Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd., [2011] A.J. No. 120

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Calgary

B.E.C. Romaine J.

Judgment: January 31, 2011

Docket: 0401 09099

Registry: Calgary

[2011] A.J. No. 120 | *[2011] 8 W.W.R. 60* | *2011 ABQB 38* | *81 B.L.R. (4th) 177* | *508 A.R. 1* | *43 Alta L.R. (5th) 83* | *198 A.C.W.S. (3d) 347* | *2011 CarswellAlta 134*

Between Indutech Canada Limited, Plaintiff, (Defendant by Counterclaim), and Gibbs Pipe Distributors Ltd., Barry Gibbs Sales Limited, 724192 Alberta Ltd., 974038 Alberta Ltd., Borealis Fabrication Ltd., Barry Gibbs, Guy Gibbs, ABC Corp., Cladtech Canada Inc., Barry Kossowan, Kossowan Holdings Inc. and 1036795 Alberta Ltd., Defendants, and Gibbs Pipe Distributors Ltd., Plaintiff by Counterclaim

(583 paras.)

Counsel

Gary B. Laviolette and J. Brown, Solicitors for the Plaintiff (Defendant by Counterclaim) Indutech Canada Limited.

D.M. McLaughlin and J.M. Doyle, Solicitors for the Defendants Gibbs Pipe Distributors Ltd., Barry Gibbs Sales Limited, Barry Gibbs and Guy Gibbs and Solicitors for the Plaintiff by Counterclaim Gibbs Pipe Distributors.

Barry M. King, Solicitors for the Defendants Barry Kossowan and Kossowan Holdings Inc.

- The Millenium Project
- Expert Witnesses
  - Allan Nelson
  - Kevin Copeland
  - Gordon Smith
  - The Gibbs Group Witnesses
  - Gene Dunphy
  - Barry Gibbs
  - Stephan Holland
  - Guy Gibbs
  - Tracey Kohlsmith
  - Mike Lundquist
  - Jim Nowakowski
  - Barry Kossowan and the Cladtech Defendants

Alleged Breaches of Agency Agreements

A. Lack of involvement of Barry Gibbs in Indutech
B. Unauthorized changes to Indutech quotes
C. Exceeding maximum mark-up of 5% on buy/sell arrangements
D. Contacting competitors
E. Triten exception and Capitan exclusion
F. Bulk welding wire supplied to Indutech's competitors
G. Diverting work to Indutech's competitors
H. The Millenium Project and diverted sales

Analysis of Law

I. Breach of Contract
II. Agency and Breach of Fiduciary Obligations
III. Doctrine of Knowing Assistance
IV. Inducing Breach of Contract
V. Unlawful Interference with Economic Relations
VI. Conspiracy to Injure

Calculation of Damages

A. Damages for Breach of Contract

1. Compensation for Loss of Business Opportunity
2. Restitution
3. Disgorgement

B. Damages for Breach of Fiduciary Duty and other Torts

(a) Equitable Compensation

(b) Disgorgement/Account of Profits

C. Punitive Damages

Counter Claim
Costs
Appendix A

Reasons for Judgment

B.E.C. ROMAINE J.

Introduction

1 The Plaintiff Indutech Canada Limited ("Indutech") manufactures specialized steel products, mainly Naspipe hardened straight pipe, induction bends and chromium carbide products for sale to petroleum producers in the Alberta oilsands.

2 The Defendants Gibbs Pipe Distributors Ltd. ("GPD") and Barry Gibbs Sales Limited ("BGS") (together with Guy Gibbs, Barry Gibbs, 724192 Alberta Ltd., and Borealis Fabrication Ltd., "the Gibbs Group") are related individuals and companies that for a number of years marketed and sold Indutech's products in the oilsands, pursuant to two agency agreements.

3 Indutech alleges that the actions taken by GPD and BGS breached the agency agreements and the fiduciary and good faith duties owed by GPD and BGS to Indutech, in particular, as they relate to the steps taken to set-up Cladtech Canada Inc., a competitor in the business. Indutech further alleges that the individual defendants (Guy Gibbs, Barry Gibbs and Barry Kossowan), and through them, their corporations, induced the breach of the agency agreements by assisting in the set-up of Cladtech and by other conduct.

4 Indutech alleges that Guy Gibbs, Barry Gibbs and Barry Kossowan, and corporations they control were co-conspirators with respect to the aforementioned breaches of duty, knowingly assisted in the breaches of fiduciary duty and unlawfully interfered with the economic relations of Indutech.

5 Indutech also alleges that BGS, GPD and the Gibbs Group defendants further breached the terms of the agency agreements and seeks damages or disgorgement of profits or restitution in connection with the following:

1. the prohibited supply of bulk welding wire to competitors;

2. the diversion of sales to third parties, including Cladtech;
3. the receipt of remuneration greater than the 5% mark-up allowed under the agency agreements; and
4. the loss of sales and the recovery of commissions and profits related to what is referred to as the Millenium Project.

6 GPD has filed a counterclaim alleging that it is owed commissions pursuant to the 2002 agency agreement.

Facts

Overview

7 As noted previously, Indutech manufactures specialized steel products. In particular, Indutech applies chromium carbide weld overlay ("CCO") to the inside of pipe to combat abrasion. Components of piping systems applied with CCO are described from time to time as "spools".

8 The relationship between Indutech and GPD and BGS was governed by two agency agreements, the first dated May 15, 2000 and the second dated November 14, 2002 (collectively, the "Agency Agreements"). Indutech filed the Statement of Claim in this matter on June 11, 2004, thereby terminating the November 14, 2002 Agency Agreement.

9 In February, 2002, Guy Gibbs, who during times material to this action was the controlling mind of GPD and BGS, and Barry Kossowan took steps to form 974038 Alberta Ltd. ("974038"). Mr. Gibbs and Mr. Kossowan each owned 50% of the shares of 974038 Alberta Ltd.

10 From April through December of 2002, 974038 acquired equipment that was capable of producing the same CCO that forms the bulk of Indutech's business.

11 On November 25, 2002, Mr. Kossowan incorporated Cladtech Canada Inc. ("Cladtech"), a company wholly owned by Mr. Kossowan. Cladtech was incorporated in order to lease the CCO equipment acquired by 974038.

12 On March 17, 2003, Mr. Kossowan and Guy Gibbs incorporated 1036795 Alberta Ltd. ("1036795"). 974038 then transferred all of its assets to 1036795, specifically, the machines to be used to manufacture CCO spools. Kossowan Holdings Inc. ("Kossowan Holdings"), a corporation controlled by Mr. Kossowan, owned 50% of the shares of 1036795 and held the other 50% of the shares in trust for and on behalf of 724192 Alberta Ltd. ("724192"). 724192 is a holding company whose sole director and shareholder is Guy Gibbs and which owns all of the shares of BGS and GPD.

13 On December 8, 2003, 1036795 entered into an equipment operating agreement with Cladtech that essentially provided for the lease of the CCO manufacturing equipment to Cladtech in perpetuity. Cladtech began operations in July of 2003 as a direct competitor to Indutech in the manufacture of CCO spools.

14 A chart illustrating the various defendants and their inter-relationship is attached as Appendix A to these reasons. In 2007, 1036795 sold all of the CCO machines for approximately $1.5 million.

A summary of the damages claimed by Indutech, the causes of which will be explained in more detail later in these reasons, is as follows:

	Category of Claim	**Commissions/ Gross Margins**	**Damages**
1.	Repayment of 4% commission paid by Indutech to GPD	$864,999.40	
2.	Profits wrongfully earned by the Gibbs Group from the supply of bulk welding wire	$309,554.00	
3.	Profits wrongfully earned by the Gibbs Group for mark-ups in excess of 5%	$286,337.00	
4.	Profits that Indutech would have earned on diverted work, excluding the Millenium Project	$335,527.00	$530,289.00
5.	Millenium Project - 2000 (a) Fees and profits wrongfully earned by the Gibbs Group through purchase orders issued to it by Millenium Construction Contractors (b) Commissions wrongfully earned by the Gibbs Group for work diverted to Triten/Bendtec (c) Profits Indutech would have earned on Sales Order 50-418 for 24 spools at a value calculated as follows $737,194.00 - 22,116.00 (3% BGS Commission) $715,078.00 $257,428.00 Net Profit to Indutech @ 36%	$292,876.00 $273,848.60	$257,428.00
6.	Loss of 2004 revenue from MSI (Suncor) re: termination of BGS as Agent: $150,000.00 loss in sales $54,000.00 net profit to Indutech @ 36%		$ 54,000.00
7.	Profits Indutech would have earned on work diverted to Cladtech (a subset of the BGS diversions)		$ 39,462.84
8.	Punitive Damages		$150,000.00

15 GPD filed a counterclaim and alleges that it is owed commissions pursuant to the 2002 Agency Agreement that Indutech has failed to pay.

Indutech's Business

16 Derek Wolstenholme, the President of Indutech, testified that Indutech was incorporated in 1986 and that he acquired the company in 1990. He has forty years of experience in the specialized steel business. Mr. Wolstenholme is the sole shareholder of Indutech and directs and controls the business. All departments report to him. He described his management style as "hands-on" and said he was involved in all parts of the business, particularly pricing and productivity.

17 Mr. Wolstenholme testified that Indutech started to become seriously involved in manufacturing CCO products for the oilsands in 1992 and 1993, although he started to procure the appropriate machinery when he acquired the company in 1990. He testified extensively about Indutech's development in this area and its current capabilities. The following is a summary of the testimony given on behalf of Indutech by Mr. Wolstenholme, the Vice President of Finance and Operations Jenny McGowan, the Sales Manager Brent Olsen and, the Quality Assurance Manager Colin Cann (collectively, the "Indutech in-house witnesses"), all of which I accept as credible and accurate except where specifically stated otherwise.

18 Indutech's shop floor is about 35,000 square feet and includes facilities for fabrication. The Indutech workforce was fairly stable between 2000 and 2004, with approximately 20 shop employees. All of these employees are cross-trained in different disciplines and are capable of working both the CCO machines and the induction benders. Indutech also has additional employees in management, finance and administration.

19 Indutech is capable of working with pipe of 4" to 36" in diameter, although about 70% of the product ordered by oilsands customers is 28" or 30" pipe.

20 Indutech is unique in that it is the only company in Canada with an integrated facility that includes induction bending, CCO and fabrication. There is some difference of opinion with respect to Indutech's capabilities in fabrication and its history of undertaking work in that area, which will be described later in these reasons. Because it is fully-integrated, Indutech avoids using subcontractors where possible for the dual reasons of quality control and maximization of profit.

21 Between 2000 and 2004, Indutech had the only machine in Canada capable of producing induction bends. Indutech had an additional induction bending machine in storage during this time that it did not use. Indutech generally operated the induction bender five to six days per week between 2000 and 2004.

22 In 2000, Indutech had two machines capable of applying CCO to straight pipe (CCO spools), one of which was equipped with two welding heads in order to increase production. There were

also four elbow machines in operation at that time, increasing to six by 2006, some with multiple heads.

23 In commenting on Indutech's overall production capacity, Allan Nelson, an expert in production capacity issues who testified for Indutech at trial, made the following comments in his report:

> Indutech has demonstrated over the years that it has increased its manufacturing capacity with the installation of additional plant machinery and improvements to existing machines. As market demand dictates, utilization of existing machinery is increased up to the point where any machine in the plant can be operating 24 hours a day, 7 days a week, in order to meet demand. If this demand is short-term, Indutech will increase overtime and schedule shifts to meet the demand with existing machinery. If market conditions show that demand is likely to be sustained over the long term, Indutech will adjust shift hours, as required, and install upgrades to improve existing machines, and, as required, install additional machines to increase total plant capacity. A clear illustration of this practice is shown by the productivity of induction bending and the chronological progression of installed CCO welding capacity, as previously discussed.
>
> The increase in production is also aided by the fact that Indutech is ISO 9000-2001 certified; therefore, each process is fully documented and efficient. The cross-training of personnel allows added flexibility to the production process and increases plant productivity. The manufacturing and scheduling system employed by Indutech further allows it to quickly respond to market demand by temporarily increasing plant utilization, and then sustainably increasing their overall capacity as long-term market conditions require.

24 Between 2000 and 2004, approximately 70% of Indutech's sales was attributable to induction bends, CCO spools and CCO bends. Of these sales, approximately 90% was sold to oilsands customers pursuant to the Agency Agreements.

25 Since 1999, Indutech's primary customers have been Syncrude, Suncor, Albian Sands, and, since 2005, CNRL. Indutech has been the major supplier to many of the large projects in the oilsands, including Suncor's Millenium Project in 2000, Syncrude's Aurora Project in 2000 and 2001, Albian Sands' Muskeg River Project in 2001 to 2002, Syncrude's UE1 Project in 2003 to 2004, Syncrude's SWQRL Project in 2004 to 2005, and various CNRL projects from late 2006 to 2007.

26 Mr. Wolstenholme testified that, while there were three major suppliers of CCO spools to the oilsands, Indutech was the dominant supplier of CCO bends for Syncrude and a significant supplier for Suncor between 2000 and 2004.

27 Bid inquiries were directed to Indutech primarily through the Gibbs Group, although some customers sent inquiries directly to Indutech (including, at some point, Syncrude, which began dealing directly with Indutech at Syncrude's request). Inquiries came primarily via phone, fax or e-mail. The Gibbs Group defendants submit that the relationship between Indutech and the Gibbs Group was a "highly verbal culture", but I do not accept that characterization in so far as it

relates to bid inquiries. If an inquiry came via phone, Indutech's sales staff would normally follow-up with a fax or e-mail. The Indutech estimators would then quote on the bid inquiry. Mr. Wolstenholme and Ms. McGowan testified that they would have known if quotes were being given informally because of their level of involvement with the sales staff, and I accept this testimony. There will be further reference in these reasons to the allegations made by the Gibbs Group defendants with respect to an Indutech employee, John Gabel, in this regard.

28 The Indutech in-house witnesses testified that it was Indutech's policy to take as much work as possible and only rarely decline to quote. Indutech's policy was to adjust its capacity to meet demand. This was based on the understanding that not all jobs on which it bid were actually obtained, Indutech's shop load varied, projects were often delayed (which would result in a more distant delivery date being acceptable) and Indutech's competitors were often similarly unable to provide the product requested as quickly as requested. As a result, the sales staff was instructed to bid on every inquiry, regardless of Indutech's current capacity. This edict was clearly understood by all Indutech employees and, Indutech submits, by Guy Gibbs.

29 Mr. Olsen was the senior estimator at Indutech in the years 2000 and 2001 and is now the sales manager. As senior estimator, he had direct contact with customers and the BGS people. Mr. Olsen was one of a group of three or four estimators headed by Mr. Gabel who was at that time the sales manager.

30 Mr. Olsen testified that communication within the estimator group was very good. His primary contact at BGS was Mr. Lundquist but from time to time he also was in contact with Guy Gibbs.

31 Mr. Olsen testified that he was unaware of any occasion between 2000 and 2004 where Indutech declined to quote on a bid inquiry. Various factors, such as the availability of materials or work-in-progress, may have impacted the delivery time quoted, but would not affect the decision to quote. In the words of Mr. Olsen, if Indutech could build it, it would quote it. Mr. Olsen could not recall Indutech ever missing a deadline to submit a quote.

32 The only circumstances where Indutech would decline to bid on inquiries was where Indutech (a) couldn't meet the client's specifications; (b) couldn't come to an agreement with the client on a critical delivery date; or (c) didn't perform the type of work requested. Where Indutech declined to bid due to a failure to come to agreement on a critical delivery date, this would be discussed with Mr. Wolstenholme regardless of the size of the inquiry. I accept Mr. Olsen's testimony as credible and accurate.

33 Michael Gibbs, brother to Guy Gibbs and an employee of the Gibbs Group at the relevant time handled approximately one-third of the bid inquiries on behalf of BGS. He testified on examination for discovery that he could not recall any specific instance where Indutech indicated that it could not deliver product within a prescribed time frame. The Gibbs Group defendants submit otherwise and this is discussed later in these reasons.

34 All quotes provided by Indutech included a price, which would be based on market

conditions and delivery requirements (which dictated whether overtime was necessary). The price could also be affected by the size of the order, and in particular, the similarity of the pieces within a job, due to the impact on equipment set-up time. There was no price list for Indutech's products sold in the oilsands area. Indutech's prices were whatever the market could bear, and it relied solely on the Gibbs Group to provide it with feedback for pricing purposes.

35 Quotes provided by Indutech would also contain an estimated delivery date, based on a consideration of work-in-progress, receipt of the customer's purchase order, material availability and customer urgency. All estimated delivery dates were stated to be confirmed when the order was placed, given that Indutech's work-in-progress may have changed prior to the customer actually issuing the purchase order. If Indutech was unable to meet a previously quoted deadline when the purchase order was issued, the customer was advised and discussions would ensue.

36 In order to keep all managers apprised of work-in-progress and delivery dates, Indutech relied on its production meetings, which were attended by the sales manager, quality assurance manager, production supervisor, senior estimator, vice president and shipper/receiver. The production meetings were approximately one to one and a half hours long, and took place three times per week (or daily during peak times). These production meetings were described as being very effective and important by those Indutech employees who participated, other than by Mr. Holland, whose testimony will be discussed later in these reasons.

37 Various factors impacted Indutech's scheduling of the work, including when information was received from the customer, the availability of materials, the requirement from time to time of laboratory testing, the re-ranking of priorities of work by the customer (which was described by the Indutech witnesses as a frequent occurrence), changes in customer specifications, and the occasional requirement of customer approval of Indutech's manufacturing procedures. Indutech often had to adjust its scheduling in response to these external factors. Indutech employed the use of white boards that recorded Indutech's work-in-progress. These white boards would be manually revised as necessary in the production meetings to reflect changing circumstances. The Indutech in-house witnesses testified that the white boards were also of assistance in identifying bottlenecks, in which case Indutech's managers would add overtime or reassign shop employees.

38 The Indutech in-house witnesses also testified that Indutech occasionally had problems with deliveries for various reasons, many of which they said were beyond Indutech's control. However, they testified that late deliveries at no time caused any work to be removed from Indutech's facility. The defendants submit otherwise, and their allegations with respect to late deliveries are referred to elsewhere in these reasons.

39 According to the Indutech in-house witnesses, Indutech's induction bending machine had more capacity than was being used at all relevant times and was capable of producing additional bends in any given year. Mr. Wolstenholme testified that there was nothing to prevent Indutech from adding welding heads to its CCO machines and that this was done when needed to add to capacity. He noted that Indutech had more than enough capacity in terms of CCO work and could add to it, as it later did with the CNRL work.

40 Mr. Wolstenholme testified that between 2000 and 2004, Indutech was using 80 to 90% of its production capacity, meaning labour and fixed assets, with respect to CCO. His objective was to increase capacity as the need arose. Mr. Wolstenholme described this as a "cash conservation strategy", as he did not want unused excess capacity. In the short term, Indutech could increase its capacity by adjusting its work week to increase overtime work and, if necessary, could add a midnight shift. The defendants suggested that Indutech was complacent with respect to sales volume and the requirements of change, but that does not accord with Mr. Wolstenholme's evidence of careful, prudent adjustments to accommodate increased demand. It is noteworthy that in a fax from Guy Gibbs to John Gabel with respect to the negotiation of commission rates dated September 24, 2001, Mr. Gibbs states at one point that "you have asked me what we will do to increase sales for Indutech products". What follows is a recitation of steps that BGS will undertake to "keep [Indutech] the number one supplier to the Tar Sands". In the second half of 2000 during the time of the Millenium Project, Indutech worked some additional shifts, including approximately 45 - 55% of available weekends and a few midnight shifts. The Indutech in-house witnesses testified that Indutech had sufficient personnel to add a midnight shift and, if required, work 45 to 55% more weekend shifts than what was in fact worked during this period of time. This evidence was disputed.

Relationship Between Indutech and the Gibbs Group

41 The relationship between Indutech and the Gibbs Group began in 1988, before Mr. Wolstenholme acquired the company. At all times between 1988 and 2004, the Gibbs Group acted for Indutech as its sole representative and exclusive sales agent in the oilsands.

42 Mr. Wolstenholme met with Barry Gibbs, Guy Gibbs' father, in 1998 when he first started to become interested in the oilsands work. Mr. Wolstenholme testified that he knew that Barry Gibbs had experience and involvement with the oilsands. Later, Guy Gibbs became involved but, Mr. Wolstenholme insisted during negotiations on the Agency Agreements that Barry Gibbs be involved with Indutech. As described later, the Agency Agreements required the active involvement of Barry Gibbs in Indutech's sales activities.

43 Mr. Wolstenholme testified that there was always an understanding between Indutech and the Gibbs Group, although written agreements did not always exist or follow immediately one after the other. This was conceded by the Gibbs Group.

44 The Gibbs Group was required to provide all market information to Indutech, including information about customers, competitors and anticipated projects. Both Mr. Wolstenholme and Guy Gibbs stated that the Gibbs Group was Indutech's "eyes and ears in the tar sands". They also agreed that the Gibbs Group provided advice to Indutech, including what the market would bear in terms of pricing and scheduling for certain products. Under the terms of the Agency Agreements, the Gibbs Group was to liaise with both customers and the major engineering firms to ensure that Indutech was at the top of the bidding list of every procurement department. The Indutech in-house witnesses testified that it was clearly expected that the Gibbs Group would forward every inquiry to Indutech without exception.

45 The Gibbs Group had complete access to Indutech's facility. In the words of Mr. Wolstenholme, the Gibbs Group had the "run of the shop". There were no restrictions with respect to which Indutech employees the Gibbs Group were permitted to speak with: anyone at the Gibbs Group could speak with anyone at Indutech (including Mr. Wolstenholme) at any time. The Gibbs Group was regularly in touch with Ms. McGowan (daily or weekly) about various matters, as well as the Indutech estimators. Guy Gibbs even attended several of Indutech's production meetings.

46 The Indutech in-house witnesses testified that the Gibbs Group was entrusted with knowledge of various confidential matters critical to Indutech's business, including scheduling, pricing, product non-conformances, manufacturing difficulties and work that was the subject of an unsuccessful bid. Indutech discussed its future plans with the Gibbs Group. Barry Gibbs testified that he understood that he and the Gibbs Group had an obligation to act in Indutech's best interests.

47 There is little dispute from the evidence that both Indutech and the Gibbs Group were cognizant of the extremely close relationship between their respective companies. By way of example, Jim Nowakowski of JNE Welding, who was called as a witness by the Gibbs Group, testified that when he introduced himself to Jack Brownlee, a Gibbs Group employee, Mr. Brownlee described the Gibbs Group as the acting sales arm of Indutech.

48 Indutech initially dealt solely with BGS but at some point received notification that Indutech would also be dealing with GPD. BGS and GPD share the same office space.

49 The current sole director of BGS and GPD is Guy Gibbs. At all material times, Barry Gibbs was president of BGS, and from 2002 was a director of BGS. The employees of BGS and GPD act on behalf of both corporations as the need arises.

50 Mr. Wolstenholme testified that whether Indutech worked with BGS or GPD or both was not a cause for concern to Indutech, provided that both companies were acting in the best interests of Indutech. Mr. Wolstenholme, Mr. Olsen and Ms. McGowan testified that they made no distinction between BGS and GPD.

51 At a certain point in time, it became apparent to Indutech that the Gibbs Group was using GPD when acting for Indutech on a commission basis and BGS when acting in a buy/sell arrangement with Indutech.

The Agency Agreements

The 2000 Agency Agreement

52 The 2000 Agency Agreement was entered into between Indutech and GPD and all other related entities, such as but not limited to BGS, which collectively were defined as the "Agent". It

was executed on May 15, 2000 by Mr. Wolstenholme on behalf of Indutech and by Guy Gibbs on behalf of the Agent.

53 The 2000 Agency Agreement includes the following relevant terms (emphasized terms in bold):

> Indutech manufactures and/or supplies the Product (as hereinafter defined) and wishes to use the services of the Agent as its agent for the solicitation of orders for the Product into the Territory (as hereinafter defined) and the Agent is desirous of so acting, all on the following terms and conditions:
>
> ...
>
> 1. In this Agreement:
>
> 1.1 The "Territory" means:
>
> 1.1.1 Syncrude operations Fort McMurray
>
> Suncor operations Fort McMurray
>
> a) The City of Fort McMurray; b) a circle having a radius of 200 mile radius from the centre of Fort McMurray, Alberta
>
> 1.2 The "Product" means:
>
> 1.2.1 Naspipe - hardened straight pipe
>
> 1.2.2 Naspipe - hardened bends and hardened fabricated fittings
>
> 1.2.3 Indulay - chrome carbide overlay products
>
> 1.2.4 Induction Bends (excluding bends used for gas and oil extraction and transmission)
>
> 2. **Indutech hereby appoints the Agent as its representative** in respect of Product categories set out above in Paragraph 1.2.
>
> 3. It is the intention of the parties hereto that the Agent shall represent Indutech to customers or potential customers in the Territory. To give effect to this intention:
>
> 3.1 **The Agent shall refer all enquires or purchase orders received** from customers or potential customers in the Territory set out in Paragraph 1.1 to Indutech. (see 2)
>
> 3.2 Indutech shall at its own option issue to such customers or would be customers all quotations in respect of such orders or inquiries. Any change to these quotations must have Indutech's full agreement.
>
> 4. During this Agreement:

4.1 **The Agent will keep Indutech informed as to the nature and extent of its sales activities and will promote, exploit and diligently seek orders to Indutech's satisfaction,** throughout the Territory as set out in paragraph 1.1. The Agent will also provide information as may be reasonably required by Indutech to have an up to date appreciation of the market situation for the Products in the Territory as set out in paragraphs 1.1 and 1.2.

This Agreement is non-transferable. **The Agent shall not:**

4.2.2 **Solicit or sell Products outside the Territory as set out in the Agreement.**

4.2.3 **Engage** otherwise than pursuant to this Agreement **directly or indirectly in, the sale of Products in the Territory (para. 1.1) that will compete or is likely to compete with the Products as defined in para. 1.2.**

4.2.4 **If Indutech receives an enquiry and is unable to produce the Product** at Indutech's facility, engage an approved subcontractor to produce the Product or produce the Product by using Indutech's workforce **then the Agent can seek, with Indutech's agreement, alternate sources for that enquiry.** No commission will be due and payable to Indutech.

4.2.5 If the Agent is required to solicit another supplier to supply Product that Indutech can supply, providing para. 4.2.4 does not apply, then Indutech would receive a commission similar to what the Agent would normally have been paid by Indutech. The commission amount will be agreed to in advance by Indutech and the Agent.

4.3 **The Agent will not engage directly or indirectly in any activities that would be detrimental to Indutech's sales volume, sales potential, sales margins or its competitive position. Examples are, but not limited to, the following:**

4.3.1 **Proactively communicate with a direct competitor** or a company considering being a competitor to Indutech on replacements for the Products covered by this Agreement.

4.3.2 **Seek alternative sources for the Products covered by this Agreement. The exception is Triten Corporation for the production of straight overlayed pipe and segmented overlayed bends providing the straight overlayed pipe and segmented overlayed bends are manufactured and supplied directly by Triten Houston and not through the Captain [sic] Welding Technologies location in Calgary, Alberta. (see Appendix B)**

4.3.3 **Supply to any party or individual**, excluding those parties or individuals which are already customers of the Agent, or anyone considering being a competitor to Indutech, **any welding wire that can be used in the manufacture of Products covered by this Agreement**. Should the Agent determine that he is capable to supply welding wire to any party or individual, then the Agent will disclose this consideration to Indutech. Indutech will determine whether this arrangement is damaging to Indutech or in breach of this Agreement. **The Agent will, prior to the date of execution of this Agreement, provide a list of those parties which are being supplied with welding wire by the Agent.**

4.4 **All expenditures by the Agent in performing his obligations under this Agreement shall be to his own account.**

4.5 The Agent will fully investigate and keep Indutech fully informed of any complaints received from customers in the Territory as set out in para. 1.1 and provide such reports to Indutech.

4.6 **Barry Gibbs will be personally involved in the Agent's business operation and have a significant involvement in the direct selling activities associated with the Products as listed in para. 1.2.**

6. It is the intention that this Agreement shall run for a period of 2 years commencing July 1, 1999.

9. The Agent agrees:

...

9.2 Not to disclose any of the information used in the business operation of Indutech, specifically but not limited to any matters relating to: the design of its specialized equipment, details of its manufacturing procedures and processes, selling prices, costs, material chemistry, material, raw material sources, technical developments associated with any of Indutech's present and future products and services, at any time in the future to any current or potential competitor or third party, or use it at any time in the future to compete with Indutech in the design, manufacture, or sale of any of its specialized products and services.

54 The 2000 Agency Agreement expired by its terms on July 1, 2001, and the 2002 Agency Agreement was not executed until November 14, 2002, 16 1/2 months later. There is no dispute that the main reason for the delay in executing a formal replacement agreement was that the parties were negotiating the commission rate. It is also not disputed that the parties always understood that the prior agreement applied until the new contract was signed. This understanding was confirmed in a conversation between Mr. Wolstenholme and Guy Gibbs around the time the 2000 Agency Agreement would have expired.

