property is 320 acres in size and a portion of the property is leased for grazing purposes, In addition, a number of pieces of equipment owned by P&T Walker Capital Ltd. (P&T) are stored on this property and rent is charged to P&T for this service. Tracy is in a lower tax bracket than Peter and as a result some tax savings exist by having the rental and grazing income reported by Tracy rather than Peter.

The property may also qualify for the \$750,000 capital gains exemption if it meets the criteria as Qualified Farm Property at some point in the future. We anticipate that Peter may use his lifetime capital gains exemption by selling shares of a qualified small business corporation and that Tracy may be able to utilize her lifetime capital gains exemption on the sale of the Knutsford property if it meets the appropriate criteria. Again, this could result in significant tax savings for the Walkers as a result of this property transfer.

If you have any questions with regards to this matter, please do not hesitate to contact the writer.

[238] Mr. Ashby testified. He stated that he provided tax advice to Peter and the Rock Companies starting in or about 2004 or 2005. Prior to that, another accountant, now retired with the firm, provided the accounting services. Mr. Ashby also reviewed the personal income tax returns of Peter and Tracy that KPMG prepared for them.

[239] Mr. Ashby wrote the letter at the request of Peter. At the time of writing the letter, he was unaware of the allegations of fraudulent conveyance or fraudulent preferences in the Ontario action or this action, and he remained unaware until he spoke to defendants' counsel. He was not aware that Tracy was a defendant in this lawsuit until he was asked to testify, which was three or four months prior to this trial.

[240] Despite Consbec asking counsel for the defendants to have Mr. Ashby bring his entire file relating to Rock Construction, Tracy, and Peter, Mr. Ashby was unable to state when the tax advice set out in the letter was given. Mr. Ashby knew that the advice had not been given to Tracy as he had not met her. A review of the file confirmed that Tracy had no meetings with other accountants in the firm.

[241] Mr. Ashby was asked to come back with his entire file. He took the stand again, said he had reviewed the file and he had the file with him. Mr. Ashby testified that there were no discussions about the transfer of the Old Stage Coach Road Property. He looked back from 2006 through 2009 and, although there were some general comments on tax planning, there was no reference to the transferring of the Old Stage Coach Road Property as a tax plan for Tracy and Peter. He confirmed that there were no notations in the file from Peter providing KPMG with instructions to transfer from Peter and Tracy to Tracy as a tax plan. I can only come to one conclusion; that is, that Peter placed this letter before the court so as to deceive the court.

[242] In order for the court to conclude that the transfer of the Old Stage Coach Road Property was a fraudulent conveyance pursuant to the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, Consbec must show the transfer was intended to delay, hinder, or defraud creditors:

Fraudulent conveyance to avoid debt or duty of others

1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies

- (a) a disposition of property, by writing or otherwise,
- (b) a bond,
- (c) a proceeding, or
- (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

[243] In *Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.*, [1995] B.C.J. No. 1814 at paras. 25-26, 34 C.B.R. (3d) 241 (S.C.), Madam Justice Baker, at paras. 25-26, stated that the applicant:

[25] need not establish that he or she was a creditor, or an unsecured creditor, at the time the transfer was made. *Re Skinner* (1960), 27 D.L.R. (2d) 74 (B.C.S.C.).

[26] All that the applicant must show is that the transferor, in making the gift or transfer, did so with intent to delay, hinder or defraud creditors or others. *Canadian Imperial Bank of Commerce v. Ash*, (1964), 47 D.L.R. (2d) 620 (B.C.S.C.); *C.I.B.C. v. Boukalis*, (1987) 11 B.C.L.R. (2d) 190 (C.A.).

[244] Peter and Rock Construction were involved in litigation in Ontario with Consbec at the time the Old Stage Coach Road Property was transferred. No reason has been placed before the court for the transfer. It was not truthful that it was for tax planning purposes, which is the explanation that Peter gave for its transfer. No other explanation has been given. I find that Tracy did not know why it was transferred to her.

- [245] I find that the transfer is void as against Consbec. However, much of this is now moot. Peter, subsequent to this transfer, purchased land in his name alone. Since the transfer, he and Tracy have separated. They entered into a separation agreement dated June 4, 2013. In that agreement, Tracy agrees that she will transfer the Old Stage Coach Road Property to Peter. At the time of trial, this had yet to take place.
- [246] As requested by Consbec, I order that the southeast $\frac{1}{4}$ of Section 9, Township 18, Range 17, W6M, KDYD and Lot 1, Section 3, 4 and 10, Township 18, Range 17, W6M, KDYD, Plan KAP86396 shall not be disposed of by either Tracy or Peter, or further encumbered until this judgment is satisfied and the appeal period has expired.

Punitive and exemplary damages against Peter and the defendants

- [247] Consbec seeks punitive and exemplary damages against the defendants, save for Tracy. When I asked Consbec's counsel which of the defendants it was seeking judgment against, I was told the two primary defendant companies, Rock Construction and P&T Walker Capital Ltd. (now PA Walker Capital Ltd.). When I asked about the other three; that is, 1627436 Ontario Limited, 0794940 B.C. Ltd. and Walker Investments Ltd., I was told that the Ontario numbered company, the B.C. numbered company and Walker Investments Ltd. were all subject to disclosure and they were named so as to prevent the transfer of assets among the companies.
- [248] I also asked what claim they were seeking against Tracy. Counsel for Consbec advised that it related only to the fraudulent conveyance, as Tracy no longer had an interest in Peter's companies.
- [249] I exclude Tracy when I refer to the defendants, except as it relates to the fraudulent conveyance.
- [250] The purpose of punitive and exemplary damages is stated in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. The court stated at 1208-1209 that, in contrast with aggravated damages, punitive damages are not compensatory in nature:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

[Emphasis added]

[251] In this case, the only damages I award are damages that reflect the cost to Consbec to replace Peter when he did not provide notice to Consbec upon quitting its employment.