55 During the period of time between the 2000 Agency Agreement and the 2002 Agency Agreement, there was no change in the manner in which Indutech and the Gibbs Group conducted business. The only difference was the commission rate. Barry Gibbs could not even recall any delay between the execution of the 2000 Agency Agreement and the 2002 Agency Agreement, and acknowledged that it was "business as usual".

The 2002 Agency Agreement

56 The 2002 Agency Agreement is identical in many respects to the 2000 Agency Agreement, with, however, the following notable changes:

1. A new clause was added at 3.3 as follows:

3.3 The Agent will endeavour to improve its representation to all clients in the territory.

Appendix A furnishes the basis of the selling and representational arrangements and should wherever possible be improved and developed by the Agent and Indutech.

2. Clause 3.3 of the 2000 Agency Agreement was renumbered 3.4, and revised as follows:

3.4 Commissions:

Commission will be 4% on all products outlined in Paragraph 1.2, based on purchase order value.

The commission relates to Product price only and excludes engineering design/consulting, freight, tax, duty, storage, external coating, and any other such non-product costs. For clarification, commission will be paid on hydro testing.

3. Clause 4 was substantially the same as in the 2000 Agency Agreement, but is repeated with slightly changed language:

4.3 **The Agent will not engage directly or indirectly in any activities that would be detrimental to Indutech's sales volume, sales potential, sales margins or its competitive position. Examples are, but not limited to, the following:**

4.3.3 **Supply to any party or individual,** or any one considering being a competitor to Indutech, **any bulk welding wire that can be used in the manufacture of Products covered in this Agreement.** Should the Agent determine that he is capable of supplying welding wire to any party or individual, the Agent will disclose this consideration to Indutech. Indutech will determine whether this arrangement is damaging to Indutech and in breach of this Agreement.

Bulk wire is defined as wire that is used for the major internal overlayed portion of the product but excludes face welding and repair wire.

...

4.5 **If the Agent, as a result of the direction of the user or intermediary,** has to place orders direct on Indutech for the product covered by this Agreement, the Agent will communicate all the details of the product quantities involved to Indutech. **The Agent will always give Indutech the opportunity to bid on all of the work involved.** To give weight to this arrangement, Indutech will always be the preferred supplier and, wherever possible, the exclusive supplier.

The normal practice of bidding such work is that Indutech will bid to the Agent less the applicable commission. The Agent, in turn, will mark up 5% in its bid to the customer.

4.6 **All expenditures by the Agent in performing his obligations hereunder shall be for his own account.**

4.9 Each party hereto undertakes to notify the other party forthwith in writing of the existence of a breach or alleged breach hereunder by that other party. The offending party shall have the **opportunity** where applicable **to remedy the said breach to the satisfaction of the other party within fourteen days of such notice being issued.**

> **Failing to do so the offended or first party shall be entitled to treat this Agreement as terminated at the date the breach was notified**. Termination of the Agreement through breach hereunder shall not absolve the party so breaking the Agreement from any liability thereby arising hereunder.

57 The 2002 Agency Agreement was executed on November 14, 2002 by Mr. Wolstenholme on behalf of Indutech and Barry Gibbs on behalf of the Gibbs Group. Mr. Wolstenholme testified that Guy Gibbs was also present.

58 According to Mr. Wolstenholme, the Gibbs Group at some point prior to the execution of the 2002 Agency Agreement represented to Indutech that it sometimes had situations where the Gibbs Group was selling a package of products, some of which Indutech did not have the ability to produce, and that it was thus required to sell the products directly or would risk losing the job. Specifically, the Gibbs Group suggested that Syncrude wanted to deal with BGS on a buy/sell basis, (a representation that Mr. Wolstenholme later determined to be false). The 2002 Agency Agreement thus included para. 4.5 dealing with these "buy-sell arrangements", which indicated that Indutech would bid to the Agent less the applicable commission and that the Agent would mark-up its bid to the customer by 5%. Mr. Wolstenholme testified that he insisted on the inclusion of this clause because he was concerned about and wanted to control the price for Indutech's product in the marketplace. His goal was to optimize profit within Indutech.

59 All of the Indutech in-house witnesses gave their evidence clearly, honestly and without hesitation. They were credible, well prepared and unshaken by cross-examination.

60 In 2003, Jack Brownlee, a Gibbs Group employee, advised Mr. Wolstenholme that the Gibbs Group was contracting with Indutech's competitors. This was a surprise to Indutech. The Indutech in-house witnesses indicated that Indutech had no knowledge that the Gibbs Group was presenting options to customers in terms of obtaining multiple quotes. Initially, Mr. Wolstenholme did not believe Mr. Brownlee, but later he confronted Guy Gibbs, who denied breaching the Agency Agreements.

61 When Indutech developed a further understanding of the activities of the Gibbs Group, it terminated the relationship on June 11, 2004 by filing and serving the Statement of Claim in this action.

The Millenium Project

62 The uncontroverted facts with respect to the Millenium Project are as follows. Suncor in 1999 began planning construction of a bitumen production facility in Fort McMurray, Alberta. The project was known throughout the industry as the Millenium Project.

63 Suncor retained the engineering firms of SNC-Lavalin Inc; and Bantrel Inc; with respect to the design of the extraction plant. Suncor also appointed an agent, Millenium Construction Contractors ("MCC") to organize, procure and coordinate the supply of all labour, materials,

equipment and services for the design and construction of the plant. MCC was comprised of a consortium of firms including Bantrel Inc. SNC-Lavalin Inc. and Suncor.

64 The Millenium Project commenced in August of 1999 with preliminary design and engineering work and was finalized sometime shortly after May of 2001.

65 In about April, 2000, SNC-Lavalin asked Indutech to provide pricing for budgetary purposes for the project. Indutech did so and copied its budget pricing to BGS. In April 2000, MCC entered into an agreement with BGS whereby BGS was put in charge of issuing purchase orders with respect to CCO spools, induction bends and straight pipe for the Project. Indutech received only a portion of the overall work on the Project.

66 The alleged breaches of the Agency Agreement with respect to the Millenium Project are described in detail later in these reasons. In summary, Indutech alleges that the Gibbs Group ignored its obligations to Indutech under the 2000 Agency Agreement (executed on May 14, 2000) while acting for MCC, particularly with respect to referring all inquiries to Indutech, keeping Indutech informed as to the extent of the agent's sales activities, engaging in activities detrimental to Indutech's sales volume and competitive position, proactively communicating with competitors and seeking alternative sources for the products covered by the Agency Agreement.

Expert Witnesses

Allan Nelson

67 Allan R. Nelson, P. Eng. was called as an expert witness by Indutech to give opinion evidence in the field of general metal fabrication, welding and automatic welding, plant production and plant production capacity.

68 Mr. Nelson has about 58 years of experience as a professional engineer. Since 1966, he has been a consultant specializing in machine design and insurance investigations with respect to manufacturing, gas, oil and petro-chemical plants. He has extensive experience in the oilsands industry and he has designed machinery for a wide range of industries. While the Gibb's Group did not contest his qualifications, Mr. Nelson was cross-examined on his experience with respect to capacity assessment and with a company like Indutech. Mr. Nelson testified that he had been consulting with respect to plant capacity for about 40 years, including with respect to production problems. About 40% of those consultations were with respect to industries that included welding. He stated that, while Indutech was a specific kind of industry, the analysis of production capacity was essentially the same for other industries. He advised that he had familiarized himself with Indutech's process and that he was very familiar with the process of automatic welding and hard-surface cladding. I found Mr. Nelson qualified to give opinion evidence in the fields in which he was sought to be qualified.

69 Mr. Nelson was asked to assess the manufacturing production capacity of Indutech from 2000 to 2006, and to comment on whether or not Indutech had the capacity necessary to have handled an increase in work during the period 2000 to 2004.

70 In addition to reviewing and viewing the manufacturing process, Mr. Nelson attended a production meeting at Indutech. He was complimentary about Indutech's white-board system, which he felt worked well. Mr. Nelson also viewed the fabrication facilities at Indutech.

71 In his report, Mr. Nelson noted that the white board system established a series of mile-posts used to chart the progress of customer orders and to integrate all of the orders into production. It enabled contracted work to be separated into various functions, such as bending, chromium carbide overlay, and fabrication. This, he noted, establishes the workload in each of the areas of production based on delivery dates and allow Indutech to accommodate changes to previously issued customer designs. It also allows the schedulers to group production by sizes, etc. to maximize manufacturing efficiencies. Mr. Nelson noted that the cross-training of personnel further allows Indutech to reorganize production to address changing work loads.

72 Mr. Nelson stated that his approach in assessing capacity was to look at Indutech's production over a number of years. He reviewed Indutech's ability to vary production by using a number of machines to deal with changing circumstances or accommodate additional work.

73 In order to assess Indutech's induction bending capacity, Mr. Nelson referred in particular to the 2001 year, which represented the company's largest output, and used this year as a baseline for comparison to previous and subsequent years. He then took the output of the primary operator of the bending machine for the year, being 1,369 bends, which equates to 0.494 bends per hour on average. Mr. Nelson was of the opinion that this rate of 0.494 bends per hour should be indicative of the typical bending capacity of Indutech, recognizing that there will be some variance depending on the angle and diameter of a particular bend.

74 Mr. Nelson calculated from the shift and payroll data of Indutech the bend operator hours for the two other part-time operators of the bending machine, using the primary operator's rate of production to come up with a total number of bend operator hours, and then calculated the total number of bends produced in the year 2001, being 2,493. Mr. Nelson conceded that the developed length of the pipe was a variable that could not be compared directly, but stated that one could reasonably expect the same type of variation in developed length from year to year.

75 Mr. Nelson then used the 2001 bend production figure as a comparison with overall production in other years, and concluded that there was no reason why Indutech could not have produced the same number of bends in any other year.

76 Mr. Nelson noted that hours of work at Indutech could conceivably vary from a minimum of 40 hours per week over 50 weeks for 2,000 hours in a year based on a single shift of 8 hours per day to a maximum of approximately 140 hours/week or 7,000 hours per year, based on two 10 hour shifts working 7 days per week. He also noted that, with a small increase in infrastructure, the second induction bender owned by Indutech could be placed in service. Mr. Nelson conceded that, if the second bender was put in service, this may require additional shop space.

77 He was of the opinion that, since in 2001 approximately 5,048 hours were utilized to produce 2,493 bends, a further increase in production would be attainable if more hours were involved on the bending machine.

78 Using this methodology, Mr. Nelson compared bend machine production and utilization for the years 2000 to 2006, using 2001 as the benchmark year of production. He concluded that Indutech could have significantly increased its output in years 2000 and 2002 to 2006 and met the production capacity of 2001.

79 Mr. Nelson also received and assessed Indutech's equipment and technical advances in machinery for the CCO process, and noted Indutech's history of converting existing machinery and adding new machinery to increase output.

80 Mr. Nelson commented in his report that, similar to improvements in CCO processes for straight pipe, Indutech's continuous innovation in equipment and processes has resulted in ongoing increases to CCO capacity for elbows and bends, with very little increase in infrastructure and overhead costs, and no increase in plant footprint.

81 He also noted that, over the years, Indutech added equipment and modified existing machines to meet customer requirements and increase production capacity.

82 Mr. Nelson then assessed Indutech's capacity for CCO welding. He noted that there are two main mechanical factors that determine CCO production capacity. The first is the number of machines installed. Mr. Nelson stated that this is determined primarily by plant space available for CCO operations and the CCO demand. Mr. Nelson stated in his report that the amount of plant space dedicated to CCO, as with the space dedicated to all other operations in the plant, is evaluated and adjusted by Indutech over the long term, based on orders and market conditions. He was of the opinion that availability of labour for CCO operations was generally not a limiting factor in CCO production capacity, because of Indutech's practice of cross-training employees.

83 Mr. Nelson's second mechanical factor in assessing CCO production capacity was the number of welding heads per machine, since production capacity per machine increases with the number of weld heads. He noted that over the years, Indutech had upgraded two machines to have multiple heads, and that others could also have been converted as required by production demands, which he testified was not significantly difficult.

84 Mr. Nelson was of the opinion that Indutech's total CCO production capacity at any point in time can be assessed based on data discussed with Indutech's personnel for CCO machines, and the characteristics and number of heads of each machine in operation. Data he used for his analysis included the total weld time, known as "arc hours", or each machine configuration welding the same, and the known size of pipe spool or bend. One arc hour is one hour of time while the arc is struck on a welding machine. It only accounts for the actual time welding and does not include setup time before and after welding, or time spent while the welding head is

travelling back to the start position. Therefore, the data compares only the baseline capacities of machines set up with varying numbers of heads.

85 Mr. Nelson testified that he used deposit rates (arc hours) because that represents the process that is being conducted at the Indutech plant and is a measure of productivity of a machine plant. He also felt it was an appropriate measure as it was independent of whether the pipe being processed was straight or elbow.

86 Mr. Nelson took data with respect to arc hours and deposit rates on each of Indutech's machines, using a 30" pipe, 141 inches in length and a double pass of CCO, as being typical of the diameter of pipe used in the oilsands. He also used comparable information for the elbow welding machines. Using this data, he measured total plant CCO capacity for all of the plant's machines from 2000 to 2006. This capacity was measured in square metres of deposit per arc hour (m^2/arc hr.) From this, Mr. Nelson determined theoretical plant capacity for the same period of time assuming the conversion of all straight welding machines operational in those years to multiple heads.

87 The resulting table indicates that Indutech had considerable excess capacity throughout the years 2000 - 2006, if it had reconfigured existing machines to meet production demand.

88 Mr. Nelson noted that, since Indutech had a multiple-head machine operating in 2000, it was reasonable to infer that Indutech possessed the technology and expertise to institute any or all of the preceding increases to CCO capacity at any time after 2000, had it been aware of market demand for such capacity. He noted that the machine conversions could be achieved within two to three months of notification of the need for more capacity.

89 Mr. Nelson in his report indicated that, while CCO deposit rates may vary if a more sophisticated and comprehensive time study was performed, the work that he had done illustrates that significant efficiencies can be achieved by increasing the number of welding heads, and that Indutech had the ability to increase manpower in any year to meet production requirements. He noted that arc hours represented a verifiable number and that other factors he may arguably have taken into account were all highly variable.

90 The Gibbs Group criticize Mr. Nelson's opinion that Indutech could have made technical improvements as theoretical. Mr. Nelson based this opinion on Indutech's history of adding welding heads to machines to improve productivity, and his assumption in that regard has a basis in fact.

91 The Gibbs Group also alleges that tear down and set up time, maintenance, breakdown, operator error and manpower challenges, which it submits that Mr. Nelson did not take into account, would reduce any calculation of production capacity. This ignores the fact that Mr. Nelson's calculations were based on production data from a specific year, which implies that these kinds of factors would have occurred during the time of analysis. At any rate, Mr. Nelson's opinion was that, by adding welding heads, machines and shifts, Indutech was able to more than double its original capacity for CCO manufacture.

92 If this excess capacity is reduced for purposes of contingencies by even as much as 25%, there would still be significant excess capacity. It is noteworthy that Mr. Lundquist, a Gibbs Group employee who was very involved with Indutech, acknowledged that Indutech's machines ran well.

93 The Gibbs Group in their arguments with respect to production capacity mischaracterize Mr. Wolstenholme's evidence with respect to both his theory of expansion and Indutech's concern for delivery dates. The Gibbs Group defendants also criticize Mr. Nelson for not attempting to evaluate capacity at the particular place and time that the Millenium Project was occurring, with information as to what was actually happening in Indutech's plant at the time. While Indutech has records of sales orders, shift records and payroll records, it did not keep the kind of records that would allow a capacity analysis on a daily or weekly basis. The white board information was constantly in flux and was not preserved, and the analysis would be dependent on a number of factors that would make a real time analysis extremely difficult and expensive.

94 The Cladtech defendants also submit that the Nelson report is flawed because it is based merely on a single production factor. As Mr. Nelson pointed out, deposit of CCO on pipe is Indutech's essential business, and I accept that it is a reasonable and verifiable measure of productivity. As he also pointed out, even though Indutech's sales records were available, as were shift records, too many variables existed for him to do a real time study of the production process. There is no persuasive evidence to suggest that such a process would produce results that would cast doubt on the arc-hour analysis.

95 The Cladtech defendants submit that I should prefer the evidence of Ms. Kohlsmith, Mr. Nowakowski, Mr. Holland and Mr. Dunphy with respect to Indutech's production capacity. The weaknesses of the evidence of these witnesses will be addressed later in these reasons.

96 I do not accept Ms. Kohlsmith's evidence as being credible and Mr. Holland's evidence was suspect. As noted by Indutech, Mr. Dunphy acknowledged on cross-examination that he could not comment on whether or not Indutech met its delivery dates on the Millenium Project. Mr. Nowakowski confirmed that on the one job on which he had dealt directly with Indutech, a design change impacted delivery time. I do not accept that the evidence establishes that Indutech was "always full" as alleged by the Kossowan defendants.

97 The Cladtech defendants submit that payroll evidence indicates that there was little or no ability for Indutech to increase productivity through additional hours. To the contrary, a careful review of that evidence indicates a capacity for additional overtime and a stable, cross-trained labour force.

98 The Cladtech defendants also made arguments with respect to equipment placement based on Indutech's financial statements. These arguments do not survive analysis or scrutiny and ignore the evidence.

99 Indutech's revenues post-2004, particularly in the years 2006 and 2007 when it had had the

opportunity to recover from its loss of a sales agent, show a substantial increase, which supports Mr. Nelson's opinion.

Kevin Copeland

100 Kevin M. Copeland, CA*IFA, CIP, was called by Indutech to give expert opinion evidence in the fields of investigative and forensic accounting, business interruption and earnings losses.

101 Mr. Copeland obtained a specialist designation in investigative and forensic accounting (CA*IFA) from the Canadian Institute of Chartered Accountants in 2000. He has focused his accounting career in loss measurement for insurance and litigation purposes since 1992, and is the partner in charge of the Calgary office of LBC International. Mr. Copeland testified that he had performed about 600 assessments over the seventeen years of his career, with about 50 being in general manufacturing.

102 Mr. Copeland gave his opinion with respect to the quantum of financial benefits allegedly unlawfully obtained by some of the defendants and the quantum of lost profits allegedly suffered by Indutech.

103 In his report of May 22, 2009, Mr. Copeland stated based upon the information and documents reviewed, the explanations provided to him, and subject to certain assumptions noted in that opinion that:

a. the financial benefit unlawfully obtained by the Gibbs Group as a result of alleged breach of contractual and fiduciary duties amounted to approximately $2,610,000 and of this amount approximately $68,472 specifically related to the diversion of sales to Cladtech;

b. the lost profits suffered by Indutech as a result of alleged breach of contractual and fiduciary duties by the Gibbs Group amounted to approximately $2,120,000 and of this amount approximately $177,728 specifically related to the diversion of sales to Cladtech.

104 Mr. Copeland opined that the profits earned by the Gibbs Group through alleged breaches of the Agency Agreements were as follows as of the date of his report:

Accounting for Profits

Commissions paid to GPD by Indutech	$	718,156
Mark-ups greater than 5%	$	328,516
Sale of Bulk Welding Wire	$	279,554
Diverted Sales, including to Cladtech	$	440,880
Diverted Sales - Millenium Project	$	533,361
Extra Commissions on Diverted Sales - Millenium Project	$	289,439

Total	$	2,609,906

105 He found that Indutech made the following commission payments to the Gibbs Group between January 2000 and June 2004:

Amount

January 2000 to November 2002 inclusive	$	423,512
December 2002 to June 2004 inclusive	$	294,644
Commissions paid January 2000 to June 2004 inclusive	$	718,156

106 Indutech's loss of profit for the period in question was broken down as follows in the report:

Loss of Profit to Indutech

Diverted Sales, including to Cladtech	$	823,970
Diverted Sales - Millenium Project	$	1,291,819
Total	$	2,115,789

107 Mr. Copeland's calculation of loss of profit was based on the assumption that Indutech would have been able to obtain the contracts for and complete all jobs identified as diverted sales and diverted sales specifically related to Suncor's Millenium Project.

108 He stated that the assumption that Indutech could have obtained the contracts for the diverted sales appeared reasonable because BGS was able to secure all of these contracts for third parties and presumably could have done so for Indutech. He noted that if some contracts could not have been obtained by Indutech the loss of profit would be reduced accordingly.

109 Mr. Copeland noted that the assumption that all the jobs could have been completed by

Indutech was supported by the report prepared by Mr. Nelson, and commented that, should it be determined that any of the diverted jobs could not have been completed by Indutech due to capacity issues, the loss of profit would be reduced accordingly.

110 With respect to diverted sales, Mr. Copeland assumed that there would be a 5% mark-up in the total diverted sales and that Indutech's marginal costs (including cost of sales, both material and labour, associated plant costs and related selling costs) would be 64%, giving a 36% profit margin, which Mr. Copeland testified was conservative and reasonable.

111 With respect to the Millenium Project, Mr. Copeland relied on Indutech's advice as to the capacity it believed it had to produce additional beds, being an increase of 301 over the 68 actually produced, and additional straight spool pieces, being 426 spools. Mr. Copeland again factored in the 5% mark-up and deducted marginal costs.

112 Mr. Copeland did not attempt to quantify any loss of revenue to Indutech as a result of Indutech not having an agent for sales in Fort McMurray after the 2002 Agency Agreement was terminated in June of 2004.

113 After reviewing a rebuttal report prepared by an expert witness retained by the Gibbs Group, Gordon Smith, Mr. Copeland issued a responding rebuttal report. While disagreeing with Mr. Smith's report in the main, Mr. Copeland accepted the following small number of corrections: a revised estimate of financial benefits obtained by the Gibbs Group (accounting for profits) resulting from the alleged breach of contractual and fiduciary duties to $2,540,000; and a small change to his loss of profits calculation to Indutech to $2,090,00.

114 Mr. Copeland admitted that he relied on schedules and summaries of alleged breaches prepared by Indutech, although he reviewed the supporting documents provided for these schedules. He testified that he did so because Indutech understood its business much better than he could. He said he was satisfied with the methodology he used, taking revenue less basic costs and other expenses, as it made sense.

115 Mr. Copeland conceded that he assumed that all orders that had not gone to Indutech would have gone to it, and that he had not performed a marketplace analysis to test the validity of this assumption. He commented that he did not think that that kind of analysis would have helped in this case. He also noted that, while he did not factor in Indutech's general success rate in obtaining work from quotes, his analysis was done in the context of bid inquiries that the Gibbs Group had actually been able to obtain for quote.

116 Mr. Copeland also conceded that he did not take into account general and administrative costs, testifying that, in his view, they were not relevant to his analysis as these costs were not incremental to additional sales by Indutech. Mr. Copeland pointed out that general and administrative costs would not be impacted one way or another by the addition of revenue. He conceded that warranty work may have a slight impact, but said that in his view, looking at historical trends, this number would be very low.

117 Indutech, after the evidence at trial had been presented, amended its original schedules of loss and damage (on which Mr. Copeland had relied) and issued a revised spreadsheet of damages based on the testimony of all of the witnesses.

118 Mr. Copeland did not hold himself out as preparing the schedules and alleged summaries of breaches he relied upon in his initial report, freely conceding that he relied upon Indutech's employees in that regard. What he did, however, was to apply a 36% profit margin to this information. Mr. Copeland reviewed costs disclosed in five years of Indutech's financial statements, from October 31, 2000 to October 30, 2004, to determine the figure of 64% in marginal costs and 36% in profit margin.

119 Mr. Copeland was cross-examined extensively on the marginal costs he included and did not include to come to these figures, and his decisions with respect to these issues were reasonable, supportable and unshaken by the cross-examination or by the opinion of Mr. Smith. I accept Mr. Copeland's opinion with respect to the costs that should be taken into account in the determination of profit margin as being reasonable, sensible and based on discussions with Indutech.

120 Mr. Copeland also commented that the audited financial statements include all of Indutech's business, and thus do not reflect margins on specific products but noted that, since he understood from Indutech that margins on CCO and induction bends are larger than on naspipe products, the average profit margin of 36% is a conservative estimate of what Indutech would have earned in diverted sales. Mr. Copeland's determination of an appropriate profit margin percentage is based on his qualification as an expert with specialized knowledge and experience and is outside the expertise and experience of the trier of fact.

121 The schedules and summaries relied upon by Mr. Copeland in his report were painstakingly presented in evidence by Ms. McGowan and were the subject of extensive cross-examination and comment by Guy Gibbs in his evidence. That they were amended after all the evidence had been adduced is no reflection on the credibility of Ms. McGowan, but merely a result of the clarification of a number of matters by other witnesses and decisions made by Indutech on the categories of damages it intended to pursue after a full hearing of the evidence.

Gordon Smith

122 Gordon Smith, C.A., CBU, CMC was called by the Gibbs Group to give expert opinion evidence in the fields of forensic and investigative accounting and damages quantification. Mr. Smith heads up the Financial Advisory Services Group of the Edmonton office of Deloitte & Touche. He was asked to comment on Mr. Copeland's report, specifically to review the methodology of calculating the losses. Mr. Smith did not set out an alternative damages position.

123 Mr. Smith met with Guy Gibbs, who advised him of his concerns with the Copeland report. Mr. Smith testified that he approached Guy Gibbs' criticisms in a sceptical manner. Mr. Smith did

not review the whole of the underlying documentation, merely reviewing examples as he requested them from Mr. Gibbs.

124 Mr. Smith suggested that certain alleged losses did not occur within the period covered by the Agency Agreements. He was apparently not informed that the 2000 Agency Agreement was considered by the parties to have continued in force until it was replaced by the 2002 Agency Agreement. His criticism of the Copeland report in this respect was thus incorrect.

125 Mr. Smith also criticized the Copeland report for claiming losses relating to the 5% mark-up prior to November 14, 2002 when the 5% mark-up provision appeared in the second Agency Agreement. The total amount claimed with respect to a mark-up of more than 5% prior to November 14, 2002 is $11,244. On cross-examination Mr. Smith conceded that there were only three such mark-ups of any significance prior to the 2002 Agency Agreement. I have in any event accepted the submission that pre-2002 mark-ups of more than 5% should not be included in Indutech's claim for incidental damages.

126 Mr. Smith identified a duplication error which Mr. Copeland accepted and corrected in his second report.

127 Mr. Smith gave the opinion that the Copeland report wrongly included diverted sales for fabricated products that were unrelated to Indutech's products. Mr. Copeland and Indutech do not agree with Mr. Smith's interpretation of the Agency Agreements. The issue of fabrication is dealt with later in these reasons.

128 Mr. Smith suggested that Mr. Copeland was inconsistent in his loss assumptions, as he allowed the deduction of a 5% mark-up in certain calculations, but calculates a commission amount for disgorgement in others. I am satisfied that this relates to the type of claim for damages made, and is not an error.

129 Mr. Smith suggested arguments with respect to the sale of bulk welding wire that I did not find persuasive or sustainable. He also submitted that Mr. Copeland made certain "data errors", most of which Mr. Copeland disagreed with, and I accept Mr. Copeland's explanations of these calculations. Mr. Copeland did, however, accept Mr. Smith's comments with respect to an error in exchange rates and a missed job cancellation, and amended his report accordingly.

130 Mr. Smith purported to give an opinion on production capacity, which was not within his expertise.

131 Many of Mr. Smith's comments and criticisms of Mr. Copeland's report were discredited under cross-examination. His critique does not affect my acceptance of Mr. Copeland's 36% profit margin opinion or the methodology employed by Mr. Copeland in his report as a whole.

The Gibbs Group Witnesses

Gene Dunphy

132 Gene Dunphy, currently the Manager of Materials Procurement for Suncor at its Firebag oilsands project, was called by the Gibbs Group defendants. Mr. Dunphy was a buyer for the MCC joint venture in 2000 and became intensely involved in the Millenium Project.

133 Mr. Dunphy testified that he was called by his management in April, 2000, given several construction work packages involving CCO spools and told that they were needed on site in December of 2000. Mr. Dunphy's manager introduced him to Barry and Guy Gibbs, advising him that the Gibbs were interested in bidding on the project and that they "knew everything there was to know" about CCO. He was told that Barry Gibbs had been instrumental in developing a tool to overlay pipe, and that he and his company would be working with MCC, advising on where to place work.

134 Mr. Dunphy testified that the arrangement with BGS was "cost plus", and that BGS submitted monthly detailed invoices. MCC would submit purchase orders to BGS, which would in turn issue purchase orders to various companies. BGS would have to submit copies of these purchase orders to MCC to show the costs that were actually incurred.

135 Mr. Dunphy testified that MCC did not care where BGS placed the orders for work, as long as the supplier was on the Suncor approved list. MCC relied entirely on BGS to tell MCC which manufactures had capacity to do various aspects of the work. MCC also relied on BGS to follow up on and update MCC on delivery dates. The 2000 Agency Agreement was executed on May 15, 2000, about the time or shortly after BGS began to work on the Millenium Project.

136 Mr. Dunphy worked closely with BGS on this project, and clearly had a high regard for the work it did for MCC. He was in daily contact by telephone with Guy Gibbs and there were formal meetings once a week. Mr. Dunphy conceded, however, that his memory of events was somewhat vague after the passing of time.

137 Mr. Dunphy said that, while initially no one had a full idea of how much work was going to be involved, over time the working group realized that there was not enough capacity in the market place and that they would have to go elsewhere for product. MCC asked BGS whether they knew of other producers. The working group was told by MCC senior management to source new shops, and to help them to submit their qualifications for approval as suppliers. Mr. Dunphy confirmed that Barry Gibbs flew around the country, "finding new shops". Mr. Dunphy advised Guy Gibbs in an e-mail dated September 19, 2000, that MCC had received approval to utilize Capitan for CCO and would be seeking similar approval for Triten Corporation.

138 Mr. Dunphy was clearly under a great deal of pressure to get the work done. He testified that he was not aware of any other contractual commitments BGS had, other than the work for MCC.

139 Mr. Dunphy testified that he visited Indutech three or four times starting in July 2000, in the company of a SNC Lavalin representative and Guy Gibbs, to try to find out why orders were not arriving on time, to see what steps Indutech was taking to improve deliveries and to try to get a

detailed delivery schedule. He recalled meeting with Mr. Gabel and said he was sure he met with Ms. McGowan once or twice and was introduced to Mr. Wolstenholme once. Mr. Dunphy testified that he found the meetings frustrating, that he never did receive a detailed delivery schedule and that he was surprised at how Mr. Gabel treated them, as he was usually disgruntled and late for the meetings. Mr. Dunphy testified that the Indutech people said they would put on extra shifts but "from memory", he didn't think they did. Mr. Dunphy said that there were discussions at the working team level near the end of the Millenium Project about the possibility of removing work from Indutech and placing it elsewhere, but that, after examining this, they concluded that the project would suffer more from this and that deliveries would have gotten worse rather than better. He said that BGS advised them not to remove work from Indutech because there were no additional shops anywhere else.

140 Mr. Dunphy said that he wasn't sure if all of the work on the project came in on time, but that he really couldn't remember.

141 Mr. Dunphy testified that, in an effort to control costs, MCC decided to buy materials itself in bulk and ship the material to the vendors to be manufactured. He acknowledged that this sometimes caused problems and delay, and that sometimes vendors would eventually be told to buy the materials themselves. Mr. Dunphy also acknowledged that there were numerous revisions to the project over the summer and fall of 2000 that had the effect of delaying ability to produce the spools. He had no recollection at the time of trial about the number of spools manufactured by Indutech or the actual dates the spools were delivered to the site. He could not recall if he was notified in early September 2000 that Indutech was waiting for materials and drawings. Mr. Dunphy was referred to an email from Indutech's sales manager, Mr. Gabel, to Guy Gibbs dated September 8, 2000 in which Mr. Gabel advised that Indutech "urgently needs" materials and drawings on spools that it was working on, refers to previous requests for information on August 31, 2000, asks for confirmation of certain design details, and concludes as follows:

> Urgent We need a purchase order indicating the unit prices and spool requirements as quoted for above orders. I have been told that we require this by Monday September 11, 2000 latest or stoppage of work-in-progress will occur and consequent delays to these contracts.

142 Mr. Dunphy was also referred to a fax from another supplier to the Millenium Project, Almac, Wear Technologies Ltd., to BGS dated November 16, 2000 indicating that it would be late on delivery of spools because of equipment breakdown, but also because of loss of welders due to high demand in the industry and unavailability of welders for hire. He was referred to a letter from Bendtec in the United States dated September 7, 2000 indicating delays in commencement of production because Bendtec was unaware of additional specifications that had to be met. Mr. Dunphy indicated that typically he didn't expect to be involved in this level of detail and would rely on BGS to deal with these things.

143 Mr. Dunphy was also referred to an email from Capitan Overlay Technologies Inc. in Calgary dated October 30, 2000 indicating that, as a result of not receiving necessary material,

its work would be delayed. Mr. Dunphy conceded on cross-examination that there were in fact late deliveries on the project.

144 Mr. Dunphy was asked to review an exhibit setting out a summary of work completed by Indutech for the Millenium Project, and was asked if there was any reason to doubt the delivery dates set out in the exhibit. He agreed that there was not. The summary indicates that Indutech met all delivery dates stated in the purchase orders for the work it did.

145 Mr. Dunphy was a credible witness, but it was apparent that he held only overall impressions of the work done by Indutech on the Millenium Project. It was clear that he relied heavily on BGS and had a close working relationship with Guy Gibbs, and also clear that he appreciated the BGS work in helping him to meet the very tough deadlines imposed on the MCC working group. He was not impressed with Mr. Gabel's client relations skills and had formed a negative impression of Indutech. However, he was not aware of or had forgotten details of problems with respect to changes to specifications and material supply that plagued this project. I am satisfied from the evidence adduced by Indutech relating to its work on the Millenium Project that BGS successfully deflected responsibility for late deliveries, if they occurred on this project, to the suppliers, including Indutech. While Mr. Dunphy was credible and candid as a witness, his recollections must be viewed in this context. The issue in this litigation is not whether BGS did a good job for MCC, which apparently it did, but whether in the course of doing so and in the manner in which it did it, the Gibbs Group breached the Agency Agreements.

Barry Gibbs

146 Barry Gibbs testified that he met Mr. Wolstenholme when Mr. Wolstenholme first became involved with Indutech. While he acknowledged that he was spending a lot of time out of Alberta from about 1997 on, Barry Gibbs testified that he understood his role with Indutech was that, if Mr. Wolstenholme needed something, he would take care of it.

147 Mr. Gibbs, Sr. testified with great enthusiasm about his role for BGS in the Millenium Project. He said that he "filled up Indutech, filled up Triten", and from there, "went elsewhere to get the job done".

148 Mr. Gibbs, Sr. clearly used expertise acquired in part from his activities as agent for Indutech to promote BGS as expert in the area of CCO overlay and obtain substantial benefits for the Gibbs Group from its involvement with the Millenium Project. He testified freely about travelling to the United States to place orders with Cladding Technology Inc. ("Cladding U.S.") on the Millenium Project despite the terms of the Agency Agreement. He submitted that there were many times when the Indutech shop could not handle projects, but that these occasions were "totally agreed upon". His memory became hazy when he was asked if he was involved with the placement of contacts between 2000 and 2005. Mr. Gibbs, Sr. also professed that he could not recall whether he had continued as President of the Gibbs Group until at least 2004 or whether he had been a director of BGS from 2002 to 2004. However, it is an agreed fact that at all times material to this litigation Mr. Gibbs, Sr. was President of BGS, and had, from 2002, been a director of that company. He also professed no memory of many details of various

transactions that occurred during these years. Basically, he suggested that the alleged breaches had nothing to do with him, implying that it was all the responsibility of his son, Guy Gibbs.

149 Mr. Gibbs, Sr. denied knowing anything about his son's plans with respect to Cladtech or discussions with Mr. Kossowan. He conceded that he knew that the President of Cladtech U.S. wished to sell his three elbow machines, but he denied initiating or being involved with discussions about this. Initially on cross-examination, he said he had no memory of a trip to Cladtech U.S.'s plant in the United States with Mr. Kossowan and his son, Michael Gibbs, between December 10 and 14, 2002. On being confronted with his examination for discovery testimony with respect to this trip, where he alleged that he was only at the Cladtech U.S. plant to look at CCO spools that were being manufactured for MSI although he knew Mr. Kossowan was there to look at the purchase of the CCO machines, he became defiant and insisted that he did not recall the details.

150 It is noteworthy that 974038, a company jointly owned by Guy Gibbs and Mr. Kossowan, purchased CCO equipment from Cladtech U.S. on December 13, 2002, during the trip taken by Mr. Gibbs, Sr., Mr. Kossowan and Michael Gibbs. The testimony of Mr. Kossowan, and even of Guy Gibbs, makes it clear that Mr. Gibbs, Sr. advised his son and Mr. Kossowan of the availability of this equipment, that he facilitated Mr. Kossowan's introduction to the seller and that he knew what was going on.

151 Mr. Gibbs, Sr. insisted that he had taken steps to inform Indutech of what was happening with the Millenium Project, but then said he had no recollection of doing so. While he understood he had contractual obligations to send contracts to Indutech, he admitted that he had not done so.

152 When asked if he understood that the Agency Agreements required the Gibbs Group to obtain Indutech's permission to use competitors, he conceded that he knew that this was in the Agency Agreements, but that he "didn't know how to answer the question". He insisted, however, that the Gibbs Group followed the agreements.

153 Mr. Gibbs, Sr.'s attitude towards the obligations of BGS and GPD under the Agency Agreements and his participation in the Millenium Project can be illustrated by the following testimony from his examination for discovery.

> I did not have to seek [Mr. Wolstenholme] and tell him where I was going for the work, because it really ... it was totally up to the plant sites at that point, who is approved to do work and who isn't approved to do work. So at that particular point it was never to go ask [Mr. Wolstenholme], well, can I go here. That never happened: it was never asked of us, I don't care what it says [in the 2000 Agency Agreement].

154 Mr. Gibbs, Sr. was not a credible witness. His recollections were detailed when that suited him and vague when he was pressed on the alleged breaches. He was careful to suggest that any breaches were not his doing, but the responsibility of his son, Guy Gibbs.

Stephan Holland

155 Mr. Holland is an aggrieved former employee of Indutech. Initially employed by Indutech in 1988 as an Eastern Canada and United States sales representative, Mr. Holland worked in the Calgary office for about eighteen months between 1998 and the fall of 2000 as National Sales Director. He currently works for both Goodall Rubber Canada in Eastern Canada as General Manager and as a Sales Representative for Ultratech, a competitor of Indutech.

156 While he was National Sales Director for Indutech in Calgary, Mr. Holland reported to Ms. McGowan. He describes his time in Calgary in this position as "miserable" and blames this on a personality conflict with Ms. McGowan.

157 Mr. Holland had no oilsands customers and was not involved in sales of Indutech product to the oilsands. He complained that he was unable to get timely delivery of product to his other customers because, over time, the oilsands business took precedence at Indutech. He testified that slowly, small day-to-day business to non-oilsands customers, which was his area of sales, started to drop. He said that Indutech was always busy and that meeting delivery dates was always an issue. Mr. Holland was not impressed with the Indutech white board system, and he found the production meetings to be too lengthy and, in his view, a waste of time. He stopped attending for a time and had to be told by senior management that he should start to re-attend.

158 Mr. Holland gave a scathing description of how the delivery dates were recorded on the whiteboard that does not accord with the testimony of the other Indutech employees. He denigrated the whole process, commenting that "on occasion, stuff went out the door on time", but that the delivery dates would be changed on the white board just to make things look good.

159 Mr. Holland resigned his position at Indutech in August 2000, but did not leave until the end of November. He testified that he had accepted a job with Goodall a week before he resigned and started with them in Montreal on December 4, 2000. Mr. Holland testified that he had begun discussions with Goodall about a month before he resigned. He could not recall if he took trips to Montreal between August 2000, and when he finally left Indutech in November 2000.

160 Mr. Holland testified that Indutech would contract out fabrication work from time to time, sometimes to a company called Rambler and sometimes to other places, the names of which he could not recall. When asked whether he had been asked to market fabrication on Indutech's behalf, he asked counsel to "define" fabrication. In response to whether Indutech had ever made bids on pump boxes, tanks or expansion barrels while he was there, he answered in the negative. However, he conceded on cross-examination that he was not involved in sending out quotes.

161 Mr. Holland maintained that he was involved in the Millenium Project, but from his testimony, it appears that his involvement was limited to "meeting and greeting" the Suncor buyers who were visiting the Indutech facility from time to time. Mr. Holland was not involved in any document review with respect to the project, had no idea of the number of contracts involved in the project as a whole, the number of contacts awarded to Indutech or the particulars of the project, commenting in explanation that he was being asked to recall something that went

back ten years. Nevertheless, he testified that he believed that Indutech was chronically late in meeting delivery dates on work on the project. When asked to comment on the proposition that Indutech had complied with every delivery date on contracts involved in the Millenium Project (which is apparent from the documentation tendered in evidence), Mr. Holland continued to maintain that he believed that this was not so, although he admitted he could not say for sure.

162 Mr. Holland conceded on cross-examination that the oilsands work was a priority to Indutech and that he could not recall any instance when an oilsands order had been cancelled due to delay.

163 Mr. Holland was also asked about a contract for SNC Lavalin, although he was not presented with any documentation on the job. While conceding that this contract was completed during "the time I was on my way out", he offered the opinion that, while Indutech had taken the job on the basis of a price for expedited delivery, he did not think that the delivery date was in fact expedited. However, the documentary evidence, and evidence from the Indutech in-house witnesses indicates that the order, and thus the delivery date, was changed from the original quote.

164 Mr. Holland testified that he knew that BGS had other clients and that it was from time to time using other fabricators to have work done. He said that, in his view, "as long as they filled my house", he didn't care. He said he "wasn't fully aware" that BGS was referring CCO work elsewhere, but offered that, if they were, it would be to satisfy their customers.

165 Mr. Holland admitted to a "friendly business" relationship with Guy Gibbs, whom he has known since 1998. He suggested, for instance, that Guy Gibbs was welcome to stay at his house when he visited Eastern Canada. In 2003, he attempted to recruit Mr. Gibbs to sell Ultratech products to oilsands customers.

166 He was very bitter and hostile in his comments about Ms. McGowan and attributed his decision to resign to stress over his inability to meet delivery dates for his non-oilsands customers and over her management style. He conceded, however, that he was unable to learn to use the Indutech computer system. He also conceded that Ms. McGowan may have questioned him about his expense reports during his tenure in Calgary.

167 Mr. Holland's comments about Indutech and his opinions on delivery issues were colored by his personal animosity towards Ms. McGowan and his unfortunate stint as National Sales Manager in Calgary. It is also noteworthy that he is a friend of Guy Gibbs and currently involved in sales activities with a direct competitor of Indutech for oilsands work. While the non-oilsands work that Mr. Holland was responsible for may well have suffered from Indutech's shift in priority to oilsands work, his comments with respect to Indutech's delivery issues suffer from his personal bias.

Guy Gibbs

168 Mr. Gibbs started working with his father in BGS and GPD in the fall of 1995. He became

an owner of the companies in 1997 and started to take a larger role as his father's role decreased. He testified that initially, the Gibbs Group of companies represented several manufacturers of products for the oilsands, including Triten and Indutech.

169 Mr. Gibbs testified that his main point of contact at Indutech was Mr. Gabel. By way of example, he said that he had discussions with Mr. Gabel in March of 2002 with respect to a Suncor proposal to manage its CCO spools that eventually went to MSI. Mr. Gibbs also testified, contrary to the terms of the Agency Agreements and the testimony of other witnesses, that, after the execution of the 2002 Agency Agreement, Indutech told the Gibbs Group that they were to remove themselves from marketing activities and become merely a forecasting resource. He said that it was "formalized" or at least discussed that Mr. Gabel would be the Gibbs Group's sales contact, as there were problems with communication with Ms. McGowan.

170 Mr. Gibbs testified that, around the time of the 2002 Agency Agreement, things began to change in the relationship. Syncrude began to deal directly with Indutech, and the Gibbs Group became reliant on Indutech to know what was happening.

171 Mr. Gibbs testified that the Gibbs Group became involved in the Millenium Project on more than just a piecemeal basis when the Gibbs Group heard that Matrix Wear Technologies was having difficulties doing the work for the project. Mr. Gibbs and Mr. Gibbs, Sr. requested a meeting with MCC.

172 Mr. Gibbs referred to notes he prepared of a meeting (which was not the first meeting) that he and his father attended on August 17, 2000 with representatives of MCC.

173 The notes reference a plan for meeting delivery of a package of spools designated CWP 1293. They indicate that the overlay work would be split between three manufactures: Triten, Almac and Cladtech U.S. Mr. Gibbs said that he went to Indutech and spoke to Mr. Gabel, explaining the importance of the delivery date of October 14, 2000. He said he "established" from his discussion with Mr. Gabel that Indutech would not be able to do the work as it had too much work in-house. Mr. Gibbs also testified that Triten was also unable to do the work, so the Gibbs Group tried to find additional vendors.

174 The notes also identify three further work packages and indicate that BGS would ask Indutech to proceed with CWP 1166 and would get quotes from both Triten and Indutech on other packages. They indicate that if Triten and Indutech were unable to meet the necessary deliveries, BGS would meet with MCC to discuss using other shops. These notes and Mr. Gibb's testimony thus indicate that, within a very short time after the 2000 Agency Agreement was executed, BGS was actively in contact with competitors of Indutech to spread the Millenium Project work around.

175 Mr. Gibbs testified that, on August 25, 2000, Ms. McGowan sent him an email indicating that she had heard from a third party that a job for CCO from Syncrude, engineered through Brown and Root, was going to Capitan in Calgary. She asked why Indutech had not been told

about this. Ms. McGowan commented "need to discuss PO 12270 Rev 1 with you. What is happening there. I am surprised, Guy that you thought we could not do this fabrication".

176 Mr. Gibbs testified that he had talked to Mr. Gabel about PO 12270 and that "we" had decided that Indutech couldn't do the work and that thus, after Indutech had done the CCO work, the job was sent elsewhere for fabrication. However, his response on August 28, 2000 to Ms. McGowan merely says that "we" decided to handle the job in a manner that allows for the best delivery. His email says that Indutech's welders were busy on the SNC job "so we went elsewhere" and invites Ms. McGowan to call him if she wants to review the matter in greater detail.

177 With respect to the Brown and Root job, Mr. Gibbs testified that, again, he had talked to Mr. Gabel, but that "Jenny was upset" and wanted him to obtain for Indutech an opportunity to quote. He said he did but was promptly turned down.

178 Mr. Gibb's August 28, 2000 email also comments that "I have been told ... that Indutech has got a machine set aside to do the [Brown and Root] job", and asks Ms. McGowan what effect this is going to have on the MCC quote. He states that MCC "wants to award that is why they gave you a couple spools to keep the equipment tied up." He notes that he believes he will get the go ahead for CWP 1166 that day and is waiting for price and delivery on CWP 1130 and CWP 1135. On cross-examination, Mr. Gibbs indicated that he actually did not believe that Indutech had a machine set aside at that time. These emails do not reference the whole of what had been discussed at the August 17, 2000 meeting with MCC.

179 On cross-examination, Mr. Gibbs was referred to an "order verification" relating to CWP 1293 from Triten which BGS received on August 23, 2000 and sent on to Mr. Dunphy on the same date. The document implies that Triten had been invited to quote on this job earlier. Despite this and although there was no documentary evidence to corroborate him, Mr. Gibbs insisted that Indutech had been given an opportunity to quote on this job. Mr. Gibbs was not credible in this evidence.

180 With respect to CWP 1166, CWP 1130 and CWP 1135, it appears from the evidence that Mr. Gabel emailed Mr. Gibbs with an "urgent" request for information on September 8, 2000 and formally quoted on CWP 1135 for 24 spools on September 7, 2000, which quote was sent to Mr. Dunphy on September 11, 2000. However, this work was subsumed into a quote made by BGS directly to MCC on October 16, 2000. Mr. Gibbs testified that he had discussed the cancellation of the Indutech quote with Mr. Gabel and "what work they could or couldn't do", although he couldn't recall the date. Mr. Gibbs testified that Indutech was unable to meet delivery requirements and unable to show a detailed, spool-by-spool schedule. However, the Indutech quote on CWP 1135 dated September 7, 2010 is accompanied by a letter from Mr. Gabel setting out issues that have to be resolved and notes "I am currently putting this order in our register and allocating machine time. However need to resolve above issues as soon as possible for scheduling."

181 Indutech's September 7, 2000 quote breaks down the different kinds of spools to be

manufactured and indicates delivery by December 31, 2000 based on free issue delivery of pipe material no later than October 6, 2000. Mr. Gabel's September 8, 2000 e-mail refers to his September 7, 2000 quote and states that Indutech required material no later than October 15, 2000. It also refers to previous inquiries for the purpose of quotations on CWP 1166 on August 31, 2000 and on September 5, 2000 for CWP 1130. Mr. Gibbs' testimony with respect to why the quote was cancelled and his alleged conversations with Mr. Gabel are not credible and not supported by the documentary evidence.

182 Mr. Gibbs conceded that he did not inform Indutech of BGS's own quote to MCC of October 16, 2000, for 150 pieces, which involved work on the project of a value of over $4 million on which BGS made a profit of approximately $241,000 ("P.O. 1502").

183 Mr. Gibbs indicated that it used Triten, Tricon, Bendtec and Almac to do the work. The documentation establishes that BGS also used Cladtech U.S. and Matrix. Some of the Triten work was done by Capitan in Calgary, contrary to the 2000 Agency Agreement. Mr. Gibbs conceded that BGS received commissions from Triten and Bendtec of 10% on the Millenium Project work.

184 With respect to CWP 1166 referred to in Mr. Gibbs' response to Ms. McGowan dated August 28, 2000, and later the subject of inquiries from Mr. Gabel in early September, BGS had in fact already awarded a purchase order on this bid inquiry for 46 pieces to Triten on August 31, 2000. It earned a commission of 10% on this job, as opposed to the 3 to 3 1/2% BGS would have earned with Indutech.

185 Indutech did receive a purchase order for 102 pieces in the amount of $1,294,237 from MCC on October 8, 2000. A number of other purchase orders for work on the Millenium Project were sent to competitors of Indutech, including Bendtec, Matrix and Capitan.

186 Mr. Gibbs was referred to the summary of work completed by Indutech on the Millenium Project prepared by Mr. Copeland. He confirmed that the first job Indutech received on the project came directly to it from SNC Lavalin, an order for 33 pieces. Mr. Gibbs testified that, while Indutech completed its work within the time set out in the quote, it did not meet "sub-requirements on site", that Indutech "chose to produce [the product] in an order independent of priority sequencing."

187 Mr. Gibbs testified that he was aware of Indutech's policy of quoting on everything, but that Mr. Gabel would often request that Mr. Gibbs not send bid inquiries if he knew he could not possibly meet the time requirements. He said that on a couple of occasions when the project was large, such as the SWQRL project in 2004, Mr. Gabel would request that Mr. Gibbs approach another manufacturer to split the work. Then, if the project changed, and became a short time, small project, that was the "kind of project we would take elsewhere."

188 Mr. Gibbs was extensively cross-examined about other work diverted to competitors of Indutech. He conceded that he had recommended to MCC that it seek approval to use Capitan and Trican for the Millenium Project work and that BGS was involved in getting various U.S.

manufacturers added to the approved vendor list. He admitted that Indutech was not advised of what was being done on MCC's behalf and that BGS received a management fee for its work, in addition to receiving substantial profits for its buy/sell work on PO 1502. On examination for discovery, he commented that Indutech "had their own blinders on, and it is not my job to take them off for them".

Set-up of Cladtech

189 Guy Gibbs met Barry Kossowan when Mr. Kossowan was working at Dacro Industries. He testified that when Dacro went into receivership in April 2002, Mr. Kossowan wanted to "revisit" becoming involved in a CCO business with him. Mr. Gibbs conceded that he had discussions with Mr. Kossowan about the procurement of CCO and induction equipment before February 12, 2002, when 974038 Alberta Ltd. was incorporated. It is an agreed fact that 974038 was incorporated for the purpose of acquiring CCO machinery and that Mr. Gibbs is a 50% shareholder with Mr. Kossowan.

190 Mr. Gibbs was contacted by an Australia company on April 18, 2002 in response to inquiries he had made with respect to some machinery. The email refers to Mr. Gibbs' "business plan". Mr. Gibbs copied Mr. Kossowan with the email, and Mr. Kossowan responded on April 22, 2002 that he was now "officially unemployed and ready to get going". Mr. Gibbs conceded that Mr. Kossowan was instrumental to his plan to set up shop, as Mr. Gibbs alone did not have the technical expertise.

191 On June 2, 2002, BGS placed a purchase order for the Australian equipment. Mr. Gibbs testified that the purchase was made on behalf of 974038, and that it was intended that he and Mr. Kossowan would contribute equally through their holding companies to the venture. He travelled to Australia in the summer of 2002.

192 Mr. Gibbs confirmed that BGS was continuing to negotiate with Indutech on the renewal of the Agency Agreement in the summer of 2002. Cladtech was incorporated on November 25, 2002 with Mr. Kossowan as sole shareholder. On November 20, 2002, Mr. Kossowan had made an offer to Cladding U.S. to purchase three CCO machines. The fax Mr. Kossowan sent to Mr. Hanna of Cladtech U.S. indicates that Mr. Gibbs would follow up with documents within a few days. Mr. Gibbs confirmed that he was aware of this fax. Thus, within six days of the execution of the 2002 Agency Agreement, Mr. Gibbs participated in the purchase of CCO equipment that was to be used by the new company, Cladtech.

193 On December 13, 2002, 974038 purchased three CCO machines from Cladding U.S. The defendants admit that these machines were purchased to produce CCO products.

194 Mr. Gibbs testified that he was aware that Mr. Kossowan was taking steps to find warehouse space for the equipment in November and December of 2002.

195 As previously described, Mr. Gibbs Sr., Michael Gibbs and Mr. Kossowan travelled to the Cladtech U.S. plant between December 10 and 14, 2002. Guy Gibbs testified that his father was

there "to make introductions", but that he "separated functions" with respect to this and work that was to be done for MSI (the procurement management entity for Suncor). He says that Michael Gibbs was merely "attending a shop visit" for MSI, although he conceded that his brother helped provide a software program for the new Cladtech.

196 Guy Gibbs testified that he "was aware" that Mr. Kossowan brought the machines up to Canada in early January 2003. When faced on cross-examination with evidence that two spools ordered by MSI had been referred to Cladtech U.S. in December 2002 through BGS, and that it appears from the documentary evidence that the new Cladtech was able to arrange for the transportation of its CCO equipment as part of the transportation of the MSI spools from the United States, with the transportation costs for both the spools and the equipment paid for by MSI, Mr. Gibbs conceded that BGS was involved in these arrangements. The same thing occurred at the end of January 2003. Cladtech U.S. was given an order for four induction bends for MSI, and additional equipment purchased by the new Cladtech was transported to Canada in the same load, at MSI's cost.

197 Guy Gibbs testified, despite no confirming documentary evidence, that Indutech had been given an opportunity to quote on this work performed by Cladtech U.S. but that he had "verified" that it was too busy to do the work. This assertion is impossible to believe in the circumstances.

198 Mr. Gibbs confirmed that he and Mr. Kossowan met between January and March 2003 with respect to setting up a corporate structure for the Cladtech venture.

199 1036795 Alberta Ltd. was incorporated on March 17, 2003, the shareholders of which were Kossowan Holdings Inc. as to 50% and 724192 as to 50%. As previously stated, 724192 is Mr. Gibbs' holding company. 724192's shares in 1036795 were held in trust by Kossowan Holdings for and on behalf of 724192. Kossowan Holdings is Mr. Kossowan's holding company.

200 The intent, according to Mr. Gibbs, was that 1036795 was to be the leasing entity that owned the equipment. 1036795 purchased the equipment from 974038, financing the purchase through loans advanced either directly or indirectly by Mr. Kossowan and Mr. Gibbs.

201 On about December 8, 2003, 1036795 and Cladtech entered into an equipment operating agreement. Mr. Kossowan executed the agreement on behalf of Cladtech and 1036795 with the concurrence and approval of Mr. Gibbs.

202 Mr. Gibbs initially testified at trial that he had told Mr. Kossowan that the Gibbs Group was representing Indutech but that he was not sure that he told him about the Agency Agreement. He was referred to his examination for discovery evidence where he agreed that he had informed Mr. Kossowan that there was an Agency Agreement in place, because "we weren't able to represent him as a marketing and sales force for this reason." The evidence continues as follows:

> Q. What reason?
>
> A. Because we had an agreement in place with Indutech.

Q. Meaning that Cladtech would be competing with Indutech and you were prohibited under the agreement from doing so.

A. Yes.

203 Eventually on cross-examination, Mr. Gibbs agreed with these questions and answers and conceded that he would have told Mr. Kossowan that BGS could not represent him as a marketing force because it was working for Indutech, except that he continued to insist that these discussions were general and that he could not recall if he specifically referenced the Agency Agreements. He agreed with his examination for discovery evidence that Mr. Kossowan certainly would have been aware that the Gibbs Group was supplied CCO product with Indutech as its preferred supplier.

204 Mr. Gibbs testified that he and Mr. Kossowan had structured the Cladtech corporate arrangement in the way that they did because it was his belief that it would not be good for business if customers in the oilsands were able to trace his involvement in Cladtech. For bidding purposes, he said, Cladtech could not be related to BGS. He referred to ensuring that no one could trace his holdings in Cladtech as "a common corporate strategy". He attempted to draw a distinction between being a "silent partner" in Cladtech and being actually involved in the CCO business, saying that he believed his involvement was more a matter of owning and leasing equipment. This explanation was self-serving and incredible.