[252] I concluded that Peter was not fiduciary. I also concluded Peter did not take client lists or take Consbec's spreadsheets so as to compete unfairly against Consbec. I found he did not breach his contractual obligations to Consbec, other than failing to give Consbec notice.

[253] I did find that the transfer of the Old Stage Coach Road Property was a fraudulent conveyance. However, that is a discreet issue and can be dealt with in an award of costs. It does not lend itself to the assignment of punitive damages.

[254] I make no award for punitive damages. This claim is dismissed.

Outstanding Issues

Consbec's Sproule Creek Holdings' Write-Off in the amount of \$28,069.94

[255] Consbec seeks that Peter pay the outstanding Sproule account that Consbec wrote off. This claim was not mentioned in Consbec's written submissions, nor was there evidence that supported such a claim. It is dismissed.

Tracy's Salary from Rock Construction

[256] The plaintiff is claiming \$120,000.00 for four years of Tracy's salary that was paid to her unlawfully. As I did not award the over \$1 million damages sought by Consbec, I need not deal with this claim. I will leave this matter to Tracy, Peter, Rock Construction, and the Canadian Revenue Agency to sort out.

[257] Peter, at one of his examinations for discovery, was not truthful about the work that Tracy did for Rock Construction. He described a number of duties that Tracy performed for Rock Construction but, in another discovery, he acknowledged that Tracy did not provide any work for Rock Construction. At trial, he acknowledged that also.

Peter's Relationship with Rick Walker and his Sons

[258] Rick testified that he and Peter's father no longer speak and no longer enjoy the hunting cabin together.

[259] Consbec provided evidence which, by inference, was an attempt to paint a negative picture of Peter, none of which I accept. Some examples are as follows:

- [260] While Peter was a manager in the Maritimes, he was involved in a motor vehicle accident in one of Consbec's vehicles. Peter was on his way to work and the accident happened on a slippery road. Richard was aware of it, as was Tracy. There was no evidence that Peter was negligent or misbehaved behind the wheel or failed to report it. There were no personal injuries as a result of the accident.
- [261] Richard gave evidence that there was a problem on one of the jobs in the Eastern Division that required him to travel to the Maritimes to attend to the problem. Consbec, apparently, was kicked off one of its projects. The contract was not lost. Richard acknowledged in cross-examination that Peter reported it to him. Richard also acknowledged that it was a situation that was not caused by Peter.
- [262] Consbec made much of Peter using a "shot-gun" clause in the agreement with Ralph Allen to buy Ralph Allen's interest in Rock Construction. The questions put to Peter and the inference to be drawn from that fact was that Peter could not have pursued the Rock Construction business opportunity without Ralph Allen. Peter acknowledged this. However, the inference is that Peter participated in a sharp business practice. I do not see sufficient evidence to support this.
- [263] George Pete and Dixie Pete both worked for Galina.
- [264] Dixie worked for Rock Construction and Galina billed Rock Construction for her services. When Rock Construction bought out Galina, Mrs. Pete was hired by Rock Construction. Peter testified that this was with Mr. Allen's consent. George Pete was also offered a job with Rock Construction by Peter, which he accepted. Peter testified that he did not speak to Ralph Allen in advance about hiring George Pete. I gather that I was to infer that Mr. Allen was upset about this and that this was a sharp business practice. Ralph Allen was not called by Consbec to confirm whether he was offended by this or not. Peter testified that he and Mr. Allen are still good friends, and there was no evidence before me to the contrary.

Costs

- [265] Neither the plaintiff nor the defendants were totally successful. Consbec was successful in obtaining damages for Peter not giving proper notice to Consbec when he quit his job. Consbec was successful against Peter for the damages he sought for wrongful dismissal. Consbec was successful in the fraudulent conveyance claim. Peter and Rock Construction were successful against Consbec in the large claim for breach of fiduciary duty, damages against Peter for his employment obligations, and punitive damages.
- [266] I would ask that counsel arrange to address me on the matter of costs.

Summary

- [267] In summary:

1. Peter was not a fiduciary of Consbec; he was an employee;

2. Peter did not breach his contractual responsibilities with Consbec;
3. There are no damages to be calculated in accordance with a breach of fiduciary duty or a breach of contractual responsibilities;
4. Peter was obliged to give his employer, Consbec, notice terminating his employment. Consbec is awarded damages in the amount of \$56,116.11 for Peter's failure to give notice;
5. Peter's claim for damages for constructive dismissal is dismissed;
6. Peter engaged in the fraudulent conveyance and the southeast quarter of Section 9, Township 18, Range 17, W6M, KDYD, and Lot 1, Sections 3, 4, and 10, Township 18, Range 17, W6M, KDYD, Plan KAP86396 shall not be disposed of by either Tracy or Peter, or further encumbered until this judgment is satisfied and the appeal period has expired; and
7. Counsel is to address me on costs.

"H.C. Hyslop J."

HYSLOP J.

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