205 Mr. Gibbs confirmed that his father was well aware of his intention to purchase the CCO machines. He said Mr. Gibbs, Sr. "may have been" aware that he intended to go into business with Cladtech, and that he was not sure whether his father supported the idea. When faced with his evidence in examination for discovery that his father did support the idea, he tried to prevaricate. Mr. Gibbs was very evasive about his father's involvement in the scheme. His evidence that his father was not supportive or that his involvement was minimal was not credible.

206 One of the first jobs involving BGS and Cladtech occurred in August of 2003. It is an agreed fact that Cladtech began manufacturing CCO product in June of 2003. Mr. Gibbs was taken through evidence of a number of diversions of sales to Cladtech, on which he gave evasive and non-responsive answers. He acknowledged knowing that Cladtech was competing with Indutech and that BGS and GPD were assisting Cladtech to obtain CCO work. He alleged on some of these diversions that he recalled discussing the jobs with Indutech, even though there was no reference to Indutech in the Gibbs Group files, but that "delivery was the driving factor". Mr. Gibbs testified that work was only directed to Cladtech when Indutech was "full". This testimony about consulting with Indutech or being aware that Indutech was "full" was not credible.

207 Mr. Gibbs' lack of credibility on the issue of diversions was illustrated by a number of examples:

(a) In January of 2004, work was diverted to Cladtech with an estimated delivery time of five weeks after delivery of induction bends from Shaw Naptec, despite Indutech's bid of the same day which quoted a delivery time of four to six weeks in

total. Mr. Gibbs attempted to suggest that Indutech was unable to deliver in the face of documentation from BGS's files to the contrary.

(b) BGS diverted work to Capitan in May 31, 2001 despite the clear prohibition in the Agency Agreements. Mr. Gibbs' explanation was that, if Indutech was unable to supply, the Gibbs Group could use any vendor.

(c) In July 2003, Indutech quoted on work with a delivery of five weeks. In January 2004, the Gibbs Group sought and received a quote from Almac for the same work with a completion date of eight weeks. A purchase order was issued to Almac, using Indutech pricing. There is no evidence Indutech was asked to re-quote. The work was actually not completed by Almac until about May 20, 2004. Mr. Gibbs testified that he had spoken to Mr. Gabel about this in January of 2004. This evidence was not credible.

(d) On May 12, 2004, BGS asked Indutech to quote on an order for bends by email. Indutech did so on May 14, 2004, specifying four weeks for delivery. On May 25, 2004, Mr. Gibbs offered the product to MSI using pricing higher than Indutech's quote and specifying delivery at four to five weeks. On May 27, 2004, the BGS files disclose a purchase order made out to Indutech that is marked "void". The next day, BGS was in contact with Shaw Naptec, which eventually was awarded the purchase order on June 28, 2004, after BGS became aware of the statement of claim in this action.

(e) On April 6, 2004, Indutech sent a quote to BGS for CCO bends which stated a delivery time of eight weeks from receipt of the purchase order. On the same day, BGS asked Cladtech to quote on this job. On April 19, 2004, Cladtech sent a quote which was higher when all costs were added in and stated a delivery time of nine to ten weeks after delivery of materials from Shaw Naptec, making total delivery time 12 to 14 weeks. On May 19, 2004, BGS emailed Ms. Kohlsmith at MSI, advising her that they were offering a quote from Indutech and an alternative quote from Cladtech "to improve the delivery time that is currently being quoted from Indutech." The described Indutech quote (with a price higher than what was in fact quoted by Indutech) indicates a delivery time of 22 weeks. The Cladtech option is described in the email as being roughly the same price with a delivery time of 16 weeks. Mr Gibbs said that he was protecting BGS by doing this, and conceded that he had not advised Indutech of what he was representing, commenting that BGS's "normal practice" was not to advise Indutech when work was done elsewhere.

(f) On May 14, 2004, BGS again proceeded to obtain quotes on two fronts for a job for MSI: from Indutech and from a combination of Cladtech and Shaw Naptec. The job had already been quoted by BGS to MSI at a price higher than quoted by Indutech and a delivery time two or three weeks later than Indutech's actual quote. Cladtech's and Shaw Naptec's quote was much higher than Indutech's, but with a much shorter delivery time. When asked whether he considered getting two quotes to be a conflict, Mr. Gibbs indicated that he was protecting the interests of BGS and the "client", being MSI.

208 Mr. Gibbs testified on cross-examination that he had considered terminating the 2002 Agency Agreement in the latter part of 2003, in part because of the Cladtech operation, and had discussed this with his father and Mr. Lundquist. One of the main reasons he did not take action to terminate was because of the large volume of work BGS had going with Indutech at the time, which would result in large profits for BGS. He decided that it would be a good time to terminate after completion of a large order on which Indutech was working which was to be delivered in March of 2004.

209 Mr. Gibbs was not a credible or reliable witness. He contradicted himself frequently, had a selective memory on difficult questions, but appeared to have a suspiciously clear memory of conversations with Mr. Gabel on various specific diversions when it suited him to remember them. He rationalized BGS's almost immediate, continuous and wide-ranging breaches of both the spirit and the specifics of the Agency Agreements by reference to self-serving complaints about Indutech's alleged problems with delivery dates and personality issues with Ms. McGowan.

210 It is noteworthy that even his strongest supporting witness, Ms. Kohlsmith, was a victim of the Gibbs Group policy of commercial self-interest in disregard of contractual commitments. It appears that MSI was manipulated into paying for the transportation of the Cladtech equipment into Canada under the guise of transportation of a few spools it had ordered. Ms. Kohlsmith also received false information with respect to the April 6, 2004 quote.

211 Mr. Gibbs stated in his examination for discovery evidence that he agreed that from May 2000 to November 2004, BGS conducted business without reference to either of the Agency Agreements. "Barry Gibbs Sales conducted business in that time period and was - as it saw fit, yes." It is clear that Mr. Gibbs only intended to comply with the Agency Agreements when it suited the Gibbs Group's interests.

Tracey Kohlsmith

212 Tracey Kohlsmith was involved in procurement activities for Suncor between 2000 and 2002 and was a procurement contracts manager for Willbros - MSI Canada Inc., ("MSI"), the procurement contracts manager for Suncor, between 2002 and 2005. Ms. Kohlsmith was a very partisan witness. She has known and been a friend of Guy Gibbs for over 20 years, since they attended high school together in Fort McMurray.

213 Ms. Kohlsmith dealt with Indutech primarily through BGS, both while she was at Suncor and while she was with MSI. Her primary contact at BGS was Guy Gibbs. Ms. Kohlsmith testified that when she dealt with Indutech while at MSI, customer service was "atrocious", that she couldn't get telephone calls answered, and that, on "a couple of occasions", she had to have Guy Gibbs intervene and get her an answer to her calls from Indutech. Ms. Kohlsmith said that when Guy Gibbs visited MSI in Fort McMurray, she would "go up one side of him and down the other" over her dissatisfaction with Indutech's customer service. She said that she had one conversation with Ms. McGowan in 2003 or 2004, whom she said was "unprofessional and very

abrasive." On cross-examination, however, Ms. Kohlsmith denied that there were any incidents with Indutech's sales manager, Mr. Gabel, characterizing her meetings with him as "normal sales calls," and said she couldn't remember any details of her conversation with Ms. McGowan, just the "tone" of it.

214 When asked about relative priority between price and delivery with respect to oilsands projects, Ms. Kohlsmith said that delivery was key. She noted that MSI had a "cost plus" contract with Suncor, so that price was not important to her, as it was passed on to the client. She testified that, while she may have kept price in mind, she wasn't driven by it when she acted for MSI, given the nature of its contract with Suncor. She also testified that she would sometimes receive requests for quotes that she knew were going to be used by a particular division of Suncor for budgeting purposes, and that she understood that the Suncor employees were asking her to obtain higher estimates, to be conservative so that they would be able to get adequate funding internally and be able to work within the eventual budget allocated to that project. In that regard, Ms. Kohlsmith was referred to an e-mail to Mr. Gibbs in which she had advised him to "fluff your numbers" on a quotation for Suncor. She maintained that this meant that he should be conservative, that the client wanted a high estimate and that "this goes on all the time." She agreed that "absolutely" she was advising BGS to inflate their quote, so that the quote would not be too low when the Suncor employees asking for the quote requested funds internally for a project.

215 Ms. Kohlsmith testified that, for a time after she was advised in 2004 that BGS was no longer Indutech's agent, she started dealing directly with Indutech. She said that this was not a positive experience, that she had problems having her telephone calls returned and getting quotes in a timely manner. She said that the service was just not there, and that "we" no longer dealt with Indutech. On cross-examination, Ms. Kohlsmith was referred to documentation indicating that between June 24 and December 14, 2004, after Indutech's relationship with the Gibbs Group had terminated, MSI had placed orders for product from Indutech of a value of $147,840 as compared to orders that had been placed through BGS between January 1 and May 10, 2004 of a value of $18,841. She also confirmed that MSI placed orders of a value of approximately $560,000 with Indutech in 2005. Despite this evidence, Ms. Kohlsmith professed not to recall whether she had continued to deal with Indutech during late 2004 and 2005. Ms. Kohlsmith left MSI at some point during 2005, and confirmed that there were other buyers at MSI who could have dealt with Indutech.

216 Ms. Kohlsmith testified that she could not recall whether she had dealt with BGS when MSI used Cladtech as a supplier, and commented that, as MSI had a direct relationship with Cladtech, there was no reason for it to use BGS as a conduit.

217 Ms. Kohlsmith testified that Indutech was not known for its fabrication work and commented that Mr. Gabel had never sold that service to her. She denied the suggestion that delivery was always a concern with any company with respect to supplying the oilsands, but then suggested that this was true only with respect to companies that supplied special products, which is, of course, the case with CCO spools. When asked about Matrix, she characterized them as "excellent." She said she did not remember if Matrix had problems with quality. She conceded

that she knew that Matrix had been taken off the Suncor approved supplier list for a period of time, but said she could not remember when. Given the contradictions in her evidence, her clear partisanship and her tendency to exaggerate her evidence for effect, I do not find Ms. Kohlsmith's evidence credible or useful in this case.

Mike Lundquist

218 Mike Lundquist, who was an employee of BGS from 1996 to 2005 or 2006, testified for the Gibbs Group. He is currently employed as General Manager of one of Indutech's competitors. After Mr. Lundquist left BGS, he worked for a period of time at Matrix, also one of Indutech's competitors.

219 Mr. Lundquist said that when BGS received an inquiry, he would ask Indutech to supply a quote and would also check with other companies to see if they had time and capacity available. His choice was to deal with Indutech because it would quote on the entire job, making his life easier. Mr. Lundquist said that he would send every inquiry that included CCO overlay or bends to Indutech, but for some quotes, he "just didn't have time", sometimes Indutech could not meet the requested delivery time, or he just didn't consider it worth it to send the quote to Indutech. He indicated, however, that even when Indutech couldn't do the job, it still got a copy of the quote.

220 On cross-examination, however, Mr. Lundquist was referred to the BGS file relating to a bid inquiry from National Oilwell dated August, 2003, and asked if there was any indication it had been brought to the attention of Indutech. He confirmed that he could not find any indication in the file that it had.

221 It was brought to his attention that Almac had bid on the same job on August 14, 2003 and that, several days later, Cladtech bid to do the work for the same price, adjusting for free issue material. Mr. Lundquist denied knowing how Cladtech had obtained the purchase order.

222 Mr. Lundquist indicated that he usually dealt with Mr. Gabel, that he would send the bid request over by fax or email in most cases, and that he and Mr. Gabel would discuss pricing and delivery, within a day usually. He also dealt with Mr. Olson.

223 Mr. Lundquist indicated that, acting on behalf of BGS, when delivery was critical and Indutech was busy, he would consider other options. Mr. Lundquist said that he was always open with Mr. Gabel, and would tell him if Triten could do it faster, and that Mr. Gabel would leave the decision to him. Mr. Lundquist was not direct when asked if he talked about suppliers other than Triten with Mr. Gabel, commenting that there were not a lot of other places to get pipe overlaid. On cross-examination, he was evasive, saying he would not necessarily tell Mr. Gabel who else he would be talking to, but that he would say that he was talking to someone else. Triten, of course, was an exception to the prohibition against seeking alternative sources for products in the 2000 Agency Agreement.

224 Mr. Lundquist indicated that the key thing with Indutech was delivery, as Indutech's pricing

was always in line with the market. He "had a sense" that Indutech was full, as deliveries were always tight. Mr. Lundquist did not give a direct answer to the question of whether there were complaints about Indutech's delivery pattern, saying merely that delivery dates were always serious in the oilsands. On examination for discovery, Mr. Lundquist said that he wouldn't say that Indutech was always busy, but that it was "from time to time."

225 Mr. Lundquist spoke generally about Indutech and delivery schedules, indicating that he would start to inquire about scheduling mid-project and that, as the scheduled delivery date got closer, he would find out that they were behind schedule. He conceded, however, that external factors could affect delivery time.

226 Mr. Lundquist was very involved in the Millenium Project. He testified that he, Guy Gibbs and Barry Gibbs were all heavily involved in the work for MCC. He did not recall what had happened with respect to delivery dates and he could not recall whether Indutech was ever apprised of the full scope of the project. He agreed that BGS would indicate where the CCO work should be sent, and that several competitors of Indutech, including Pacific Pipe, Matrix, Almac, Cladtech U.S. and Capitan were used.

227 Mr. Lundquist was aware that BGS had a contract with Indutech, but testified that he had never reviewed it and was not familiar with its terms. He knew the commission rate and indicated that he understood that the first call on a bid inquiry was supposed to be Indutech. While generally straight forward in his evidence, Mr. Lundquist became evasive when cross-examined on what he knew about the prohibitions in the Agency Agreements, saying he only knew that BGS was allowed to use Triten.

228 Mr. Lundquist made it clear from his testimony on examination for discovery that he was also aware of the agreement with respect to a 5% mark-up and how it applied to the buy/sell arrangements, commenting:

> - we take their quote, and they can supply two products; another company can supply two products, and we meet the delivery one week. We've now taken those combined prices and we've added our percent commission on it and submitted it to the client. I don't believe Indutech had a commission structure in there for us. They were just quoting it straight to us with no commission in it at all.

229 He said that he was not aware of the limitation on using Capitan, and agreed that he used Capitan as an alternate supplier, including on the Millenium Project. He would not have brought that to the attention of Mr. Gabel or anyone else at Indutech. He testified that he was not aware that the Agreements required BGS to get Indutech's approval before sending work to third parties, although on examination for discovery he had indicated that he knew that. Mr. Lundquist also testified at trial that he was not aware of any prohibition on the sale of bulk welding wire.

230 Mr. Lundquist testified that Mr. Kossowan was frequently in the BGS offices in 2003 and 2004 and that Guy Gibbs told him that Cladtech should be offered a chance to bid. He testified that he recalled being involved in shipping up some CCO machines from the United States for BGS but could not recall when.

231 Mr. Lundquist was clear in his evidence that he considered his job to be to act to protect the best interests of BGS, and that his priority was the end users of product. While Mr. Lundquist was generally credible, he was evasive in some areas and very careful with respect to his evidence in others.

Jim Nowakowski

232 Jim Nowakowski, the President of JNE Welding in Saskatoon, testified about a poor experience with Indutech with respect to an order for breaker pumpboxes he placed with them in March of 2001. He said that delay of the delivery of the first part of the order of about a month "probably" delayed his delivery to his customer by about two weeks. He acknowledged that delays in getting detailed drawings from the customer contributed to the overall delay and resulted in JNE being pushed hard to make up time it had lost. He testified that he was not comfortable going back to Indutech.

233 Mr. Nowakowski testified that two or three years later, in 2003 or 2004, he sourced some CCO equipment from BGS. He learned later that BGS had obtained these products from Indutech. There were no delivery issues with respect to this order.

234 Mr. Nowakowski indicated that JNE and the Gibbs Group had put together an "informal strategic alliance" and had worked together almost as a "loose partnership" since the work done in 2003 or 2004.

Barry Kossowan and the Cladtech Defendants

235 Mr. Kossowan now works for a competitor of Indutech, Matrix, in research and development. He was working as President for Dacro Industries, a company that manufactured and sold heavy pressure vessels, when it went into receivership in April, 2002. Mr. Kossowan said he had previously met Guy Gibbs when Mr. Gibbs assisted Dacro in putting together a bid for structural equipment for the oilsands, and Mr. Gibbs mentioned to him that he would be interested in getting into the business of induction bending, citing the shortage of capacity. Mr. Kossowan asked Mr. Gibbs in January or February of 2002 if he would be interested in being involved in a business together. Mr. Kossowan said that he was trying to buy Dacro and was interested in having Dacro get into the induction bending business, but that was unsuccessful. He collaborated with Mr. Gibbs in incorporating 974038 in February 2002 with the intention of using that corporation to go into business if he was unable to buy Dacro.

236 Mr. Kossowan said he asked Mr. Gibbs for information about entering the business, and Mr. Gibbs suggested that they engage in the production of CCO spools and elbows.

237 Mr. Kossowan said he and Mr. Gibbs started to make inquiries during February and March of 2002 about acquiring machines for induction bending and CCO. They received responses from vendors and met several times. Mr. Kossowan referred to a series of emails that commenced on April 18, 2002 in which Mr. Gibbs received a response to an inquiry he had sent

to a third party with respect to equipment he would require for such a business, referring him to an Australian vendor. Mr. Gibbs forwarded this information to Mr. Kossowan, who responded on April 22, 2002 with the information that he was "officially unemployed and ready to get going".

238 Mr. Kossowan testified that he then did the groundwork necessary to purchase about $90,000 AUS of equipment, confirmed by purchase order dated June 17, 2002. BGS signed the purchase order as 974038, which did not have the financial ability to do so at that time. Mr. Kossowan indicated that he and Mr. Gibbs were in close communication throughout the summer and early fall of 2002 about the equipment.

239 Mr. Kossowan testified that he understood that BGS was a broker for various manufacturers from discussions with Mr. Gibbs. He said he understood, prior to 9724038 purchasing the equipment, that Mr. Gibbs was involved in the marketing of CCO products to the oilsands. He knew prior to June, 2002 that Indutech produced CCO spools. Mr. Kossowan said that he was aware that the Gibbs Group was buying and selling CCO product on behalf of Indutech, Almac and Matrix and that Indutech was BGS' preferred supplier. He testified, however, that he did not consider whether Mr. Gibbs had a conflict, saying that "with Guy, if there were a conflict, he would have told me." Mr. Kossowan appeared to draw a distinction between Mr. Gibbs having a financial interest in a company that manufactured CCO spools, and having an interest in a company that owned equipment that was leased in the manufacture of spools.

240 Although Mr. Kossowan had years of experience as a senior manager in a similar business, and was knowledgeable about non-competition agreements with key personnel, he was insistent that he did not believe that Mr. Gibbs had a conflict.

241 Mr. Gibbs advised Mr. Kossowan in early November 2002 that Cladtech U.S. was interested in selling some equipment, and a deal to purchase three machines plus ancillary equipment was struck between 974038 and Cladtech U.S. on November 20, 2002. This was evidenced in a letter of intent, with final documentation signed on December 13, 2002 at the Cladtech U.S. plant. Mr. Kossowan travelled to the Cladtech U.S. plant in December with Barry Gibbs and Michael Gibbs.

242 Mr. Kossowan said that Guy Gibbs arranged the trip, but couldn't go himself. Mr. Kossowan said that Guy Gibbs suggested that his father go with him, and that Michael Gibbs came along at Mr. Kossowan's request. Mr. Kossowan testified that 974038 paid for the expenses of Mr. Gibbs, Sr. and Michael Gibbs, although later he said that he wasn't sure.

243 He said that Mr. Gibbs Sr.'s primary role on the trip was to make introductions, as he had a long-standing relationship with Cladtech U.S.'s president and that he gave Mr. Kossowan credibility. Michael Gibbs, he said, came along to help Mr. Kossowan to record the details of welding parameters.

244 Mr. Kossowan initially insisted that he did not discuss BGS's operations with Barry Gibbs or Michael Gibbs while they were in the United States, but when faced with his examination for

discovery evidence, conceded that he could not recall and may or may not have done so. He testified initially, however, that in December of 2002 he was not aware of any reason that would preclude BGS from providing quotes to the new Cladtech.

245 Mr. Kossowan said that he had found office/warehouse space near Edmonton at the beginning of December 2002. He returned to the United States in January 2003, to supervise the dismantling and transportation of the equipment, which became operational in February or March of 2003.

246 Mr. Kossowan said that he asked Guy Gibbs in early 2003 to market Cladtech's product, but that Mr. Gibbs said that he couldn't do it, without being specific why, and Mr. Kossowan said that he didn't ask. Guy Gibbs did, however, give Mr. Kossowan the names of two or three key contacts in Fort McMurray.

247 One of them was the general manager of MSI in Fort McMurray, who asked Mr. Kossowan when he visited him in February 2003 if he was involved in any way with the Gibbs, with them either representing the company or serving it as a broker. Mr. Kossowan testified that he didn't understand the reason for this question. He testified that this person at MSI advised him that he didn't like dealing with an intermediary, that MSI liked to deal directly with the supplier. The MSI representative, according to Mr. Kossowan, said that it was important to them that they were able to purchase for reasonable prices, and that he was very concerned that having a broker between MSI and the company would result in the product costing more.

248 This does not accord with Ms. Kohlsmith's testimony of dealing with Indutech through BGS at this time.

249 Mr. Kossowan says that he told the MSI representative that he wasn't represented by anyone and could deal with him directly. He testified that it occurred to him then that what seemed to be "bad blood" between MSI and the Gibbs could affect Cladtech's ability to have MSI as a customer. He said on cross-examination that it was clear to him that in no circumstances did MSI want to deal with BGS. However, he conceded that Cladtech later produced product that was sold to MSI through bid inquiries and quotes made through BGS.

250 Mr. Kossowan testified that he then consulted a lawyer and set up the trust arrangement in 1036795. On examination for discovery read in by Indutech, Mr. Kossowan testified that the corporate structure was "simply a strategy on Guy's part to enable him to continue to source material from producers". At trial as well, Mr. Kossowan testified that the 1036795 concept was attractive to Guy Gibbs because of the potential for Mr. Gibbs' producers being upset if they knew he was setting up as a competitor. Mr. Kossowan conceded that the corporate set-up was a strategy to enable the Gibbs Group to continue to source from various manufacturers.

251 Mr. Kossowan conceded that the oilsands customers would not have known that 974038 actually owned the equipment and leased it to Cladtech, as he took the approach with customers that Cladtech owned the equipment. Cladtech actually had no assets, other than minor chattels, and no retained earnings.

252 Mr. Kossowan said that Cladtech became an approved vendor for CCO for Albian Sands immediately after set up, for Suncor in the middle of 2003, and for Syncrude in January 2004.

253 Mr. Kossowan testified that he never saw the Agency Agreements until this lawsuit commenced and that he had never had discussions with Mr. Gibbs about their specific terms. On cross-examination, he conceded that he knew there was an agreement in place between BGS and Indutech sometime between December 2002 and February 2003, but testified that he had no idea what kind of arrangement was in place.

254 Mr. Kossowan was referred to Guy Gibbs' testimony at examination for discovery wherein Mr. Gibbs said that he had informed Mr. Kossowan about the time the 2002 Agency Agreement was signed on November 14, 2002 that there was an agency agreement in place between BGS and Indutech, that BGS wasn't able to represent him as a marketing and sales force because it had an agreement in place with Indutech, and that the agreement prohibited acting for a competitor. Mr. Kossowan denied that this was accurate, saying that he took Mr. Gibbs at his word that he couldn't act as agent and did not make inquiries. Mr. Kossowan conceded that failing to inquire further was a consciously made choice, and insisted that he did not need to know why Mr. Gibbs could not act. Mr. Kossowan, however, conceded that the plan was that Mr. Gibbs was going to receive 50% of the profits of the venture in return for being in a position to refer bid inquiries to Cladtech.

255 Mr. Kossowan was also referred to Mr. Gibbs' testimony at examination for discovery to the effect that at some point in time he discussed BGS's history with Indutech with Mr. Kossowan. Mr. Kossowan testified that he did not recall this, although he was aware that BGS sold Indutech product.

256 Mr. Kossowan disputed Mr. Gibbs' discovery evidence that Mr. Kossowan would have been aware that BGS was supplying CCO product with Indutech as its preferred supplier.

257 Cladtech was eventually wound-up and the assets of the venture were sold to Matrix for roughly $1.5 million dollars.

258 As can be seen from the description of Mr. Kossowan's evidence, he contradicted himself at various times in his testimony and examination for discovery over the critical issue of what he knew about the Gibbs Group's commitments to Indutech and when he knew it, and was evasive in his answers when cross-examined on the issue.

259 Mr. Kossowan's position of innocence about the state of the CCO market and Indutech's relationship with the Gibbs Group does not ring true. He was an experienced manager in a similar business. He testified that he had commissioned a study on the CCO market before he left Dacro. He retained counsel to set up an elaborate corporate structure that would hide the Gibbs Group involvement. Although he conceded that Mr. Gibbs told him that he could not market Cladtech's product, that is exactly what in fact occurred after the corporate structure was put in place and BGS began to refer bid inquiries to Cladtech.

260 Mr. Kossowan appears to draw a nonsensical distinction between "marketing" efforts and receiving bid inquiries from third parties through the Gibbs Group.

261 It is reasonable to infer that Mr. Kossowan's plan was always to have the Gibbs Group refer bid inquiries to Cladtech. Otherwise it would make no commercial sense to set up a structure under which Mr. Gibbs would get half of the profits when he was not involved in any way in the day-to-day management of the company. Mr. Kossowan testified on cross-examination that what Mr. Gibbs brought to the business arrangement was his understanding of the market and his knowledge of customers. While Mr. Gibbs was not a credible witness generally, his examination for discovery evidence, read in by Indutech on what he told Mr. Kossowan and when, makes sense in the context of what was occurring during this period of time.

262 Mr. Kossowan's stubborn insistence that he had never considered whether Mr. Gibbs had a conflict in entering into the Cladtech arrangement was not credible, particularly given the elaborate scheme that was set up to hide Mr. Gibbs' involvement. His evidence, that during the time that he was in the United States with Barry Gibbs and Michael Gibbs to purchase the Cladtech U.S. equipment, they did not discuss BGS operations is not credible, and his ultimately evasive answer on that issue is not convincing. It is unbelievable that Mr. Kossowan and Mr. Gibbs did not talk about Mr. Gibbs role in marketing and why he could not be seen to be marketing Cladtech's products between April and December 2002 when both were making significant investments in a new business.

263 As Indutech submits, the details of the diversions to Cladtech indicate clearly how closely Cladtech and BGS worked together on bid inquiries.

264 On one diversion, PO 13048, the evidence discloses that there is no record that Indutech was asked to quote with respect to the manufacture of 20" CCO pipe. Almac was asked to quote and provided a price of $2,900 for the application of the CCO, which price was matched by Cladtech. Mr. Gibbs confirmed that BGS told Cladtech that if the CCO portion of the work cost $2,900, then Cladtech would be awarded the work.

265 With respect to PO 13220, there is no indication that Indutech was asked to quote with respect to the manufacture of 24" CCO straight pipe. Almac applied CCO to the pipe for BGS, and BGS sold the same pipe to Cladtech for re-sale to the oilsands. Mr. Kossowan stated that Cladtech fabricated flanges to the pipe and then sold it to an oilsands customer (with G65 certification) as though Cladtech had manufactured this CCO spool.

Alleged Breaches of Agency Agreements

266 Indutech submits that the Gibbs Group defendants breached the Agency Agreements in the following ways:

A. **Lack of involvement of Barry Gibbs in Indutech sales activities and alleged breaches of Agency Agreements by Barry Gibbs.**

267 It was a term of both Agency Agreements that Barry Gibbs be personally involved in the Agent's business operation and have a significant involvement in the direct selling activities of Indutech's hardened pipe and CCO. Both Barry Gibbs and Guy Gibbs acknowledged that they were aware the Agency Agreements required the ongoing and active involvement of Barry Gibbs in BGS between 2000 and 2004.

268 It is clear from the evidence that Barry Gibbs essentially became semi-retired in 1997. Both Gibbs stated that Barry Gibbs' primary contribution to the Gibbs Group was his sales ability. Mr. Gibbs, Sr. testified that after 1997 he had little, if any, day-to-day involvement in a sales capacity. By his own testimony, he remained involved in the Gibbs Group solely to consult as required, and to deal with Mr. Wolstenholme in negotiating any contracts with Indutech. Barry Gibbs own testimony, therefore, supports the allegation that he was not significantly involved in Indutech sales activities as required by the Agency Agreements.

269 Neither Gibbs specifically advised Mr. Wolstenholme that Barry Gibbs had retired from the company and was no longer actively involved, although Mr. Gibbs, Sr. submitted that Mr. Wolstenholme knew this. This was not put to Mr. Wolstenhome in cross-examination, and I do not find it credible, given the specific provisions of the Agency Agreements.

270 It is apparent from Barry Gibbs' testimony about the Millenium Project, however, that he was actively involved promoting other manufacturers for the project. He admitted diverting a number of orders to Capitan Drilling shortly after the 2000 Agency Agreement was executed. It is clear that within days of executing the 2002 Agency Agreement, Mr. Gibbs, Sr. assisted Mr. Kossowan with the purchase of the Cladtech U.S. CCO machines. I find that Barry Gibbs' denial of any knowledge of what was being planned with respect to Cladtech is not credible, and that he was aware of and participated in those breaches.

B. **Unauthorized changes to Indutech quotes**

271 The Gibbs Group had no authority under the Agency Agreements or arising from their relationship with Indutech to alter quotes or delivery dates without Indutech's approval. However, on several occasions, particularly in early 2004, the Gibbs Group submitted a quote to a customer on behalf of Indutech that was different from the written quote provided by Indutech. Indutech's in-house witnesses denied granting any authorization to change these quotes, and there was nothing in writing to indicate that such authorization had been provided. The Gibbs Group defendants presented no persuasive or credible evidence to explain those alterations.

C. **Exceeding maximum mark-up of 5% on buy/sell arrangements**

272 As previously described, in those situations where BGS dealt directly with an oilsands customer and purchased CCO products or induction bends directly from Indutech, the general understanding was that BGS would mark-up the Indutech products by 5% on the resale. Indutech relied on BGS for information as to what price the market could bear so as to maximize its profits. This agreement was set out in paragraph 4.5 of the 2002 Agency Agreement, and Ms.

McGowan testified that this was the understanding with the Gibbs Group prior to the execution of that agreement on November 14, 2002. Mr. Gibbs, however, said that this restriction only applied after the 2002 Agency Agreement was executed.

273 Paragraph 4.6 of the same agreement specified that all expenditures incurred by BGS in performing its obligations on a buy/sell arrangement were for its own account.

274 The Indutech in-house witnesses testified that between 2000 and 2004, Indutech sold product to BGS for supply to various oilsands customers and did so on the assumption that BGS was in turn marking up the product by the specified 5%. Mr. Lunquist, who was actively involved in handling orders on behalf of the Gibbs Group, indicated that, in these buy/sell arrangements, BGS would combine the prices of the products manufactured or fabricated on their behalf, add on its 5% commission and submit the quote to the client.

275 It is apparent from the spreadsheet prepared by Ms. McGowan on this issue that very few job numbers were marked up greater than 5% in the years 2000 to 2002. In fact, there were no instances in 2001 where BGS marked up product greater than the 5% mark-up allowed between the parties. Indutech submits that this is an indication that BGS understood the arrangement and for the most part abided by it in those years. The Gibbs Group, however, submits that this obligation did not exist before the 2002 Agency Agreement. Given that the obligation was not part of the 2000 Agency Agreement. I have reduced Indutech's claim under this heading to eliminate excessive mark-ups prior to that date. While I do not doubt the evidence of the Indutech in-house witnesses that they assumed that this was how the Gibbs Group was operating in the period prior to November 14, 2002, I cannot find that it was a breach of contract until after the arrangement had been formalized in the 2002 Agency Agreement.

276 Throughout 2003 and 2004, after the arrangement had been finalized in the 2002 Agency Agreement, there were a number of instances where the mark-ups exceeded 5%. This time period coincides with the start-up of Cladtech.

277 The Gibbs Group submits that making calculations of discrete mark-ups was "impractical", although it is not apparent from the evidence that this would have been overly difficult. It should be noted, in the specific context of the buy/sell arrangements that this arrangement was negotiated. The Gibbs Group also submits that no understanding was reached on what "in the normal course" meant, although no evidence was led by it that any of the mark-ups occurred in special or unusual circumstances. However, the Gibbs Group submits that it would be "practically impossible" to comply with the 5% mark-up requirement in circumstances where BGS had already quoted on a job, been issued a purchase order and was using Indutech to fill it, when other subcontractors were being used, where free issue bends were provided by BGS or where BGS may have had costs of transportation and jobs in which costs were charged after the purchase orders were issued. By "practically impossible', it appears that the Gibbs Group means that it was reluctant to reprice product if it appeared that a greater percentage of profit could be attained from the ultimate customer. Mr. Gibbs gave no explanation as to why he had not notified Indutech of these circumstances to obtain its approval to a higher mark-up.

278 Guy Gibbs testified with respect to some of these transactions that there were unaccounted-for costs. However, Mr. Lundquist testified that the BGS records were prepared carefully with respect to keeping track of costs, and the extra costs alleged by Mr. Gibbs were not found in the records. I do not accept Mr. Gibbs' evidence with respect to this issue.

279 The Gibbs Group submits that the 2002 Agency Agreement somehow required Indutech to bid at a discount to BGS. Mr. Gibbs testified that he had a conversation with Mr. Gabel in which he said that if Indutech was not discounting their price, BGS would mark it up as he saw fit. This is not how the contractual provision reads, and the testimony of Mr. Wolstenholme, Ms. McGowan and Mr. Lundquist supports the contractual language. They understood that the Gibbs Group would, on a buy/sell arrangement, mark-up Indutech's product by 5% to reflect commission. As Mr. Wolstenholme indicated, "pricing was discussed with the Gibbs Group" and the intent was for Indutech (and not BGS) to maximize profits on the manufacture of the goods. As he further indicated, "(i)t was important for Indutech to control the pricing in the market".

280 The Gibbs Group submits that Mr. Wolstenholme testified that Indutech had no interest in the final price of a fully constructed fabrication product. This is not an accurate characterization of his evidence. Mr. Wolstenholme testified that he "understood that the products would only be marked up by 5% even on products that Indutech did not market". The one exception related to pump boxes, where he conceded that the CCO component may be "inconsequential". The amount claimed by Indutech in damages for this breach at the end of the trial only relates to mark-ups on CCO products manufactured by Indutech, and are net of the 5% allowed mark-up.

281 Indutech claims $286,337 in damages for this breach. Deleting the excess mark-ups prior to November 14, 2002, and correcting the calculation to eliminate a double entry reduces the damages claimed to $186,028.

D. **Contacting competitors**

282 Both Agency Agreements prohibit the Gibbs Group from engaging directly or indirectly in any activities detrimental to Indutech, including, specifically, proactively communicating with a direct competitor on replacements for products or seeking alternative sources for products, with limited exceptions.

283 It is clear from evidence adduced from the sales files of the Gibbs Group and testimony by the Gibbs Group witnesses that the Gibbs Group was in nearly constant communication with Indutech's competitors to obtain alternate bids from the period from July 1999 to June 2004.

E. **Triten exception and Capitan exclusion**

284 The Gibbs Group had previously represented Triten in Houston, Texas with respect to the manufacture of CCO straight pipe and segmented bends. Before the execution of the 2000 Agency Agreement, Indutech was aware of this and permitted the Gibbs Group to continue representing Triten.

285 Triten eventually acquired Capitan, a Calgary-based company that was a direct competitor to Indutech with respect to CCO bends and straight pipe. The 2000 Agency Agreement included a clause that limited the involvement of the Gibbs' Group with Triten by indicating that the work could not be manufactured by Capitan. After implementing the 2000 Agency Agreement, there were no further discussions between the parties with respect to Triten or Capitan.

286 In the 2002 Agency Agreement, the exception that permitted the Gibbs Group to deal with Triten was entirely deleted. Thus, from November 14, 2002 forward, the Gibbs Group was restricted contractually from dealing with Triten in the same way as it was from dealing with any of Indutech's other competitors.

287 The evidence from the spreadsheet of diversions compiled by Ms. McGowan makes it clear that Capitan was used by the Gibbs Group to perform work throughout the material time from 2000 to 2004, as was Triten. Confirming this, Mr. Gibbs gave evidence that during the Millenium Project approximately, 100 CCO spools were ordered through Triten, approximately 20 - 25 of which were manufactured by Capitan.

288 Guy Gibbs also acknowledged that the Gibbs Group did not tell Indutech about work that was being sent to Triten or Capitan. He testified as follows on examination for discovery:

> Q All right, but to answer my question, you would not have informed Indutech in the fall of 2000 that you intended to use Capitan to supply some of the chromium carbide spools?
>
> A Once Indutech was aware that they were full and they could not comply with the requests, there was no mandate to ever go back and talk to them or explain how we managed to get it down.
>
> Q Which included informing them that spools were going to be obtained through Capitan?
>
> A It didn't matter who the spools went through, there was no need to go back and talk to Indutech. And quite frankly, don't ask, don't tell. They didn't want to know, didn't care; they were happy doing their own work, knew that they had what was going on, and that was that.

F. **Bulk welding wire supplied to Indutech's competitors**

289 The Indutech in-house witnesses testified that specialized welding wire is necessary to apply chromium carbide overlay. This specialized wire is commonly referred to as bulk welding wire.

290 Mr. Wolstenholme testified that prior to the execution of the 2000 Agency Agreement, he was concerned that BGS may be supplying bulk welding wire to competitors of Indutech and obtaining commissions through those sales transactions. Ms. McGowan testified that Indutech

had no interest in being dependant on BGS for the supply of its chromium carbide wire and did not want BGS assisting its competitors to produce CCO products.

291 Indutech therefore included a provision in both the Agency Agreements that prohibited the supply of bulk welding wire by BGS. The wording of the respective provisions varies somewhat. Concurrent with or as a condition precedent to the execution of the 2000 Agency Agreement, Indutech requested that BGS "...prior to the date of execution of this Agreement, provide a list of those parties which are being supplied with welding wire by the Agent". BGS provided a letter to Indutech on May 15, 2000 that stated that it only sold wire to Suncor and Syncrude.

292 Guy Gibbs testified that BGS had sold bulk welding wire to Matrix since at least 1997 when he assumed control of BGS from his father. He further indicated that BGS had previously sold wire to Suncor, although he couldn't recall when, but had never sold any wire to Syncrude. Both Barry Gibbs and Mr. Lunquist testified that they had no recollection of BGS ever having sold bulk welding wire to either of these entities, at least not in either 1999 or 2000.

293 The evidence discloses, however, that in 2000, BGS was a distributor of bulk welding wire, referred to as "Stoody wire", particularly to Matrix, a competitor of Indutech, on behalf of a company known as Thermadyne Canada. On April 24, 2000, in anticipation of signing the May 2000 Agency Agreement, Mr. Gibbs wrote to Thermadyne and requested that a commission structure be entered into instead of a buy/sell arrangement. The proposed commission on the supply of bulk welding wire to Matrix was to be 10% for as long as the agreement remained in force. Thermadyne replied on May 3, 2000 and confirmed that Thermadyne would assume the direct supply of Stoody wire to Matrix in return for payment of the proposed commission. The commission arrangement was specific to Matrix and did not extend to the sale of bulk welding wire by BGS to any other company.

294 The uncontroverted evidence of the Indutech in-house witnesses is that Indutech relied on the disclosure made by BGS in the May 15 letter when executing the 2000 Agency Agreement. Indutech alleges, and I accept, that Guy Gibbs on behalf of the Gibbs Group failed to disclose the fact that the Gibbs Group had sold wire to Matrix and was now involved in supplying wire to the same company on a commission basis. His letter advising that BGS sold wire to Syncrude was a misrepresentation. At trial, Mr. Gibbs testified that he understood the purpose of the letter was to identify on a "going forward basis" the entities that BGS intended to sell bulk welding wire to in the future. This is contrary to his discovery evidence, the wording of the Agency Agreement and the wording of the letter. Both of those documents are worded in the present tense and require confirmation of the parties "being" supplied with bulk welding wire, which BGS failed to do. Mr. Gibbs also testified that, initially, he thought the prohibition bound GPD, but not BGS. Mr. Gibb's evidence on these issues, as on others, is not credible.

295 On examination for discovery, Mr. Gibbs was asked if he anticipated in April 2000 that if he had to disclose the fact that he was selling bulk welding wire to Matrix, Indutech would be unhappy. He replied:

> Yes, they would be unhappy. It would be unreasonable to be so, but it was easier to comply than to explain to them why it's unreasonable.

296 He explained that Matrix was "going to buy wire from somebody somewhere, whether it was us or anybody else wasn't going to change anything" and agreed that the Gibbs Group might as well get the commission.

297 I find that Mr. Gibbs deliberately misled Indutech in connection with the sale of bulk welding wire by BGS. He also tried to circumvent the Agency Agreement by entering into a commission, rather than a buy/sell arrangement for the sale of wire, even though the Agency Agreements prevent the "supply" rather than just the "sale" of bulk welding wire. At any rate, the supply of such wire would be contrary to the more general provisions of the Agency Agreements that prohibit the Agent from engaging in activities detrimental to Indutech's competitive position.

298 Egregiously, BGS directly sold bulk welding wire to Matrix within days of executing the 2000 Agency Agreement.

299 Ms. McGowan prepared a schedule setting out such prohibited sales. By way of example, in March of 2000, BGS was involved in supplying Matrix with in excess of 100,000 lbs of chromium carbide wire to assist them in producing CCO products. The schedule also references direct sales of bulk welding wire to the defendant Cladtech in both 2003 and 2004. These sales were confirmed by Mr. Gibbs, who admitted that he knew he was acting contrary to the Agreement. The evidence establishes that between January 1, 2000 and June of 2004, BGS received profits and commissions relating to the sale of bulk welding wire in the amount of $279,554.

300 Mr. Gibbs acknowledged at trial that BGS realized approximately $60,000 per year from the sale of bulk welding wire. Although no records were produced by BGS for the period prior to January 1, 2000, Indutech also claims reimbursement for BGS's sales of bulk welding wire for the period of July 1, 1999 to the end of that year. This period coincides with the effective date of the May, 2000 Agency Agreement. Indutech estimates that BGS earned an additional $30,000 during that time frame. Indutech's total claim arising out of the sale/supply of bulk welding wire is therefore $309,554.

301 The Gibbs Group submits that one of the sales to a company called Ibex was not a breach of the Agreement because the wire was "tungster" wire and Ibex, according to Mr. Gibbs, had no role in the oilsands. The invoice, however, refers to "stoody" wire, which is the industry name for bulk welding wire, and the prohibition on sale in the Agency Agreement is not limited to competitors.

302 The Gibbs Group argues (without calling any evidence on the issue) that the limitation on selling wire was not one that gave Indutech a competitive advantage. That is irrelevant to the contractual obligation, even if it were true. The Gibbs Group also submits that the sale of bulk wire is not as blameworthy as the other breaches, and for this reason ought not to attract the remedies of restitution or disgorgement. There is no basis for this argument.

G. **Diverting work to Indutech's competitors**

303 Indutech submits that the Gibbs Group was only entitled to send work to Indutech's competitors in the most narrow circumstances, when Indutech specified that it could not perform the required work and agreed in writing that the Gibbs Group could take the order to a competitor. Indutech submits that BGS breached the terms of the Agency Agreements by in many cases being in contact with competitors at the same time it was dealing with Indutech on a bid inquiry.

304 Indutech compiled a spreadsheet of what it submits are diverted sales, mainly taken from the BGS files, which was amended after evidence was adduced at trial.

305 Each of the jobs in the spreadsheet involves the diversion of work to one or more of Indutech's competitors. In each case, the Indutech in-house witnesses testified that Indutech had no knowledge of the diversions and was never advised that other companies had been retained to manufacture the work, nor did Indutech approve of the work being sent to these competitors.

Fabrication

306 Guy Gibbs suggested that Indutech was limited in its fabrication activities and offered the opinion that it was a "bottleneck" problem for Indutech. He testified that BGS had a role in outsourcing fabrication for Indutech and that Mr. Gabel had sometimes suggested that BGS could use other fabricators. Mr. Gibbs testified that this became more frequent later in the relationship with Indutech. He said Indutech would attempt to do the fabrication itself but encounter problems, and as a result the customer would become upset. By way of example, Mr. Gibbs described a job for Syncrude in the spring of 2001 where he says that Indutech was not willing to work through a weekend, and the work was therefore completed by Clearwater Welding & Fabrication Ltd. Mr. Gibbs said that Mr. Gabel suggested that it would make his life a whole lot easier if BGS would contract the job out. None of this is credible, and more will be said later with respect to Mr. Gibbs' alleged conversations with Mr. Gabel.

307 Mr. Nelson, however, testified that Indutech had a large well-equipped area set up for fabrication work, had employees qualified to do fabrication and had the ability to extend its fabrication activities. Mr. Nelson testified that Indutech was not limited in fabrication .

308 Mr. Lundquist confirmed his understanding that Indutech manufactured certain "fabricated" items, and page 12 of the 2002 Agency Agreement contains a separate schedule of commissions negotiated for certain of these items.

309 Despite this, a number of claims that involved fabrication were withdrawn by Indutech in its amended spreadsheet of diversions based on the trial evidence. Indutech acknowledges that it does not specifically manufacture pump boxes and separation feedwells and has accordingly withdrawn these items from its claim for damages, separate and apart from the CCO component of these items that should have been referred to Indutech.

310 With respect to work that included pump boxes and separation feedwells, Indutech claims only the CCO component of these jobs. However, Indutech does claim under the heading of "diverted work for fabrication" work relating to reducers, expansion barrels, spool adaptors, cones and venturis. The Indutech in-house witnesses testified that Indutech has a history of manufacturing these products, and Mr. Gibbs acknowledged this in cross-examination.

311 However the Gibbs Group submits that the product line covered by the Agency Agreements does not include fabrication, either of CCO products or induction bends and does not include fabrication products such as pump boxes, feed-well distributors or expansion barrels.

312 The Agency Agreements provide that Indutech appoints GPD and related entities as its representative in respect of "Product", a defined term that means, among other things, CCO products and induction bends (excluding certain bends that are not relevant to this litigation). The Agency Agreements clearly acknowledge that Indutech manufactures and supplies Product as defined. It is incorrect to say that it does not cover fabricated products. I thus accept the Indutech position on diverted sales of fabricated items.

313 The Gibbs Group defendants make a number of submissions on the revised diversion spreadsheet. The following warrant specific comment:

1. Diversion 1 (PO 12323), Diversion 8 (PO 12637), and Diversion 22 (RGS # 102123) fall within the Triten exception in the 2000 Agency Agreement. I am satisfied that they do not, as work was done in Alberta in one case and by Capitan in the others.
2. Diversion 20 (BGS # 103037). In view of the uncontradicted evidence read-in from Mr. Gabel's discovery on this alleged diversion, I am satisfied that Indutech has not been able to establish that this was an unauthorized diversion, and commission in the amount of $25,647 should be deducted from the total. However, given that I accept that expectancy damages are the appropriate type of damages for the diversion claims and not disgorgement or restitution, this makes no difference to the final amount of damages.

314 After trial, Indutech claims $530,289 in damages for this breach. This is calculated by subtracting the BGS mark-up, assumed to be 5%, from the total selling price of the diverted product in the amount of $1,550.553 and applying a 36% profit margin to the resulting number. I find that this is a reasonable and appropriate way to calculate damages for this claim. Indutech cannot claim both expectancy damages and restitution or disgorgement damages for the same breach. Expectancy damages are most appropriate in this circumstance. As the claim is for expectancy damages, the Cladtech diversions are a sub-set of the whole damage claim, and are as calculated later in this decision.

Other Gibbs Group Submissions

315 The Gibbs Group submits that the evidence of Mr. Nowakowski of JNE Welding is a demonstration of what it describes as Indutech's "business model" and what it says are

Indutech's problems in achieving timely deliveries. Mr. Nowakowski described one incident of late delivery in 2001 with respect to what would have been a fairly small job for Indutech to a non-oilsands customer. Mr. Nowakowski's evidence is largely exaggerated by the Gibbs Group.

316 The Gibbs Group also overstates the evidence of Mr. Lundquist with respect to how BGS typically operated with Indutech. While Mr. Lundquist did indicate that he would send bid inquiries to Indutech first, he later amended that to exempt jobs where there was a quick turn around and was evasive about the Millenium Project. While he was aware that BGS had a contractual relationship with Indutech, he testified that he was not aware of the contractual limitations with respect to contact with competitors and readily admitted sending bid inquiries to both Triten and Capitan. He said that Guy Gibbs later instructed him to give Cladtech an opportunity to bid on projects. He denied being aware that the Agency Agreements required obtaining Indutech's consent. Rather than corroborating the Gibbs Group allegations, the testimony of Mr. Lundquist supports Indutech's submission that BGS largely ignored the limitations and prohibitions contained in the Agency Agreements and operated on a basis that was most beneficial to BGS.

John Gabel

317 The Gibbs Group made a number of submissions with respect to what Guy Gibbs said about his conversations with Mr. Gabel, and submitted that an adverse inference should be drawn against Indutech from the fact that Mr. Gabel did not testify at trial.

318 As previously noted, Mr. Gabel was formerly an employee of Indutech, originally an estimator and later the sales manager, who left Indutech's employ in 2005 and was working for Rambler at the time of the trial. At least one of the defendants was in contact with Mr. Gabel prior to the trial and had shown him a copy of Mr. Nelson's Report, according to Mr. Gabel's read-in discovery evidence.

319 Mr. Gabel was extensively examined for discovery on three separate occasions in 2007 and 2008 by the Gibbs Group defendants. The Gibbs Group read in excerpts from Mr. Gabel's examination for discovery as part of their case. Counsel for the Gibbs Defendants indicated that these excerpts were being read-in, not for the truth of their content, but "as some knowledge of Indutech".

320 The Gibbs Group submits that the tenor of Mr. Gabel's evidence as read in is that Indutech was operating at capacity at all times and that it knew that overflow bends and CCO work were of necessity being placed from time to time with other manufacturers. However, the read in evidence does not support the contention that Indutech had no excess capacity to perform additional work and is of limited utility on the knowledge issue.

321 Mr. Gabel did agree that deliveries were of substantial concern to clients, commenting that with any fabrication shop, "the client wants their stuff as fast as you can get to em". He also commented that Indutech was always fairly busy, noting that it didn't lay off many people. He agreed that fabrication was typically a bottleneck in the production process. Mr. Gabel indicated

that if a customer came to Indutech with an unrealistic delivery date, he would talk to them about it. He acknowledged that delivery was a factor on a lot of inquiries, commenting "I don't think there was too many of it actually turned down, but I'm sure there were." He recalled visits from Barry Gibbs and Guy Gibbs during the Millenium Project and another large project, commenting:

> Well, I'm sure they, being the distributor, some of the people that they were talking to or involved in phoning them and saying, When the heck am I gonna get my stuff? So they would obviously be - their next phone call would be to me, When am I gonna get my stuff? And so they were concerned in some places because it was -you know, we were jam-packed with work, and it was - was tough getting stuff out on time - and so I guess they - they felt it was in their due diligence to come down and talk to us to see what was going on so they could go back to their people and tell 'em the facts. Simple as that, I guess.
>
> Q. I see. So they were liaising back with your customer with regard to delivery times issues and what your various hold-ups were in getting the product out.
>
> A. Yeah. Especially on them two projects, I believe.

322 In another read-in, Mr. Gabel was asked in the context of having direct discussions with a customer about delivery dates after having received a request for a quote:

> Q. Were there situations in which you simply declined to issue a quote because you knew you weren't going to make the delivery date?
>
> A. Sure. There would be times where [the customer would] say, We need it in a week, and look at our - at our bending schedule, and if there was a bunch of bending and it would hurt my other clients to even entertain it, I'd say no, I can't do it, if you have to have it by that day, forget it.

323 None of this is particularly supportive of the Gibbs Group submission that Indutech did not have capacity to do any additional work, or that Mr. Gabel would tell Mr. Gibbs from time to time that he didn't want to receive a bid inquiry, given that Mr. Gabel appears to be addressing direct conversations with customers after having received a bid inquiry.

324 Although the Gibbs Group defendants had the opportunity to thoroughly examine Mr. Gabel for discovery, they did not read in any admissions with respect to knowledge about specific bid inquiries being sent elsewhere.

325 It is true that this read-in evidence appears to contradict the evidence of the Indutech in-house witness that Indutech would never refuse to submit a quote, but, given that the Indutech witnesses gave evidence at trial and were subject to intensive cross-examination on this issue, and Mr. Gabel did not, the read-in evidence has little weight. I must also take note of Indutech's read in evidence of Michael Gibbs, who worked at GPD between March 2002 and December 2005, who replied in the negative to the question of whether he recalled any instances where Mr. Gabel had indicated that he couldn't deliver Indutech product within a prescribed time frame

326 It is true that in speaking about the Millenium Project and other big oilsands projects, Mr. Gable commented that they were huge projects and that there was no way one shop could do

all the work that was out there. This does not address the issue of the contractual obligations of the Gibbs Groups to Indutech under the Agency Agreements.

327 Mr. Gabel was examined at discovery about a Muskeg River project where Indutech had been invited to a meeting with all of its competitors on November 23, 2001 and told to work out who would do what part of the work. Mr. Gable evidently wrote a letter dated December 3, 2001 in which he said that the total spool requirement in the time frame indicated was impossible for one overlay shop to undertake. In the letter, Mr. Gabel indicates that Indutech could produce 46 pipe bends, 50 straight spools and 20 specialized spools by the March 31, 2002 deadline and could take on more work if the deadline was extended. Mr. Gabel commented that Indutech got a lot of the work, a "good portion of it" because it had more capability than the other competitors to do it. He also commented that he remembered "little bits" of the letter.

328 This read in evidence does not particularly support the allegations by the Gibbs defendants about Indutech's lack of capacity, being evidence with respect to a particular project at a particular point in time by a witness with a poor memory of the event, who was not called and therefore not subject to cross-examination.

329 With respect to drawing an adverse inference against Indutech for failing to call Mr. Gabel, Mr. Gabel was available to be called as a witness by either side and the general rule is that it is not appropriate to draw an adverse inference in that situation: *Hibberd v. Hurricane Hydrocarbons Ltd.,* 2006 ABQB 707, 407 A.R. 1 at para. 38, aff'd 2007 ABCA 408, 422 A.R. 18. Indeed, given the evidence of Guy Gibbs and Mr. Lunquist with respect to their alleged communications with Mr. Gabel, Mr. Gabel's evidence may have been of greater value to the Gibbs Group than to Indutech, although Mr. Lundquist was very careful to say only that he had spoken to Mr. Gabel about getting alternate quotes from Triten.

330 On that issue, the onus lies on an agent to prove that any transaction was fair, reasonable and not the product of concealment, and to provide evidence that the principal was aware of what he was doing and that no advantage was taken of the principal: Mark Vincent Ellis, *Fiduciary Duties in Canada*, looseleaf (Toronto: Thomson Carswell, 2004) at 3-12.1, 3-12.2, citing *Woods v. Moon* (1923), 23 O.W.N. 582 (HC).

331 The Gibbs Group defendants have not satisfied that onus merely through the testimony of Guy Gibbs, which was not credible, and the testimony of Mr. Lundquist, which was guarded and limited on that issue.

H. **The Millenium Project and diverted sales**

332 Testimony with respect to this project has been set out elsewhere in these reasons, but, for clarity and at risk of repetition, I am satisfied by the evidence of the following additional facts on the Millenium Project. Indutech submitted pricing for budgetary purposes for work on the Millenium Project through BGS to SNC-Lavalin on April 18, 2000. Neither BGS nor Indutech appreciated the exact scope of the work at that time. BGS was responsible for maintaining contact with the engineering firms and MCC for purposes of obtaining information regarding the

timing and specifics of the CCO products to be manufactured. In the 2000 Agency Agreement, the parties had agreed that a separate commission rate would apply to this project. In accordance with the agreement, Indutech paid BGS commissions of 3.0% and 3.5% on the two contracts it was awarded for this project.

333 Indutech quoted on Construction Work Packages ("CWP") 1196 and 1197 on June 28, 2000 with a 17 week delivery from receipt of purchase order and material receipt. The purchase order was received on July 13, 2000. Indutech submits that it met all delivery dates set out in its quotation for 33 spools, referencing a summary of work that it performed.

334 The quotation was specific to SNC-Lavalin's specification. This was the first work that Indutech performed in connection with the Millenium Project and the quotation was submitted directly to Suncor. BGS therefore received a negotiated commission from Indutech for these spools. The minutes of a meeting between representatives of SNC-Lavalin and Indutech employees dated June 29, 2000 records that as of that date:

> Indutech currently has a moderate workload in the shop. One major project is underway.
>
> ... The current situation offers a window that our order would fit into.

335 Guy Gibbs testified that either in July or August of 2000 he became aware that work on the Millenium Project had been removed from Matrix and needed to be manufactured by year- end. Barry Gibbs and Guy Gibbs met with MCC in the summer of 2000 and, in doing so, were introduced as experts in the field of CCO products. Mr. Dunphy acknowledged that he relied on BGS to provide information about the shop capacity and current shop load of the various companies manufacturing CCO products. The Gibbs Group even sourced additional suppliers at his request.

336 A July 16, 2000 revised spreadsheet prepared by MCC outlines all of the spools that were required to be manufactured for the project. Indutech submits that since this document was the first version of the other spreadsheets entered at trial, it is reasonable to assume that both MCC and BGS knew the full scope of the project around this time, if not earlier, recognizing that it took some time to gather the information and prepare the spreadsheet in question. There is no credible evidence that would contradict that assumption.

337 Both Barry Gibbs and Guy Gibbs attended a meeting with MCC on August 17, 2000, which was previously referred to as part of Guy Gibbs' evidence. One of the primary purposes of the meeting was to deal with a specific construction work package, CWP 1293, which Mr. Dunphy testified that BGS had already been asked to assign to manufacturers for the production of the spools. Indutech was not asked by BGS to attend the meeting and had no knowledge that BGS was even meeting with representatives of MCC. In his direct examination, Guy Gibbs indicated that he "established" from discussions with Mr. Gabel that Indutech would not be able to do the work. I do not believe this evidence, and I find Indutech was never asked to quote on this work, nor advised of it in any way.

338 Guy Gibbs further testified that it was clear that if BGS could satisfy the requirements of MCC, there was more work available and MCC would continue to use BGS to place additional

work. He said that this was an opportunity for BGS to prove itself and, as he admitted on cross-examination, enhance its reputation. By August 17, 2000, BGS was confirming a cost plus arrangement with MCC for the handling of CWP 1293 as reflected in the Minutes of Meeting. Guy Gibbs confirmed that BGS as of that same date had also contemplated utilizing manufacturing facilities other than Indutech and Triten to complete the balance of the work. I accept from the evidence that Indutech was never notified in August 2000 of the full scope of the work involved with CWP 1166, CWP 1130 and CWP 1135, which construction packages were discussed at length in that same meeting.

339 On August 25, 2000, Ms. McGowan questioned Guy Gibbs in an email as to why work was being sent to Capitan on a Syncrude project. She also questioned why certain fabrication work was not brought to the attention of Indutech. Mr. Gibbs responded to this email on August 28, 2000 and indicated that the fabrication work had to be handled on a "critical time rush" and BGS therefore went elsewhere. He then briefly mentioned the Capitan issue, and provided a satisfactory response to allow that diversion to occur. Mr. Gibbs then mentioned in the same email that Indutech had a machine set aside to do certain work. In the last paragraph he stated:

> MCC wants to award that is why they gave you a couple of spools to keep the equipment tied up.

340 Indutech submits that the reference to a"couple of spools" coincides with a Indutech Sales Order for two pieces related to CWP 1166, confirming that a few spools were given to Indutech to keep the CCO equipment tied up. On August 31, 2000, BGS issued a purchase order to Triten Corporation for the manufacturer of CCO spools specific to CWP 1166.

341 Indutech quoted on September 8, 2000 for the manufacture of 46 spools with respect to CWP 1166. Indutech submits, and the evidence bears out, that it was never notified of the full number of spools involved in this construction work package. On August 29, 2000, Indutech also quoted on CWP 1130 for the supply of 54 spools. Indutech submits that both of those orders were dependant upon the supply of materials from BGS to Indutech by August 31 and September 21, 2000 respectively. Although Guy Gibbs denied at trial that BGS was responsible for the supply of the materials, an Indutech email of September 8, 2000 confirms the opposite. In that email, Indutech specifically references CWP's 1166, 1130 and 1135. In doing so, reference is made to earlier facsimiles dated September 5 and September 7, 2000. This email specifically outlines delivery dates for material and requests additional material clarifications and drawings be issued by prescribed dates, failing which BGS is forewarned that delays in manufacturing will occur.

342 On September 7, 2000, Indutech submitted a quote to BGS for the manufacturer of 24 spools that pertained to CWP 1135. The total price of the order was $737,194 with the free issue pipe to be delivered to Indutech no later than October 6, 2000. Indutech indicated in the cover sheet that it was allocating machine time to do the work. BGS forwarded the quote by facsimile to Mr. Dunphy on September 11, 2000.

343 Ms. McGowan testified that this sales order was cancelled without any reason being given. Guy Gibbs testified at trial that he informed Mr. Gabel that the work "had gone elsewhere". In

doing so, he concedes that he did not specifically indicate that the order had been cancelled or provide any further explanation. Mr. Gibbs said that Mr. Gabel had replied that it "wasn't important". On cross-examination, Mr. Gibbs did not recall what was discussed in the conversation and could not recall the date or month of the telephone conversation, nor was any record of this conversation ever produced. Mr. Dunphy indicated at trial that he did not recall offering any work to Indutech that it declined.

344 It appears from his testimony that Guy Gibbs gave the Indutech quote re CWP 1135 to Mr. Dunphy around September 11, 2000 as they had a meeting to expedite delivery of the CCO spools. Mr. Dunphy confirmed in his testimony that he relied on the advice given by Mr. Gibbs as to the capacity of the various manufacturers, including Indutech. Indutech submits that either BGS recommended to MCC that Indutech's work be placed elsewhere, or, in the alternative, BGS made that decision on its own and cancelled the order. Indutech submits that BGS' motivation for this was profit.

345 The evidence discloses that BGS received commissions of 10% on any work placed through Triten and Bendtec, separate and apart from any other remuneration it may have received from administering the spool orders on behalf of MCC. As previously noted, the 24 spools that were the subject of the Indutech quote became part of the scope of work of BGS' own bid for the work that gave rise to Purchase Order M800-1502 issued to BGS for a total amount of $4,324,985.84. The cost to BGS of manufacturing the various spools was $4,083,105.97, giving BGS a profit of $241,880, or a 5.6% profit level when compared to the 3.0% and 3.5% commission that would have been paid by Indutech pursuant to the 2000 Agency Agreement. Indutech was never made aware of this.

346 In addition, BGS received a 10% commission from both Triten Corporation and Bendtec on any spools they manufactured. The evidence discloses that the total commissions paid to BGS were $273,848.60 (adjusted to delete Job No. 101069 for Dreco Rig), which work related to CWP's 1166 and 1130, CWP 1135 and CWP 1293. The total remuneration eventually paid to BGS in connection with PO 1502 was $515,728.60 ($241,880 and $273,848.60). This equates to an 11.9% profit margin.

347 The Gibbs Group submits that CWP 1135 was removed from Indutech through no fault of the Gibbs Group because Indutech was not going to be able to meet the delivery schedule by year-end. It suggests that MCC had a final say in the placement of work, but Mr. Dunphy's evidence does not support this. Mr. Dunphy was not asked specifically whether MCC decided to remove this work from Indutech. In fact, his testimony was that the working group decided not to remove work from Indutech because that would have made their delivery problems worse.

348 The evidence also discloses that further purchase orders were issued to BGS in connection with the Millenium Project. Indutech says that it had no knowledge of this additional work and was not asked to submit quotations. Those purchase orders include the following:

1) Job Number 101109 issued

	December 7, 2000 to Capitan	$ 55,280
2)	Job Number 101108 issued	
	December 13, 2000 to Capitan	$ 25,262
3)	PO M890-2756 issued	
	February 21, 2001 to Bendtec	$148,555
4)	Job Number 101155 issued	
	February 21, 2001	$ 14,414

BGS issued these purchase orders to Indutech's competitors. The last of Indutech's deliveries on the jobs it had been awarded were made on December 15, 2000.

349 Both Mr. Wolstenholme and Ms. McGowan testified that Indutech had capacity in the fall of 2000 and at any time could have handled additional induction bends. Indutech submits that BGS was in a direct conflict of interest when it either recommended to MCC that Indutech's order be cancelled or cancelled the order on its own. Indutech says BGS was protecting its own interests and, in doing so, was acting contrary to the terms of the 2000 Agency Agreement and to the detriment of Indutech. Guy Gibbs acknowledged that no disclosure was made to Indutech of PO 1502, the number of spools contained in that order or the fact that BGS was the successful supplier of this CCO product. I find it reasonable to infer that BGS was responsible for the cancellation of the order, and in doing so, breached its duty of loyalty to Indutech under the Agency Agreements, in addition to its conflict of interest over the issue of commissions.

350 Indutech submits that it could have manufactured an additional 24 spools in the fall of 2000 and completed its portion of the work relating to CWP 1135 by year-end, relying on:

a) its financial statements for 2000 evidencing sales of approximately $1.3 million less than sales in 1999, indicating that Indutech had excess capacity;

b) the admission by Mr. Smith, the expert called by the defendants, that, all things being equal, Indutech had the capability of meeting previous year's sales;

c) payroll evidence indicating that Indutech only worked 45 - 55% of the weekends between June and December of 2000, indicating there could have been more weekends and additional shifts could have been worked;

d) the Nelson Report which indicates that Indutech manufactured 2493 bends in 2001 as compared to 1606 bends in 2000 and that manufacturing an additional 24 bends would only have required 48 additional hours of bending time and a roughly 3.6% increase in CCO application time; and

e) the fact that the documentary evidence establishes that Indutech completed the spools it was given on time despite delays in requisitioning materials and obtaining final drawings.

351 The Gibbs Group submits that Indutech was "filled to the brim" and unwilling or unprepared to take on more work on the Millenium Project for a number of reasons:

a) The Gibbs Group submits that Indutech functioned at "near capacity", approximately 90%, throughout the relevant time period. This does not accurately characterize Mr. Wolstenholme's evidence, which was that Indutech was using 80 to 90% of its production capacity between 2000 and 2004, that it was trying to function at 90% average capacity and that it always had spare capacity for induction bending. Mr. Wolstenholme testified that capacity was added when and as needed, and the evidence confirms that Indutech added capacity in the short term through overtime or additional shifts and by adding equipment and welding heads over time.

b) The Gibbs Group suggests that, while Indutech met the delivery dates for the SNC-Lavalin work, the work was charged on an expedited basis when it was not actually delivered on that basis, relying on the testimony of Mr. Holland and Guy Gibbs. Indutech submits that Mr. Gibbs was not candid in this testimony. It points out that the original quote in June was on the basis that pipe bends were to be delivered to Indutech. The scope of work changed in early September 2000, as evidenced by an email from Mr. Gabel to Mr. Gibbs, with additional production and testing requests being made by Suncor on September 15, 2000, and a change in the sales order to the effect that Indutech became responsible for the supply of pipe bends as well as the CCO application. The invoice thus reflected a later delivery date, which was met.

c) The Gibbs Group cites Mr. Dunphy's testimony about MCC's concerns over Indutech's delivery. As previously indicated, Mr. Dunphy's overall impressions with respect to delivery problems at Indutech did not survive reference to actual documentation indicating problems in the project which delayed deliveries of material and revised specifications from MCC and documentation reflecting Indutech's actual record of deliveries on the project.

d) The Gibbs Group relies on Mr. Holland's testimony. As previously discussed, Mr. Holland's knowledge of what occurred with respect to the Millenium Project was suspect and unhelpful.

e) The Gibbs Group and the Kossowan defendants made submissions about shifts worked in the fall of 2000 and the number of employees hired. After reviewing the submissions made by the Gibbs Group and Indutech on these records, I find that the evidence discloses Indutech worked approximately 45 - 55% of weekends between June and December 2000, that it worked some extra shifts and that it hired some additional employees, but that extra shifts could have been scheduled if the need had arisen and Indutech had the ability to hire additional workers to

meet production demands. I also agree with Indutech's characterization of its work force as stable.

f) The Gibbs Group submits that "fragments of communication in 2000", referring to the email exchanges between Ms. McGowan and Guy Gibbs in late August 2000 previously described, are an indication that Indutech was aware of the contents of CWP 1135. The email itself does not support this submission, nor does it support the suggestion that Indutech knew the work was placed elsewhere by BGS. Both Mr. Wolstenholme and Ms. McGowan testified that they had no idea of the overall number of spools involved in the project and Guy Gibbs admitted that he never disclosed PO 1502 to Indutech, nor did he provide copies of the MCI spreadsheets to Indutech.

352 BGS submits that it was acting within the terms of the first Agency Agreement when it took on a management role for a portion of the Millenium Project as this presented Indutech with the opportunity to be the preferred supplier for the project. The evidence establishes the opposite: work on the project was diverted from Indutech for the benefit of the Gibbs Group and Indutech's competitors and the management of the project thus became an opportunity for the Gibbs Group to profit at the expense of Indutech.

353 The Gibbs Group submits that it was not in a position to forward inquiries with regard to the work on the Millenium Project. This was directly contracted by Mr. Dunphy's evidence that MCC relied upon BGS with respect to who should do the work. By way of example, Guy Gibbs conceded that he recommended to Mr. Dunphy that Capitan and Trican be added to the approved suppliers list for the Millenium Project.

354 The Gibbs Group submits that BGS fulfilled its obligations to Indutech under the Agency Agreement because Indutech received the largest share of the work, while Triten received fewer spools. This ignores diversions of work on the project to other competitors, including Capitan (which was specifically prohibited by the 2000 Agency Agreement).

355 As Mr. Gabel indicated as part of the Gibbs Group defendants' read-ins, Indutech was always "fairly busy" but even when it was handling major projects it tried "... to save a little capacity".

356 The Kossowan defendants make certain arguments arising from Indutech's financial statements that do not survive close examination, nor do they aid in the analysis of the question of productivity capacity. It cannot be said from the evidence as a whole, as the Kossowan defendants argue, that Indutech was content to stay with the status quo.

357 The Kossowan defendants object to one of the diverted sales being included in the claim for damages on the basis that it was a sale outside of the "Territory" defined by the Agency Agreement. While this is so, the Agency Agreement also prohibits BGS from selling products outside the Territory. The Kossowan defendants also incorrectly submit that the evidence discloses a refusal to sell to Goodall Rubber.

358 In summary, the evidence establishes that BGS entered into cost plus arrangements with MCC for managing certain aspects of the Millenium Project and for the supply of materials for manufacturing the spools in direct competition with Indutech, without its knowledge or consent. Those efforts resulted in BGS being awarded a purchase order for the manufacture of approximately 150 spools, as well as a purchase order on February 21, 2001 for induction bends to be supplied by Bendtec.

359 Throughout the summer and fall of 2000, BGS carefully managed the Millenium Project without disclosing to Indutech the full extent of its involvement and, in particular, the fact that it was making recommendations to MCC in connection with the manufacturing capacity of Indutech and its competitors. Indutech submits that BGS had a conflict of interest in pursuing these contracts with MCC and in assisting competitors of Indutech in becoming approved to manufacture these spools, including such companies as Capitan and Triten. I am satisfied that the evidence referred to establishes those breaches of the 2000 Agency Agreement.

360 As a result of its involvement in the Millenium Project, MCC paid BGS approximately $832,000 in commissions and fees. In contrast, Indutech paid commissions to BGS of approximately $70,000 for the two contracts that it completed for the Millenium Project. Indutech submits, and the evidence establishes, that BGS saw an opportunity to maximize its profits on the Millenium Project and did so without regard to the interests of Indutech, and without regard to the terms of the governing 2000 Agency Agreement.

Analysis of Law

I. Breach of Contract

361 Much of the evidence adduced by the Gibbs Group defendants relates to the reasons why their breach or non-performance of the Agency Agreements was justified or commercially reasonable. However, even if the evidence establishes valid commercial reasons for breach or non-performance, non-performance of a contract to any degree, in any way, and regardless of intention, is a breach of contract unless otherwise excused by law: Gerald Henry Louis Fridman, *The Law of Contract in Canada,* 5th ed. (Toronto: Thomson-Carswell, 2006) at 579.

362 As Indutech points out, breach of contract is actionable even absent an intent to breach or negligence in performance: Fridman, *The Law of Contract in Canada*, at 702. The major defences that may preclude liability would be a finding that the contract was frustrated, that the plaintiff failed to perform a condition precedent, or that the contract contained an exclusion clause permitting the breach: Fridman, *The Law of Contract in Canada*, at 702. None of these are present.

363 The Gibbs Group concedes that it breached the Agency Agreements with respect to the set-up of Cladtech, but submit that Indutech has failed to establish that it suffered any loss as a result of this breach. The evidence is otherwise, and the law with respect to damages with respect to breach of contract is analyzed later in these reasons.

364 With respect to the sale of bulk welding wire, the Gibbs Group concedes sales of such wire to Cladtech, but denies otherwise selling bulk welding wire contrary to the Agency Agreements.

365 The Gibbs Group submits that the 2000 Agency Agreement allowed the supply of bulk welding wire to parties that were already its customers. While this is true, GPD was to provide Indutech with a list of parties it or BGS supplied with bulk welding wire as a condition precedent to the agreement. The list supplied was misleading and inaccurate and did not include Matrix. Guy Gibbs' explanation of what he thought was to be included in the list is not credible. His conduct in attempting to alter the relationship between BGS and Matrix in order to be able to continue to supply Matrix was deceptive and deliberately conceived to attempt to undermine the clear prohibition in the Agency Agreement. Even the altered arrangement, however, breached the agreement, which refers to the "supply" of wire, not merely direct sales. The supply of bulk welding wire to Matrix was not only a breach of section 4.3.3 of the Agency Agreement, it was also a breach of the general provisions prohibiting assistance to Indutech's competitors.

366 Indutech has established a breach of the Agency Agreements with respect to all of the alleged unauthorized sales of bulk welding wire. The Gibbs Group's submissions about Indutech's motives in insisting on this provision and whether Indutech suffered any loss from these sales are irrelevant to the issue.

367 With respect to the Millenium Project, whether or not it could be said that the Gibbs Group's involvement in a management contract with respect to the Millenium Project was beneficial to Indutech (and the evidence does not establish that it was), this involvement was a breach of the 2000 Agency Agreement. Examples of the contractual breaches that arose from this involvement include Barry Gibbs' involvement in promoting the interests of Indutech's competitors, the diversions of sales to Capitan and other competitors contrary to the agreement and the failure to refer all inquiries to Indutech. The involvement also was in breach of the obligation to keep Indutech informed, both of the Gibbs Group's sales activities and the market situation, in breach of the prohibition against proactive communication with competitors and in breach of the prohibition against seeking alternative sources for products without Indutech's consent.

368 I have found that the evidence establishes that Indutech had the capacity to do more work on the Millenium Project and in general and that the defendants' allegations that Indutech was unable to take on more work are unfounded. However, even if the Gibbs Group had been able to show a lack of capacity, the Gibbs Group breached the 2000 Agency Agreement with respect to work diverted to competitors. The Gibbs Group failed to follow article 4.2.4 (which allows the Agent to seek alternate sources of product) by failing to seek Indutech's agreement to such alternate sources. Guy Gibbs' evidence about seeking and obtaining agreement from Mr. Gabel was not credible.

369 The Gibbs Group defendants submit that Indutech must have known that BGS placed work elsewhere and that it was working for MCC given that Mr. Dunphy attended the Indutech facility on at least one occasion with BGS representatives. Mr. Dunphy, however, was not asked about

whether the BGS-MCC relationship was made clear to anyone at Indutech, and there is no persuasive evidence to establish that Indutech knew either the scope of work nor the true nature of the relationship between BGS and MCC. The evidence read in from Mr. Gabel's testimony does not help the Gibbs Group defendants on this issue. Rather, the evidence confirms that BGS failed to inform Indutech that it was handling CWP 1135, an order that was cancelled without explanation, as part of Purchase Order 1502 issued to BGS by MCC.

370 The Gibbs Group references the email communications between Ms. McGowan and Guy Gibbs in August, 2000 as evidence that Indutech knew there was concern over the limits of Indutech's capacity and that work was being placed elsewhere. However, these email communications do not, as alleged, establish that Indutech had full knowledge of the scope of the project or BGS's role, and cannot serve as a basis for estoppel. This evidence falls far short of meeting the three requirements for estoppel: *Scotsburn Co-operative Services Ltd. v. W.T. Goodwin Ltd.,* [1985] 1 S.C.R. 54 at 66.

371 That Ms. McGowan did not investigate the loss of the work order mentioned in the emails does not establish knowledge as acquiescence, but only indicates the misplaced level of trust Indutech held in its agent.

372 With respect to diverted sales other than those that were part of the Millenium Project, there is no evidence that Indutech had knowledge of these diversions other than Guy Gibbs' repeated and convenient assertion that he discussed these projects with Mr. Gabel. Mr. Gibbs' evidence is not credible. The evidence establishes that, for some of the diverted sales, the Gibbs Group misrepresented Indutech's projected delivery dates or used Indutech pricing information to allow Cladtech to underbid a quote.

373 With respect to the allegation of breach of contract by virtue of a mark-up in excess of 5%, I have found that this would be a breach of contract only after the understanding was incorporated into the 2002 Agency Agreement. There is no evidence, however, that the Gibbs Group sought to discuss these situations with Indutech to delineate what "normal practice" would be, or to obtain Indutech's consent to a higher mark-up where the Gibbs Group was filling an existing purchase order. BGS and GPD had an obligation under the 2002 Agency Agreement to keep Indutech informed of the nature and extent of their sales activities and to provide information to Indutech on the market situation for products, and their failure to inform Indutech of these situations was a breach of these obligations under the Agreement in addition to being a breach of the specific 5% mark-up prohibition.

374 In summary, Indutech has established that BGS and GPD breached the Agency Agreements in multiple ways, including the following:

a) by Barry Gibbs not being personally involved in direct selling activities on behalf of Indutech, and by his being directly responsible for engaging competitors in the sale of similar products as a part of his work on the Millenium Project;

b) by changing Indutech's quotes with respect to delivery times without authorization;

c) by exceeding the maximum mark-up of 5% when operating under a buy/sell arrangement after November 14, 2002;

d) by engaging, directly or indirectly, in the sale of products likely to compete with Indutech's products within the oilsands territory, both with respect to the Millenium Project and generally;

e) by obtaining alternate sources of product from competitors without Indutech's agreement or knowledge;

f) by engaging directly or indirectly in activities detrimental to Indutech's sales, including communicating with Indutech's competitors;

g) by supplying bulk welding wire;

h) by failing to disclose BGS's involvement in the Millenium Project; and

i) by establishing and promoting Cladtech in competition against Indutech.

II. Agency and Breach of Fiduciary Obligations

375 Indutech submits that GPD and BGS were agents of Indutech, relying in part on the four-part definition of agency provided in F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 18th ed. (London: Sweet & Maxwell, 2006) at page 1:

(1) **Agency is the fiduciary relationship which exists between two persons,** one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

(2) In respect of the acts which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.

(3) Where the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.

(4) A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority, and hence no power, to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent. [emphasis added]

376 Indutech notes that *Bowstead and Reynolds* refers to two categories of quasi-agency. The first is "canvassing" or "introducing" agents, described as persons hired to introduce parties desirous of entering into contracts, which are then left to enter into contracts between

themselves. Such agents make no contracts and dispose of no property and their powers to alter their principals' legal relations are at best extremely limited. The text notes at page 10:

> They do, however, act for their principals in a capacity which may involve the repose of trust and confidence, and hence may be subject in some respects to the fiduciary duties of agents towards their principals... but...because of the limited nature of their external powers to affect their principals' legal positions, are not agents in the full sense of the word.

377 The second category of quasi-agency referred to in *Bowstead and Reynolds* is "indirect representation", wherein a principal appoints an agent to deal on his behalf on the understanding that when dealing with any third party the agent will deal in his own name as principal. The author states at pages 10-11:

> As between principal and agent, however, the relationship is one of agency; *viz.* the agent does not promise to achieve a result but only to use his best endeavours, he does not answer to his principal on the strict basis appropriate to seller or buyer (though he may have some of the rights of a seller, *e.g.* a lien), he is normally remunerated by commission, he owes fiduciary duties and thus may not without disclosure take commission from the other party; and he is in a sense under his principal's control.

378 With respect to the traditional categories of fiduciary relationship, a strong (but not irrebuttable) presumption arises that a fiduciary obligation is present: Lac Minerals Ltd. v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 646-647, La Forest. The relationship of principal-agent is a traditional category of fiduciary relationship: *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377 at 409.

379 The Gibbs Group denies that the Agency Agreements created any relationship of agency. It argues that the circumstances of the parties must be considered in determining the true nature of the agreements, and that the use of the words "agency" and "commission" are not determinative the nature of the relationship between the parties.

380 It submits that because GDP and BGS were not empowered to enter into contracts with third parties on behalf of Indutech, the agreements did not establish a true agency relationship, pointing specifically to the following paragraph of the Agency Agreements (paragraph 3.5 of the 2000 Agency Agreement and para. 3.6 of the 2002 Agency Agreement):

> Nothing herein shall empower the Agent to commit or bind Indutech to any contract or contractual obligation and the Agent has no authority to act on Indutech's behalf or in Indutech's name in any manner whatsoever, other than, expressly so authorized by Indutech, and the Agent hereby warrants that it shall not represent to any customers, potential customers or any third party that it has any such power.

381 The Gibbs Group relies heavily on *Trophy Foods Inc. v. Scott* *(1995), 140 N.S.R. (2d) 92* wherein the Nova Scotia Court of Appeal, citing *Fridman's Law of Agency*, 4th edition, comments at paras. 34, 36 and 37:

> The essence of a true principal and agency relationship is the power of the agent to affect the legal position of the principal by entering into contracts with third parties that bind the principal ...
>
> This power, vested in an agent, to affect the legal position of a principal by making contracts that are binding on the principal is the primary reason that historically gave rise to equity's imposition of fiduciary duties on agents. I use the term "imposition" in the sense that they are imposed as obligations over and above those obligations that may be spelled out in a contract between a principal and an agent.
>
> Like the term "fiduciary", the term "agent" is loosely bandied about in a broad range of circumstances...

382 *Trophy Foods* is what Hallett, J.A. on behalf of the Court at paragraph 49 characterized as an "opportunities" case, a situation where the alleged breach of fiduciary duty involved a fiduciary acquiring an opportunity at the expense of a beneficiary. The commercial background was similar to the facts of this case. A commission agent was responsible under contract for selling products manufactured by the principal in a geographic area. There is one important distinction; the alleged breach, being the agent competing with the principal to acquire a contract with a former customer, occurred after the agreement had terminated by mutual agreement of the parties.

383 The contract included a specific non-competition clause that was limited to the life of the agreement. The Court found that, since the issue of competition had been dealt with in the contract, the Court should not in the exercise of its equitable jurisdiction impose restrictions respecting competition on the defendant subsequent to the termination of the contract: *Trophy Foods* at para. 73. While indicating that this was the primary reason for allowing the appeal, the Court also found that, even accepting the trial judge's decision that the defendant was a fiduciary the defendant's acquisition of the opportunity at issue was not caused by a misuse of power arising from the relationship between the defendant and the plaintiff nor the possession of any confidential pricing information.

384 Despite the general comments cited by the Gibbs Group, the Court of Appeal in *Trophy Foods* did not, disturb the trial judge's characterization of the relationship between the plaintiff and defendant as an agency relationship, referring to it as "having the earmarks of agency", but being close to that of an independent contractor, falling "within the broad spectrum" of the term "agent", being an agency "in the broadest sense of the word" and being "a hybrid somewhere between being an agent and an independent contractor". The Court emphasized at paragraph 32 that:

> It is trite to say that the principal and agency relationship gives rise to fiduciary duties but the extent of those duties must vary given the great range of activities that fall under this concept and the varying contractual arrangements that principals and agents make. The duties imposed by equity ought to reflect the nature of the particular principal and agency relationship and, in particular, the terms of the contract between the parties if both are commercial entities.

385 The Court points out that in determining what fiduciary duties should be imposed on agents

over and above the obligations that are imposed by contract, it is essential to look at the contract, noting at paragraph 42 that:

> When there is a written contract between a principal and a so-called agent one must look at the terms of that contract to ascertain the scope of the latter's duties. This is critical in determining (i) whether or not a fiduciary relationship exists between two corporate businesses who have entered into a contract whereby one will represent the other; and (ii) the extent of the duties that ought to be imposed by equity, if any, over and above the contractual terms.

386 Hallett, J.A. refers to the comments of Sopinka, J. in *Lac Minerals Ltd.* at 597, to the effect that it is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty, and that:

> The nature of the relationship may be such that, notwithstanding that it is usually a fiduciary relationship, in exceptional circumstances it is not. See Shepherd, *The Law of Fiduciaries*, at pp. 21-22. Furthermore, not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature.

387 Analysing *Trophy Foods* as a whole, there is little inconsistency between the description of agency provided in *Bowstead and Reynolds* and the analysis of agency and its relationship to a finding of extra-contractual fiduciary obligations set out in *Trophy Foods*.

388 The relationship between Indutech and GPD (and BGS) as set out in the Agency Agreements was not the classic relationship of principal and agent in which the agent had the power to affect the principal's legal relationship with third parties, but a "quasi-agency", or agency "in the broadest sense of the word", as described in *Trophy Foods*. As noted by Hallett, J.A., the equitable duties implied by that relationship, to the extent they exist, must depend on the nature of the contracts between Indutech and GPD.

389 Indutech points out that the Court in *Trophy Foods* refers approvingly at paras. 60 and 61 to a statement by a noted academic that "a person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other's or in their joint interest to the exclusion of his own several interests". The Court comments that the overriding principle is "concerned with proscribing advantage-taking of a relationship and this, of course, would apply to an agent of which [the broker] is one in the broadest sense of the word".

390 The nature of the contractual relationship between Indutech and BGS and GPD leads clearly to the imposition of fiduciary obligations on BGS and GPD. By way of example:

a) The relationship, was exclusive. Indutech had no other outside sales agency and had to rely entirely on BGS and GPD to represent it to oilsands customers.

b) BGS had the contractual obligation to provide information on sales opportunities and the market to Indutech. BGS, it was conceded, was Indutech's "eyes and ears" in the oilsands market.

c) Indutech treated BGS personnel as if they were its own employees in terms of allowing access to information and access to the plants.

d) BGS purported to act as Indutech's agent in the market, which perceived BGS as being Indutech's sales arm.

e) BGS and GPD were restricted by the agreements from associating with, sourcing from or supplying Indutech's competitors.

f) The agreements provide in effect and in totality that BGS was to act in Indutech's best interests. Guy Gibbs acknowledged this.

391 These factors place BGS and GPD closer in the spectrum of types of agency to the traditional kind of agent, even if they lacked the power to contract directly for Indutech. As distinguished from the situation in *Trophy Foods*, Indutech's allegations of breach of fiduciary obligations arise in almost all cases from breaches or misappropriations of corporate opportunities during the course of the life of the agency relationship.

392 The Gibbs Group defendants submit that none of the characteristics of a fiduciary relationship adopted by the Supreme Court in *Lac Minerals Ltd.* at 652 are present in this case. These characteristics were taken from Wilson, J.'s dissenting analysis in *Frame v. Smith*, *[1987] 2 S.C.R. 99* and adopted in *Lac Minerals Ltd.* and in *Hodgkinson v. Simms*.

393 In *Frame v. Smith*, Wilson J. noted that the categories of fiduciary relationship are never closed. In order to determine which relationships that have not traditionally been viewed as fiduciary in nature should be subject to a fiduciary duty, Wilson J. stated at page 136 that fiduciary relationships tend to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

394 Wilson J. described the second characteristic at page 136 as follows:

> With respect to the second characteristic it is, of course, the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty necessary. Indeed, fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary's vital non-legal or "practical" interests.

395 With respect to the third characteristic, Wilson J stated at page 137:

> The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power.

396 Vulnerability is not taken to mean pre-existing inequality in bargaining power; rather, what

is relevant is the relative position of the parties that results from the agreement: *Hodgkinson v. Simms* at 405.

397 As noted by Indutech, the necessity of a finding of vulnerability is somewhat contentious. In *Lac Minerals Ltd.,* Sopinka J. noted that vulnerability is a required element in any fiduciary relationship (at 599), while La Forest J. stated that while vulnerability is an important indicia, it is not a hallmark of a fiduciary relationship (at 662). Sopinka J. commented at page 600 of *Lac Minerals Ltd.* that the presence of all three of these factors does not necessarily give rise to a fiduciary relationship, and a fiduciary relationship may exist even in the absence of some of these characteristics.

398 La Forest J. noted that in addition to arising out of a fiduciary relationship (either a traditional category of fiduciary relationship or based on Wilson J.'s test in *Frame v. Smith*), fiduciary obligations may also arise outside of a fiduciary relationship based on the specific circumstances of a particular relationship: *Lac Minerals Ltd.* at 648. The test in such a case is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue: *Lac Minerals Ltd.* at 648. In answering this question, discretion, influence, vulnerability and trust are the types of evidence that the court should consider: *Lac Minerals Ltd.* at 648.

399 The test for fiduciary obligations arising outside a typical fiduciary relationship was applied in *Gunning & Associates Marketing Inc. v. Kesler*, *[2005] O.J. No. 1059*, *2005* CarswellOnt 1066 (S.C.J.). In that case, the defendant was an independent contractor responsible for running the plaintiff's business in Canada. The Court explained that the defendant was in sole charge of the plaintiff's Canadian business, was the face of the plaintiff to Canadian customers, and controlled the plaintiff's relationship with customers, the provision of services, payment of third party suppliers and collection of payments to the plaintiff : *Gunning* at para. 25. The plaintiff depended on and was vulnerable to the defendant and, for all these reasons, the plaintiff could reasonably expect that the defendant would act in its best interests: *Gunning* at paras. 25-26. Fiduciary obligations therefore arose: *Gunning* at para. 27. Indutech submits that, two tests have emerged to determine whether fiduciary obligations arise in a non-traditional category of fiduciary relationship.

400 The test in *Frame v. Smith* appears to be geared towards determining whether there are additional categories of fiduciary relationship not previously considered as such, while the test from *Lac Minerals Ltd.* seeks to determine whether fiduciary obligations arise in a particular set of circumstances. I agree with Indutech that little seems to turn on this distinction, as either test could be used to find that fiduciary obligations arose between Indutech and the Gibbs Group.

401 *Frame v. Smith* requires that the fiduciary have the ability to unilaterally exercise some power or discretion that can affect the beneficiary's legal or practical interests, and requires that the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary.

402 Much of Indutech's work was directed through the Gibbs Group, and Indutech relied solely on the Gibbs Group to make full disclosure and bring work to its attention, rather than referring it

to competitors. Indutech was peculiarly vulnerable to the Gibbs Group in that it relied upon it for information and advice with respect to such matters as pricing and scheduling, as well as projects that were planned. Based on these factors, the Gibbs Group owed a fiduciary obligation to Indutech pursuant to the test set out in *Frame v. Smith*.

403 The test for fiduciary obligations in *Lac Minerals Ltd.* requires that, based on the circumstances, Indutech could reasonably expect the Gibbs Group to act in its best interests with respect to the oilsands work involving CCO or induction bends.

404 Both Indutech and the Gibbs Group gave evidence that the Gibbs Group was obligated to act in the best interests of Indutech. If the factors suggested by La Forest, J. are considered, the Gibbs Group was capable of diverting work to Indutech's competitors, which suggests the element of discretion was present The Gibbs Group had influence over Indutech given that Indutech relied upon the Gibbs Group for advice with respect to various decisions including pricing of its product. Indutech trusted the Gibbs Group, as was demonstrated by the Gibbs Group's ability to access Indutech's personnel, facilities and confidential information. Indutech was also vulnerable to the Gibbs Group, because it relied solely on the Gibbs Group for information concerning the market and larger projects that were planned. As such the Gibbs Group owed Indutech a fiduciary obligation pursuant to the test in *Lac Minerals Ltd.*

405 The Gibbs Group submits that the fact that the 2002 Agency Agreement provided for a three-month notice of termination period with immediate actual effect is a factor that points to Indutech's lack of vulnerability. The short notice period, however, did nothing to limit or eliminate Indutech's vulnerability to the kind of breaches that occurred. The argument lacks force, as the breaches Indutech complains of occurred over the roughly four years of the agency relationship and Indutech was unaware of them at the time they occurred.

406 Although the Gibbs Group defendants rely heavily on the fact that they could not bind Indutech contractually with third parties, they in effect did so with respect to the buy/sell arrangements. The evidence establishes that while BGS advised Indutech that certain oilsands customers did not want to deal directly with them, the opposite was proven to be true. Under the buy/sell contracts, BGS bound Indutech to the customer, as Indutech always remained responsible for warranting the products it manufactured.

407 The Gibbs' Group defendants in their argument on fiduciary obligations submit that Mr. Wolstenholme made an offer of employment to Mr. Brownlee, an employee of GPD. I am satisfied from Mr. Wolstenholme's evidence that he never offered Mr. Brownlee a job, but this is irrelevant to the issue in any event.

408 The Gibbs Group also submit that the exception for sales to Triten in the 2000 Agency Agreement created a situation of inherent conflict of interest in the Agreement, which indicates that no fiduciary obligations should exist. As Indutech points out, the conflict of interest, to the extent it existed, was that of BGD, and the Agreement merely creates a narrow exception to the duty of loyalty.

409 In summary, fiduciary obligations arose in this case by reason of the agency relationship (albeit not a traditional agency relationship), through application of the Wilson test for fiduciary obligations outside a traditional category of fiduciary relationship and through application of the LaForest, J. test in *Lac Minerals Ltd.*

410 The Gibbs' Group breached its fiduciary duty of good faith to Indutech in a number of ways, the most important of which were as follows:

a) It altered Indutech's quotes without Indutech's consent in breach of its obligation to comply with the instructions of its beneficiary.

b) It placed itself in a number of cases in a conflict of interest with respect to Indutech's interests. First, it accepted commissions from purchasers of the product it was supplying.

Second, the sole shareholder of BGS and GPD indirectly acquired a 50% interest in Cladtech, a competitor to Indutech. This was a particularly egregious conflict of interest.

Third, it placed itself in a position to profit from sales diverted to Indutech's competitors, frequently receiving more remuneration from Indutech's competitors' products than the remuneration it received from Indutech (either through a higher commission rate or a profit exceeding 5% on buy/sell arrangements).

Fourth, it sold bulk welding wire and marked-up buy/sell sales greater than 5%. In these cases, BGS profited without regard to the consequences suffered by Indutech.

c) It used Indutech's property and information to secure a personal gain. The fairness of the transaction is irrelevant: *Stahl v. Miller* (1918), 56 S.C.R. 312 at 322. If a fiduciary obtains a profit due to knowledge obtained as a result of the fiduciary relationship, the fiduciary is required to account to the beneficiary for the profit made by the fiduciary, even where the beneficiary suffered no harm and may actually have benefitted from the transaction: *Charles Baker Ltd. v. Baker*, [1954] O.R. 418 at 429 (C.A.).

The prohibition against personal gain has also been given substantial consideration in the agency context where it has been held that the onus lies on the agent to prove that any transaction was fair, reasonable and not the product of concealment, and to provide evidence that the principal was aware of what the agent was doing and that no advantage was taken of the principal: Ellis at 3-12.1 and 3-12.2, citing *Woods*. Because the agent is not permitted to make a profit beyond his established remuneration (Ellis at 3-24, citing *Hitchcock v. Sykes* *(1914), 49 S.C.R. 403*), and because any secret payment by one party to the agent is in law a bribe as it puts the agent in a position where its interests conflict with its duty, any secret commission is forfeited: *Ruiter Engineering & Construction Ltd. v. 430216 Ontario Ltd.* *(1989), 67 O.R. (2d) 587* at *591-592* (C.A.). In addition, any profit on the personal gain is also forfeited (Ellis at 3-12.1).

I am satisfied from the evidence that the Gibbs Group leveraged its relationship with Indutech to obtain the contract from MCC to manage the CCO portion of the Millenium Project. In particular, the Gibbs Group used the knowledge of the CCO and induction

bending industry that it had obtained in part through exposure to Indutech's confidential information, personnel and facilities to represent to MCC that it was an expert in the field of CCO. As a result, it was able to obtain the contract to manage the CCO portion of the Millenium Project, through which it earned approximately $566,724 ($292,876 + $273,848.60) in fees, profits and commissions. The duty to avoid personal gain by the fiduciary was breached. The secret payments earned by the Gibbs Group through this breach should therefore be disgorged in full.

d) It acted for two principals with conflicting interests. A fiduciary is prohibited from acting for two principals where to do so would affect its ability to pursue the beneficiaries' respective best interests. This creates a *de facto* inability to serve with utmost good faith and fidelity: Ellis at 3-17. In *Manitoba & North-West Land Corp. v. Davidson* *(1903), 34 S.C.R. 255*, the Court framed the issue as whether the plaintiff in agreeing to accept $500 to hold land he was selling on behalf of the vendor for a potential purchaser was making an undisclosed bargain in relation to his contract of service that would put him in a position where he was tempted not to perform his duty to his employer faithfully. In *Aaron Acceptance Corp. v. Adam* *(1987) 12 B.C.L.R. (2d) 300* (C.A.) the Court of Appeal explained at page 306 that the agency agreement had clearly not contemplated that the agent would become the ultimate lender and in doing so, the agent became a principal to itself, which vitiated any rights it had as an agent.

I am satisfied that the Gibbs Group acted for multiple principals aside from Indutech.

e) It failed to disclose vital information to Indutech. A fiduciary must completely disclose all material information to enable the beneficiary to adequately advise the fiduciary, which means making the beneficiary aware of "all matters of relevance to the mandate with respect to which confidence is reposed": Ellis at 1-6.1. The onus of providing adequate disclosure rests with the agent: *Atlanta Industrial Sales Ltd. v. Emerald Management & Realty Ltd.*, *2006 ABQB 255*, *399 A.R. 1* at para. 162. The Gibbs Group failed to establish that it made adequate disclosure to Indutech of any of the impugned conduct. The fact that a contract may have been fair or that a long time has passed does nothing to nullify a breach of the duty to disclose: *Aaron Acceptance Corp* at para. 16. Further, non-disclosure is not relieved by a mistaken belief that the principal is aware of the information in question: *West-Can Communications Ltd. v. Standard International Underwriters Ltd.* *(1985), 65 A.R. 81* at paras. 5-7 (Q.B.).

In this case, I do not believe that any of the Gibbs Group principals had any real belief that disclosure of their various breaches and potential breaches had been made to Indutech.

Where a case of non-disclosure has been made out and evidence of loss is provided, the onus lies on the defendant to prove the plaintiff would have proceeded with the transaction regardless of the non-disclosure: Jeff Berryman, "Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals" *(1999) 37 Alta. L. Rev. 95*, at 101, 107-108 and 28, referring to *London Loan & Savings Co. of Canada v. Brickenden*, *[1934] 2 W.W.R. 545* (P.C.).

> The Gibbs Group failed to disclose the full scope of all inquiries to Indutech, most notably in the case of the Millenium Project, but also in the case of other diversions.
>
> Where an agent is in an actual or potential conflict of interest position, it must make full disclosure regarding the conflict and its interest, and advise the principal to seek independent legal advice in order for the principal to be considered to have provided informed consent: *Klana v. Jones* *(2003), 35 B.L.R. (3d) 236* at para. 45 (Ont. S.C.J.). I am satisfied by the evidence that the Gibbs Group at no time disclosed to Indutech that it was representing the interests of MCC with respect to the Millenium Project, that Guy Gibbs had a 50% interest in the profits of Cladtech, or that BGS was earning a profit from sales of products of Indutech's competitors through commissions and mark-ups.

411 Indutech submits that I should find that all of the Gibbs Group defendants were agents, relying on the principle that individuals and corporations can attain "agency" status without any formal commitment: Ellis at 3-24.

412 In the circumstances of this case, given my findings with respect to knowing assistance, inducing breach of contract and conspiracy, it is not necessary that I make this determination. However, if I am wrong in any of these determinations, I would find that Guy Gibbs, Barry Gibbs, BGS and BPD all owed fiduciary obligations to Indutech directly as agents, despite the statutory prohibition against piercing the corporate veil. The circumstances of this case justify this, given that the Gibbs operated with little regard to corporate restraints or obligations.

III. Doctrine of Knowing Assistance

413 Indutech submits that Barry Gibbs, Guy Gibbs, 724192, Barry Kossowan, Kossowan Holdings, Cladtech, 974038, and 1036795 are all liable to Indutech for breach of fiduciary obligations by reason of the operation of the doctrine of knowing assistance.

414 Professor Ellis notes that "it is trite" that individuals who are not in a fiduciary position themselves can be caught by the fiduciary obligations of another person if they act in association with the fiduciary with knowledge that the fiduciary is in breach of his duty: Ellis at 15-30.18. The law in effect creates a constructive trusteeship on the part of the fiduciary's associates and establishes a duty to make full inquiry where the fiduciary appears to be in a situation of conflict: Ellis at 15-30.19; *Hanson v. Clifford*, (sub nom. *Clifford & Associates Consulting Ltd. v. Clifford*) *(1996), 83 B.C.A.C. 261*.

415 In *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 at 804-805, the Supreme Court of Canada considered the imposition of personal liability on strangers to a trust, stating it was dependent on whether the stranger's conscience was sufficiently affected to justify the personal liability. Personal liability can be imposed either by determining that the stranger is a trustee *de son tort* (i.e., accepting the role of trustee and administering trust property), or pursuant to the doctrine of knowing assistance (i.e., knowingly participating in the breach of trust) or knowing receipt (i.e., personally receiving trust property). The equitable doctrine that makes individuals liable in situations where they are connected to a breach of equitable duty applies to both breaches of trust and breaches of fiduciary duty: P.D. Finn, "The Liability of Third Parties for

knowing Receipt or Assistance" in *Equity, Fiduciaries and Trusts*, D.W.M. Waters, ed. (Toronto: Carswell, 1993), p. 195 at pp. 200-1, 204-5; *3464920 Canada Inc. v. Strother* 2005 BCCA 385, 8 B.L.R. (4th) 4 at para. 22, appeal allowed in part on other grounds, 2007 SCC 24, [2007] 2 S.C.R. 177.

416 Paul Perell in "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty", 21 A.Q. 94 (1999) lists the necessary elements of knowing assistance at pages 106 and 107, based on *Air Canada v. M & L Travel Ltd:*

1. the existence of a trust or fiduciary relationship;
2. the trustee's or fiduciary's fraudulent or dishonest breaches of his or her equitable duty;
3. the stranger has actual knowledge of the misconduct, and
4. the stranger assists in the fraudulent or dishonest design.

417 The Supreme Court in *Air Canada* at 806 addresses the requirement of actual knowledge, noting that "(t)he knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice."

418 Iacobucci, J. at pages 811-812 for the majority notes that:

> In the [case of wilful blindness], Sachs L. J. stated that to be held liable the stranger must have had "both actual knowledge of the trust's existence and actual knowledge that what is being done is improperly in breach of that trust - though, of course, in both cases a person wilfully shutting his eyes to the obvious is in no different position than if he had kept them open." Whether the trust is created by statute or by contract may have an impact on the question of the stranger's knowledge of the trust. If the trust was imposed by statute, then he or she will be deemed to have known of it. If the trust was contractually created, then whether the stranger knew of the trust will depend on his or her familiarity or involvement with the contract.

419 The Court also notes that constructive knowledge, being knowledge of circumstances that would indicate the facts to an honest person or knowledge of facts that would put an honest person on inquiry, is not enough to find liability, commenting that "the carelessness involved in constructive knowledge cases will not normally amount to a want of probity, and will therefore be insufficient to bind the stranger's conscience."

420 The test for wilful blindness in the civil context is set out in *Brae Centre Ltd. v. 1044807 Alberta Ltd.*, 2008 ABCA 397, 446 A.R. 10 at para. 28 where the Court of Appeal stated:

> If the defendant acted under a *bona fide* belief that contractual rights would not be infringed, liability will not be found even though the belief turned out to be mistaken. But for a mistaken belief to be bona fide, rather than the result of recklessness or wilful blindness, some basis for the belief must exist, and some reasonable effort must have been made by the defendant to learn the truth.

421 The stranger himself need not have acted in a fraudulent or dishonest fashion. The issue is

whether the breach that founds the action was fraudulent and dishonest and it is the conduct of the party that breached its equitable duty that must be examined in determining whether the breach was fraudulent or dishonest: *Air Canada* at 813-814, Perell at page 107.

422 Iacobucci, J. defined a dishonest or fraudulent breach at page 826 of *Air Canada* as follows:

> Where the trustee is a corporation, rather than an individual, the inquiry as to whether the breach of trust was dishonest and fraudulent may be more difficult to conceptualize, because the corporation can only act through human agents who are often the strangers to the trust whose liability is in issue. Regardless of the type of trustee, in my view, the standard adopted by Peter Gibson J. in the *Baden, Delvaux* case, following the decision of the English Court of Appeal in *Belmont Finance*, *supra*, is a helpful one. I would therefore "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take'." In my opinion, this standard best accords with the basic rationale for the imposition of personal liability on a stranger to a trust which was enunciated in *In re Montagu's Settlement Trusts, supra,* namely, whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. In that respect, the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability.

423 The doctrine of knowing assistance was the subject of further comment in *3464920 Canada Inc. v. Strother* (appeal allowed in part on other grounds without referencing this issue). Newbury, J.A. in considering the liability of the Davis law firm for the breaches of fiduciary duties committed by Mr. Strother considered the development of the law of knowing assistance. The Court commented that the English Courts have switched emphasis from the criterion of "knowing" by the stranger to the trust to the criterion of "dishonesty" by the stranger, measured by a combined test of subjective and objective standards. Newbury, J.A. noted at paragraph 25 that, in Canada, "the Supreme Court has not pronounced on whether "knowingly" should give way to "dishonesty"[by the stranger] as the 'defining ingredient' of accessory liability," and that, although the meaning of dishonesty was difficult to determine in some cases, she was bound by *Air Canada*.

424 The Court considered two cases of accessory liability involving breach of fiduciary duty and commented at para. 29 as follows:

> On the one hand, a "stranger" who participates innocently in a breach of trust or duty by another - i.e., without actual knowledge, recklessness or wilful blindness to the breach - and who does not receive the profits thereof will not be held liable to account. For this purpose, *Canson* indicates that even a person who himself owes a fiduciary duty to the plaintiff (as did Davis in the case at bar) and who is a partner of the wrongdoer will be treated in the same way as a "stranger" to the trust or duty. **On the other hand, a person who agrees with the wrongdoer fiduciary on a "common action" which includes the commission of a breach, or a person who receives the profits of such a wrongdoing as the mere cipher of or vehicle for the wrongdoer will be liable to account in the same manner as the wrongdoer himself**. A person who is not an agent or accomplice of the wrongdoer but who receives a benefit resulting from the breach of

> duty may or may not be found to have known of the breach: as stated in *M & L Travel*, "The receipt of a benefit will be neither a sufficient nor a necessary condition for the drawing of such an inference."
>
> [emphasis added].

425 I find that the breaches of fiduciary duty by BGS and GPD meet the criteria of being fraudulent and dishonest. Cladtech was set-up in such a way as to prevent the involvement of Guy Gibbs and other members of the Gibbs Group from being detected. As noted in *Air Canada*, it is difficult to conceptualize this criterion when the wrongdoer is a corporation because the corporation can only act through its human agents. The human agents in this case acted blatantly in appropriating opportunities that should have been offered to Indutech, in breaching the Agency Agreements from the time they were executed, in taking actions that were directly prejudicial to Indutech and in hiding these breaches from Indutech.

426 I find Guy Gibbs and Barry Gibbs knowingly assisted BGS and GPD in their fraudulent and dishonest conduct and thus personally liable for breach of fiduciary duties on the basis of knowing assistance.

427 Guy Gibbs as an active director and controlling mind of BGS and GPD at the relevant time clearly directed the conduct complained of and had actual knowledge of what was going on. He agreed to go into business with Barry Kossowan to compete against Indutech and permitted BGS to supply Cladtech with materials and business opportunities. He was complicit in the amendment of delivery dates on Indutech quotes and instrumental in keeping BGS's various breaches of the Agency Agreements from coming to Indutech's attention. Liability on the same basis flows through to 724192 as Mr. Gibb's wholly-owned corporation.

428 While Barry Gibbs may have been semi-retired, he was specifically referenced in the Agreements, executed one of them and had actual knowledge of the Gibbs Group's obligations under the Agreements. He was active in the breaches involving the Millenium Project and assisted in acquiring machines for the production of CCO for Cladtech.

429 Determining whether the doctrine of knowing assistance applies to Barry Kossowan, Kossowan Holdings, 974038, 1036795 and Cladtech is more challenging.

430 Indutech submits that Mr. Kossowan (and through him, Kossowan Holdings, 974038, 1036795 and Cladtech) had actual knowledge of the fiduciary obligations owed by Gibbs Group to Indutech. Indutech submits specifically that Mr. Kossowan knew there was an agreement between Indutech and the Gibbs Group, was aware they had a special relationship and that, because of that relationship, BGS could not act on behalf of Cladtech.

431 Indutech submits that even if Mr. Kossowan did not have actual knowledge of the Gibbs Group's breach of fiduciary duty, the knowledge requirement is still established based on the doctrine of "wilful blindness". The evidence establishes that, instead of making a reasonable effort to discover why BGS could not act on behalf of Cladtech, Mr. Kossowan consciously chose not to make any further inquiries.

432 Mr. Kossowan assisted in the Gibbs Group's breach of fiduciary duty by: incorporating 974038, taking steps to obtain the CCO machine from Australia, incorporating Cladtech, taking steps to obtain the three CCO machines from Cladding U.S., acting with Guy Gibbs to incorporate 1036795 and shield Guy Gibbs' involvement in the enterprise from public awareness, requesting that Guy Gibbs and/or the Gibbs Group market and sell Cladtech's product, obtaining materials (including welding wire) through BGS, and accepting business opportunities from BGS. Kossowan Holdings, 974038, 1036795 and Cladtech also assisted in the fraudulent scheme, either as beneficiaries or as entities used to hide Guy Gibbs' involvement.

433 Mr. Kossowan is an experienced manager in a business similar to that of Indutech and Cladtech. He must have had his suspicions about why the Gibbs Group could not market Cladtech's product, and his evidence that he did not inquire further, that he consciously chose not to inquire further, is indicative either that he is not credible in his evidence on this issue, or that he was at the least wilfully blind.

434 Mr. Kossowan appears to suggest that the reason for the elaborate corporate structure that hid Mr. Gibbs' involvement in Cladtech was because he discovered from his meeting with MSI in February 2003 that it would not be a good thing for the new company to be associated with the Gibbs Group. However, he also conceded that he knew the 1036795 concept was attractive to Mr. Gibbs because the producers that Mr. Gibbs represented would be upset if he knew he was setting up in competition.

435 Mr. Gibbs in his examination for discovery evidence testified that he told Mr. Kossowan at about the time the 2002 Agency Agreement was signed that the agreement prohibited BGS from acting for a competitor of Indutech. Mr. Kossowan denied this and it is certainly true that Mr. Gibbs was generally not credible in his evidence.

436 However, even if Mr. Gibbs did not specifically advise Mr. Kossowan of the terms of the agreement, Mr. Kossowan's failure to inquire as to why BGS could not act for Cladtech constitutes wilful blindness and not merely constructive knowledge. Mr. Kossowan's participation and assistance in the elaborate scheme to hide Mr. Gibbs' involvement in Cladtech strongly suggests that he was wilfully shutting his eyes to what was obvious. At best, he deliberately and recklessly failed to make such inquiries as an honest and reasonable person would make when faced with the fact of the agreement and Mr. Gibbs' advice that BGS could not market Cladtech's product. It is relevant that Mr. Kossowan was not a mere participant in the simple establishment of Cladtech, but was directly involved in the structure that shielded the Gibbs Group' breach of its contractual and fiduciary duties from Indutech.

437 I find, therefore, that Barry Kossowan, and through him, Kossowan Holdings, 974038, 1036795 and Cladtech knowingly assisted and are therefore liable for the Gibbs Group's breach of fiduciary obligations to Indutech.

IV. Inducing Breach of Contract

438 In a trio of cases from the House of Lords, *Douglas v. Hello! Limited, OBG Limited v. Allan, Mainstream Properties Limited v. Young*, [2007] UKHL 21, [2007] 4 All ER 545 (collectively, "*OBG*"), (cited in *Brae Centre Ltd.),* Lord Nicholls at para. 172 described this tort as follows:

> With the inducement tort the defendant is responsible for the third party's breach of contract which he procured. In that circumstance this tort provides a claimant with an additional cause of action. The third party who breached his contract is liable for breach of contract. The person who persuaded him to break his contract is also liable, in his case in tort. Hence this tort is an example of civil liability which is secondary in the sense that it is secondary, or supplemental, to that of the third party who committed a breach of his contract. It is a form of accessory liability.

439 In *369413 Alberta Ltd. v. Pocklington*, *2000 ABCA 307*, *271 A.R. 280* at para. 13, the Alberta Court of Appeal set out the following seven elements necessary to establish that a defendant intentionally induced a breach of contract:

1. the existence of a contract;
2. knowledge or awareness by the defendant of the contract;
3. a breach of the contract by a contracting party;
4. the defendant induced the breach;
5. the defendant, by his conduct, intended to cause the breach;
6. the defendant acted without justification; and
7. the plaintiff suffered damages.

440 Lord Hoffman in para. 40 of *OBG* adopted the description of "knowledge" of the contract described by Lord Denning MR in *Emerald Construction Ltd. v. Lowthian*, [1966] 1 W.L.R. 691 at 700-701:

> Even if they did not know of the actual terms of the contract, but had the means of knowledge - which they deliberately disregarded - that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not.

441 Lord Hoffman noted that this statement of the law is "in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of the fact."

442 With respect to what constitutes the necessary intent, the Court of Appeal in *Pocklington* stated that intent can be established if the breach is the result of wilful, deliberate and direct conduct, or intent can be inferred when the consequences of the conduct were a necessary or reasonably foreseeable result: at paras. 39 to 40.

443 Furthermore, it is not necessary that the breach of contract be the primary objective: it is

sufficient if the interference is necessarily incidental to attaining the defendant's primary objective: *Pocklington* at para. 40.

444 In *Pocklington*, the Court also held that intention can be established when a defendant is reckless or wilfully blind to a breach, commenting at paragraph 41:

> The defendant need not have actually known the precise terms of the contract or that his object only could be accomplished through breach of the contract. "If - turning a blind eye - he went about it regardless of whether it would involve a breach, he will be treated just as if he had knowingly procured it": J.G. Fleming, The Law of Torts, 8th ed. (Sydney Law Book Co., 1992) at 694.

445 In *Brae Centre Ltd.*, the Court of Appeal considered the element of intention again, noting at paragraphs 27 and 28:

> The test for intention is described in Klar's third edition of *Tort Law* at p. 612 (cited with approval in *Parks v. West Mall Ltd. v. Jennett* *(1995), 178 A.R. 45*, *[1995] A.J. No. 1150* (C.A.) at para. 22):
>
> > In order to succeed, a plaintiff must prove that the defendant intended to procure a breach of contract. In this respect, intention is proven by showing that the defendant acted with the desire to cause a breach of contract, **or with the substantial certainty that a breach of contract would result from the defendant's conduct.**
> >
> > (emphasis added)
>
> In *Pocklington*, this Court reiterated the importance of the mental element of the tort, stating at para. 43:
>
> > If the defendant acted under a *bona fide* belief that contractual rights would not be infringed, liability will not be found even though the belief turned out to be mistaken. But for a mistaken belief to be *bona fide*, rather than the result of recklessness or wilful blindness, some basis for the belief must exist, and some reasonable effort must have been made by the defendant to learn the truth.

446 In *OBG*, the House of Lords defined the mental element of this tort as being "an intention by the defendant to procure or persuade ('induce') the third party to break his contract with the claimant": at para. 191 *per* Lord Nicholls. Lord Hoffman commented at paragraphs 42 and 43:

> It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. ...
>
> On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think is what judges and writers mean when they say that the claimant must have been "targeted" or "aimed at".

447 Again, the case is relatively clear against Guy Gibbs, Barry Gibbs and 724192 and I find them liable for inducing breaches of the Agency Agreements. Both Guy Gibbs and Barry Gibbs

had direct knowledge of the Agency Agreements and their specific terms and 724192 had knowledge through Guy Gibbs. They knew that BGS and GPD were breaching these Agreements. I do not find the self-serving explanations offered by Guy Gibbs with respect to his interpretation of various terms of the Agreements to be credible. Both of the Gibbs by virtue of their control of BGS and GPD as officers and directors caused BGS and GPD to breach the Agreements. While Barry Gibbs was semi-retired at the relevant times, he was still involved in BGS and GPD. In particular, Barry Gibbs was personally active in obtaining alternate vendors on the Millenium Project and helpful to Guy Gibbs and Mr. Kossowan in acquiring equipment for Cladtech.

448 724192 participated in the breach of contract by obtaining a benefit from the operations of Cladtech and 1036795, and by being a party to the concealment of the relationship between Guy Gibbs and Cladtech.

449 Guy Gibbs had the requisite intent since the breaches of contract were the result of wilful, deliberate and direct conduct on his part to establish a direct competitor to Indutech. He used the services of BGS both to procure materials and business opportunities for Cladtech. Mr. Gibbs knew that these actions would be a breach of BGS's contract with Indutech. 724192's intent can be inferred based on the benefit it obtained and the fact that Mr. Gibbs owns 100% of the shares.

450 Barry Gibbs intended to induce the breach of the Agency Agreements by lending support to Guy Gibbs' decision to acquire machines for the production of CCO, aiding in their acquisition and by being active and instrumental in the Millenium Project.

451 There was no justification for any of these acts other than self-interest. While it may be argued that Guy Gibbs and Barry Gibbs as directors of the Gibbs Group companies were justified in their conduct and acting within the scope of their authority and in the best interests of the company by breaching the Agency Agreements, the fact is that they acted in self-interest, breached the agreements in various ways throughout their entire existence and actively concealed the breaches as best they could from Indutech in order to continue to reap the benefits of the agreements. The breaches did not amount to a mere early termination of the contract in order to take advantage of a better opportunity for BGS and GPD, a so-called "efficient breach". Such conduct cannot be said to be the *bona fide* exercise of a director's duty to the corporation. It is "something akin to fraud": *Brae Centre Ltd.* at para. 25. It is therefore appropriate to find liability in tort against Guy Gibbs and Barry Gibbs personally.

452 Barry Kossowan was well aware of the special relationship between the Gibbs Group and Indutech. He was well aware at least as of June 2002 that the Gibbs Group sold CCO spools on behalf of Indutech, and that Indutech had an induction bender. Mr. and Kossowan admitted that he was aware there was an agreement in place between Indutech and the Gibbs Group. He was also advised that because of the agreement, BGS was unable to act on behalf of Cladtech to market its product. He therefore was wilfully blind to the breaches of the Agreements, and the necessary knowledge is thus established.

453 The Cladtech defendants submit that there was no agreement in place between 2001 and the date of execution of the 2002 Agency Agreement, but the evidence establishes otherwise. They also submit that, while the purchase of the CCO equipment was not concluded until November 20, 2002, six days after the execution of the 2002 Agreement, certain steps were taken before that time and there is no evidence that the Cladtech defendants were immediately informed of the existence of the second agreement. The evidence is that Mr. Kossowan was informed of the 2002 Agreement either in November 2002 (according to Guy Gibbs) or December 2002 or January 2003, by his own testimony. He was thus aware of the agreement before taking possession of the equipment and setting up the corporate structure of Cladtech to compete with Indutech in Alberta. Mr. Kossowan was also aware from late 2002 that BGS was unable to act on behalf of Cladtech because of the existence of an agreement.

454 Even if Mr. Kossowan lacked actual knowledge of the Agreement, he was wilfully blind to its existence. Instead of making a reasonable effort to determine its terms, he consciously chose to make no further inquiries as to its nature, and, more importantly, not to determine why BGS could not act on behalf of Cladtech. As noted by Lord Hoffman, in *OBG* at 12, this should be treated as equivalent to knowledge of the fact that the Agreement prohibited BGS acting on Cladtech's behalf.

455 Kossowan Holdings, 974038, 1036795 and Cladtech were similarly imbued with Mr. Kossowan's knowledge as he was the director of each of these corporations.

456 Mr. Kossowan induced the breach of the Agency Agreements by approaching Guy Gibbs to go into business together, acquiring machines, establishing the corporate structure, and eventually producing the same product as Indutech and competing against Indutech. He asked Mr. Gibbs to have BGS market Cladtech's product, and, after an elaborate corporate scheme was set up to shield Mr. Gibbs' involvement from discovery, that is exactly what the Gibbs Group did. In addition, Mr. Kossowan sourced bulk welding wire on behalf of Cladtech from BGS. Kossowan Holdings, 974038, 1036795 and Cladtech participated in this breach by obtaining the benefit and concealing the relationship between Guy Gibbs and Cladtech. All of this conduct was without justification.

457 Applying the tests established by the Court of Appeal in *Pocklington* and *Brae Centre Ltd.* and the House of Lords in *OBG* to determine whether Mr. Kossowan had the requisite intent to cause the breaches, these breaches of contract were the result of wilful, deliberate and direct conduct of Mr. Kossowan to establish Cladtech, a direct competitor to Indutech. He and Mr. Gibbs also agreed to use the services of BGS to procure materials and refer bid inquiries to Cladtech. Mr. Kossowan's intent can also be inferred from the fact that the breach of BGS' contract with Indutech was a necessary result of Guy Gibbs' involvement in Cladtech and Cladtech's procurement of materials and business opportunities through BGS. This was not merely foreseeable, but the means to an end. That Mr. Kossowan's primary objective was to earn money rather than breach BGS's contract with Indutech does not alter the fact he intended to cause the breach. Given Mr. Kossowan's knowledge that BGS could not act to market

Cladtech's product, it was a "substantial certainty" that a breach would result from the subsequent activities.

458 The establishment of Cladtech was particularly directed or targeted against Indutech because Mr. Kossowan went into business with Guy Gibbs, a principal of Indutech's agent.

459 Mr. Kossowan must be considered to have intended the natural consequences of his conduct. The Cladtech defendants argue that there is no evidence that Indutech was a factor in the decision to proceed with the Cladtech business plan. This ignores Mr. Kossowan's knowledge of Indutech and its relationship to the Gibbs Group.

460 Mr. Kossowan also submits he is entitled to use the defence of justification as a director of Cladtech. It cannot be a *bona fide* exercise of a director's authority or duty to induce a third party to breach a contract and to aid in concealing such breach. Mr. Kossowan cannot use this as a shield, even if his conduct benefitted his corporations. It is also noteworthy that Mr. Kossowan was involved in many of the impugned activities in his personal capacity even before the corporate structure of Cladtech was finally settled.

461 Finally, Indutech suffered damages as a result of the conduct of all of the defendants once Cladtech was operational and work was directed to it to be manufactured.

462 In conclusion, I find all of the defendants liable for inducing the breach of the Agency Agreements between BGS and Indutech.

V. Unlawful Interference with Economic Relations

463 Indutech submits that 724192, Kossowan Holdings, Cladtech, 974038, 1036795, Guy Gibbs, Barry Gibbs and Barry Kossowan are liable for unlawful interference with economic relations.

464 However, this tort is not appropriate to the facts of this case. Unlawful interference with economic relations involves an alleged tortfeasor intentionally damaging another's business by unlawful means. To qualify as unlawful means, the tortfeasor's actions (i) cannot be actionable directly by the plaintiff and (ii) must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff. The tort fills a gap in a situation in which the third party does not breach a contract with the plaintiff, which would give rise to a direct action by the plaintiff, but instead interferes with the plaintiff's economic relations as a result of unlawful means used by the tortfeasor against a third party. In that case, the tort serves to provide a cause of action to a plaintiff that is indirectly harmed by damage to a third party in which he or she has an economic interest.

465 In this case, the harm was suffered by Indutech. Indutech has a cause of action against BGS and GPD directly in breach of contract and against the other defendants in knowing assistance and/or inducing breach of contract and/or conspiracy. There is no gap that need be filled.

466 If it is intended that the third party that allegedly was damaged is BGS or GPD, the cause of action fails because the Cladtech defendants cannot be said to have used unlawful means against BGS or GPD.

467 I therefore dismiss the allegations of unlawful interference with economic relations against all of the defendants.

VI. Conspiracy to Injure

468 Given that I have found that all of the defendants are either liable for breach of contract, or for tortious conduct related to the breach of contract, it is not necessary to determine whether they are also liable in conspiracy.

469 However if I am wrong, I would find the defendants liable as parties to a conspiracy by unlawful means.

470 In *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471-472, the Supreme Court of Canada confirmed that there are two ways that a plaintiff can prove the tort of conspiracy to injure. Estey J. stated:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> ...
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

471 Conspiracy by unlawful means, as described above, requires:

a) an agreement between two or more defendants to act, followed by an execution of that agreement;

b) unlawful conduct on the part of the defendants;

c) conduct directed at least in part towards the plaintiff, which the defendant should have known would likely result in injury to the plaintiff; and

d) resulting injury to the plaintiff.

472 The first element of the test, requiring execution of an agreement to act, requires little

additional explanation, and is clearly present here with respect to the establishment of Cladtech. Mr. Kossowan asked Mr. Gibbs to market the Cladtech product, and although he initially said he could not because of the agreement with Indutech, BGS and GPD later referred inquiries to Cladtech. It can thus be inferred that there was an agreement that BGS would act as agent to refer bid inquiries to Cladtech and that the agreement was acted upon. In addition, Guy Gibbs and Mr. Kossowan (and through them 724192, Kossowan Holdings, Cladtech, 974038, and 1036795) entered into an agreement to set up a competitor to Indutech, and then executed this agreement. Barry Gibbs was aware of this scheme and supported it.

473 The meaning of the second element of the test, unlawful conduct, is less clear. According to Fridman in *The Law of Torts in Canada*, 2d. (Toronto: Carswell, 2002) at 770: "unlawful conduct in the context of conspiracy includes crime, tort, breach of contract, or breach of statute". The courts in Alberta have adopted a still broader definition. In *Franklin Supply Co. v. Midco Supply Co.* *[1995] A.J. No. 765*, *(1995), 172 A.R. 264* (Q.B.), the Court concludes that "unlawful means and acts" includes conduct that is not independently actionable.

474 In *Recovery Production Equipment Ltd. v. McKinney Machine Co.* *(1995), 220 A.R. 1* (Q.B.), aff'd at *(1998), 223 A.R. 24* (C.A.), Ferry, the founder of the plaintiff company who had special expertise, discussed with officers of the defendant company the possibility of joining the defendant company. Ferry ultimately did so, bringing with him the plaintiff's confidential information, including certain technology and customer lists. Shortly thereafter, Ferry, along with the officers of the defendant company and the defendant company, formed another company to compete against the plaintiff. The plaintiff successfully sued these defendants in the tort of conspiracy.

475 Concerning unlawful conduct, the Court found in *Recovery Production* at para. 18 that the "defendants agreed together to commit an unlawful act in breaking their duty of confidentiality in taking the plaintiff's technology and customer lists and they should know in the circumstances that injury to the plaintiff is likely to and does result". Further, at paragraph 20, the Court stated that the defendants discussed and agreed that Ferry would bring confidential information to the defendant company, which "represented a breach of confidence as did the decision to produce compressors in competition with the plaintiff." In that case, the officers of the defendant company and the defendant company were strangers to the plaintiff and owed it no obligation under contract or as fiduciaries. However, the Court nonetheless found all of these defendants liable in conspiracy, based on the acceptance and use of confidential information supplied by Ferry.

476 Thus, it is clear that "unlawful conduct" has a very broad meaning, and can include tortious conduct, breach of contract, inducing breach of contract and even conduct that is not independently actionable. It is present here.

477 Unlawful conduct can be established by any one of the following acts by any one of the defendants: breach of the contract between Indutech and the Gibbs Group, inducing breach of same, breach of fiduciary obligations owed to Indutech, inducing breach of same, or knowing assistance in the breach of fiduciary obligations.

478 The third element that must be established in conspiracy by unlawful means is that conduct be directed at least in part towards the plaintiffs, and the defendants should have known that injury to the plaintiff was likely to result. The final element is that the plaintiff must be injured as a result of the defendant's conduct.

479 The impugned conduct was directed at least in part at Indutech on the basis that the defendants set up a business in direct competition with Indutech, with the intent to service the same geographical area and customers. If the business was successful, the defendants knew that injury to Indutech was likely to occur by way of loss of profits, loss of business opportunities, and disruption to Indutech's business affairs. Such injury was multiplied when Cladtech began receiving work orders from Indutech's exclusive agent, BGS.

480 The fourth element is also established, given that Indutech lost certain bid opportunities to Cladtech. It is not necessary to prove that the predominate purpose was to cause injury to Indutech, but rather constructive intent can be derived from a finding that the Cladtech defendants should have known that injury to Indutech would ensue from their unlawful acts. In *Canada Cement*, the appellants were successful in their appeal on the basis that the unlawful acts (being contraventions of the *Combines Investigation Act*), although "heinous", were not directed in any way towards causing injury to the respondent, and that, in fact, the respondent sought to benefit from those acts. Here, the situation is different. The unlawful acts were all very much directed towards Indutech and the defendants certainly should have known that injury to Indutech would ensue.

481 Fridman in *The Law of Torts in Canada* at page 764 noted that:

> Where unlawful acts are the object of the combination or manifestly unlawful acts are performed to attain what is *prima facie* a lawful object or end, the intent to injure would seem to be conclusively presumed.

and at page 769:

> If the conspirators intend to injure the plaintiff it will not matter whether they intended to employ unlawful means or perpetrate unlawful acts. But it will be important to determine whether the defendants acted unlawfully if they had no intent to injure the plaintiff but ought to have known, in the circumstances, that what they did would be likely to cause such injury. If that is the case the fact that the predominant purpose of the defendants was the advancement of self-interest will not relieve them of liability.

482 I therefore find that Indutech has established that Guy Gibbs, Barry Gibbs, 724192, Mr. Kossowan, Kossowan Holdings, Cladtech, 974028 and 1036795 were all parties to a conspiracy to injure Indutech.

Calculation of Damages

A. **Damages for Breach of Contract**

483 It is trite law that compensatory damages are the usual remedy for breach of contract. The governing principle is the expectancy principle that requires the party in breach to pay as damages an amount of money that will provide the victim of the breach with the financial equivalent of performance.

484 Although the expectancy principle is the primary governing principle, a court can also restore the plaintiff to the position it was in prior to entering the contract by awarding recovery of out-of-pocket expenses incurred in reliance on the contract and other similar losses (the "reliance measure" of damages).

485 A further alternative is to require the party in breach to restore to the plaintiff benefits that the plaintiff has conferred upon the party in breach through performance of the agreement. Such awards are considered to be restitutionary in nature. Disgorgement of profits may be awarded in exceptional circumstances: John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005) at pages 813-814.

486 Indutech claims damages for breach of contract under three separate categories: compensation for loss of business opportunity, restitution and disgorgement.

1. **Compensation for Loss of Business Opportunity**

487 If a service provider fails to perform in a contract for services, the recipient of the services is entitled to damages in an amount that would put it in as good a position as it would have been in if the contract had been performed, less the remuneration that would have been paid to the service provider: S.M. Waddams, *The Law of Damages*, looseleaf (Toronto: Canada Law Book, 2008) at 2-1. The value of lost services can be calculated based on the benefit that the plaintiff would have received: Waddams at 2-1 to 2-3.

488 The Supreme Court of Canada provided a thorough analysis of this theory of damages in *Ellis-Don Construction Ltd. v. Naylor Group Inc.*, 2001 SCC 58, [2001] 2 S.C.R. 943. In a situation involving the breach of an agreement between a contractor and a sub-contractor, the Court held that damages are normally assessed in a building context on the basis of the contract price less the cost of executing the work (i.e., the contemplated profit). There must be evidence to justify any negative contingency that would reduce this contemplated loss of profit. The sub-contractor was awarded as damages the projected profit it stood to make had the contract been performed as contemplated, less a negative contingency for unanticipated site conditions that would have reduced its profit had it performed the work.

Projected Profit

489 Indutech submits that, if the Agency Agreements had been performed by the Gibbs Group, Indutech would have received all of the diverted sales and a certain portion of the Millenium Project work and that it had capacity to perform this additional work.

490 Indutech claims expectancy damages for loss of profits that it would have earned on

diverted work, excluding the Millenium Project, in the amount of $530,289. This is the total selling price of the diverted sales, $1,550.553, less a mark-up for BGS assessed at the 5% allowed under the Agreements, with the resulting figure multiplied by 36% to reflect Indutech's profit margin.

491 The Gibbs Group defendants made a number of submissions on the details of these diverted sales, but I rejected all of them, other than one that does not change the calculated amount of $530,289.

492 The defendants submit that the calculation of damages for loss of profit for diverted work should be reduced to recognize contingencies. They submit that Indutech, even had it had the full opportunity to quote, would not have obtained all of the work for which it submitted quotes.

493 The general rule for proof of a claim for damages in a situation of this kind was set out in *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* *(1993), 12 O.R. (3d) 675* (C.A.) at 687, leave to appeal to S.C.C. refused, at *[1993] S.C.C.A. No. 225*, *104* D.L.R. (4th) vii (note) (S.C.C.):

> The general rule is that the burden is on the plaintiff to establish on the balance of probabilities that, as a reasonable and probable consequence of the breach of contract, the plaintiff suffered the damages claimed. If the plaintiff is not able to establish a loss, or where the loss proven is trivial, the plaintiff may recover only nominal damages.
>
> A second fundamental principle is that where it is clear that the breach of contract *caused* loss to the plaintiff, but it is very difficult to quantify that loss, the difficulty in assessing damages is not a basis for refusal to make an award in the plaintiff's favour. One of the frequent difficulties in assessing damages is that the plaintiff is unable to prove loss of a definite benefit but only the "chance" of receiving a benefit had the contract been performed. In those circumstances, rather than refusing to award damages, the courts have attempted to estimate the value of the lost chance and awarded damages on a proportionate basis. [emphasis in original]

494 Further guidance was provided by the Supreme Court in *Webb & Knapp (Can.) Ltd. v. Edmonton (City)*, *[1970] S.C.R. 588* where Hall J., delivering the judgment of the majority, stated at p. 601:

> The fact that assessment is difficult is no ground for awarding nominal damages... The broad general rule is that damages which are uncertain, contingent and speculative in their nature cannot be made a basis of recovery; but **this rule against recovery of uncertain damages is directed against uncertainty as to cause rather than as to the extent or measure**. [emphasis added]

495 John A. McLeish in *Contingencies; Loss of Interpersonal Relationships; The Material Contribution Test; and Punitive, Exemplary, and Aggravated Damages*: Special Lectures 2005: *The Modern Law of Damages/Law Society of Upper Canada,* Irwin Law Inc. at 279 described the evolving law of contingencies as follows:

> Over the past thirty years, the Canadian approach towards the valuation of contingencies has evolved in leaps and bounds. Courts no longer apply an arbitrary across-the-board

> reduction in awards for future pecuniary losses in a pre-determined scale. Instead, the modern, realist approach mandates an evidentiary foundation on which to justify either a discount or premium for various contingencies. This approach calls for a trier of fact to consider all forms of contingencies: general, specific, positive, and negative, and to consider their application to a particular plaintiff. In the absence of any persuasive evidence in either direction, the trier of fact may make no deduction, and should not, in any event, make more than a modest deduction.

496 What the defendants appear to suggest is a general contingency factor to be applied to Indutech's calculation of loss of profits. They present no evidence, other than Mr. Smith's opinion that it is not reasonable to assume that Indutech would not face competition for these sales or would achieve a market share greater than that historically experienced. While the defendants do not bear the evidential onus of establishing that there should be a deduction for contingencies, Indutech has presented evidence to counter the argument that a contingency factor is necessary or appropriate.

497 While it cannot be disputed that Indutech does not obtain all the work it quotes on in the general market, the claim for diverted sales does not involve the general market. All of the claims for loss of profit on diverted sales relate to requests for work by oilsands customers that were funnelled through the Gibbs Group, and all the claims relate to work for which a purchase order was granted through the assistance of the Gibbs Group to manufacturers to whom they chose to forward bid inquiries.

498 It is a reasonable assumption that, as BGS was able to secure purchase orders for all of these contracts for other manufacturers, it could have done so for Indutech.

499 It could perhaps be argued that if BGS had fulfilled its duty under the Agreements and offered all bid inquiries to Indutech, only looking elsewhere for options where Indutech agreed it could do so in accordance with the terms of the Agreements, oilsands customers would have requested bids directly from other manufacturers or used a different agent. However, there is no evidence that this would have been the outcome. There is evidence that there was a small group of manufacturers for this specialized product in a time of intense demand. It is particularly true with respect to the Millenium Project diversions that BGS had the power to ensure that Indutech would have been able to obtain the work in issue. Many of the diverted sales were structured in such a way as to maximize profit to BGS or to favour Cladtech, and not merely to accommodate oilsands customers or to save them money or time.

500 With respect to the Millenium Project diversions, the expert witnesses disagreed with respect to whether Indutech had the capacity to undertake all of the work. At the time the expert reports were prepared, Indutech was claiming expectancy damages for loss of opportunity on all contracts issued under the project. At trial, Indutech's claim for lost profits under this heading was restricted to the 24 spools for which it had been issued a purchase order that was subsequently cancelled. No contingency factor should be applied to this claim for damages.

501 On the capacity issue, Indutech presented evidence of a positive contingency: that it would have been able to increase productivity relatively rapidly had it been required to do so.

502 In these circumstances, any negative contingency factor I would choose to apply to the loss of profits for diversion would be arbitrary and not warranted. I note that, if it were impossible to ascertain expectancy damages for loss of profit or to place a reasonable value on the lost opportunity for profit, the alternative approach would be to award Indutech reliance damages in the amount of repayment of the 4% commissions paid during the term of the agreements and/or profits made by the Gibbs Group on diverted work. That approach to damages would result in a much larger award against the Gibbs Group with respect to diversions. Indutech's claim for lost profits is restrained in the circumstances.

503 The same response can be made to the argument that there is no evidence that Cladtech's entry into the market affected Indutech's market share. There is, however, evidence that Cladtech was referred opportunities to bid on work by BGS in breach of the Agency Agreements and obtained the work, giving rise to the inference that had there not been such a breach, these opportunities would have gone to Indutech. The Cladtech defendants also submit that these damages are claimed on the basis of a theoretical capacity to perform the work. I have found that Indutech has established that it had the means to increase productivity and capacity.

504 I find that Indutech is entitled to damages in the amount of $530,289 against BGS and GPD for loss of opportunity arising out of breach of contract, without diminution for contingencies.

2. **Restitution**

505 Indutech seeks to reverse the transfer of certain benefits that accrued to the Gibbs Group pursuant to the performance of the Agency Agreements. The most obvious benefit is the 4% commissions paid by Indutech to the Gibbs Group in the amount of $864,699.

506 Indutech also claims restitution for profits wrongfully earned by the Gibbs Group through the following wrongful conduct:

(i) marking-up Indutech's product by more than 5%,

(ii) monies received by BGS through the supply and/or sale of bulk welding wire; and

(iii) commissions and profits wrongfully earned by the Gibbs Group on the diverted work (including in the Millenium Project).

507 While Indutech characterizes these claims as claims in restitution, they are more precisely disgorgement claims, and will be analyzed as such.

508 In its claim for return of commissions, Indutech relies on *Hodgkinson v. Simms*. In that case, the plaintiff invested in a project recommended by his accountant (upon whom he relied for independent financial advice) in which the accountant had an undisclosed financial interest. The investment later plummeted in value. The Supreme Court accepted that the plaintiff would not have entered into the investment had it not been for non-disclosure by the accountant of his

conflict of interest. In considering damages, the majority of the Supreme Court applied a restitutionary principle and held that the plaintiff was entitled to be restored to his pre-transaction *status quo*, meaning he was entitled to the return of 100% of the funds he had invested in the project: *Hodgkinson* at 477-478.

509 However, the finding of liability for restitutionary damages in *Hodgkinson* arose primarily from a breach of fiduciary duty. LaForest, J. noted at page 455 that, given the existence of a fiduciary duty, it was not strictly necessary to consider damages for breach of contract, although on the facts of the case, damages in contract would follow the same principles. Restitutionary damages were awarded in lieu of expectancy or loss of profit damages.

510 Indutech's claim for restitution applies to the commissions that Indutech paid GPD pursuant to the Agency Agreements on the basis that Indutech did not receive what it paid for pursuant to the Agreements. Indutech argues that it would not in all probability have entered into the 2000 Agency Agreement had it been aware that BGS was selling bulk wire to Matrix. Neither would it have entered into the 2002 Agency Agreement if it had known that steps were being taken to set up Cladtech as a competing business. The amount claimed in commissions is $864,990.40.

511 Given that I have awarded expectancy damages to Indutech for loss of opportunity, it is not appropriate or necessary to make an additional restitutionary award for these commissions. This type of award is most often made when an award of expectancy damages is unsatisfactory, as when it cannot be shown that a profit would have been made had the agreement been fully performed. The commissions were earned on specific opportunities that were referred to Indutech by BGS and GPD in partial performance of the Agency Agreements. For these reasons, I decline to make a restitutionary award of damages for commissions paid. I will refer to unpaid commissions in my reasons on the counterclaim.

3. **Disgorgement**

512 Disgorgement requires that the defendant give up a benefit that it has wrongfully acquired. It differs from restitution in that restitution is restricted to the recovery of a benefit obtained by the defendant from the claimant, while disgorgement applies more broadly to the delivery up of a benefit obtained by the defendant from any source whatsoever. Thus, Indutech's claims of damages for (i) profits wrongfully earned by the Gibbs Group in marking-up Indutech's product by more than 5%; (ii) commissions wrongfully earned by the Gibbs Group on the sale of bulk welding wire; (iii) commissions and profits wrongfully earned by the Gibbs Group on the diverted work (including the Millenium Project); and (iv) fees wrongfully earned by the Gibbs Group for managing the Millenium Project are disgorgement claims.

513 The House of Lords in *Attorney General v. Blake*, [2000] H.L.J. No. 47, [2000] 4 All E.R. 385 (H.L.) found that disgorgement is a remedy that is available for breach of contract. The House of Lords was called upon to decide whether an author was entitled to royalties from an autobiography he wrote and had published relating in part to his years in the Secret Service and acting as a spy. Publication of the book was in breach of a declaration the author had executed at the time he commenced employment with the Secret Service. The author was found to be in breach of contract.

514 The House of Lords noted at 391 that the general rule that the measure of damages is to be "as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong", but that the common law has been pragmatic in many instances, awarding damages on a different basis where the general rule would not do justice.

515 The House of Lords then considered the different approach that equity takes to the assessment of damages, noting that the difference in remedial response between equity and the common law "appears to have arisen simply as an accident of history": at 393.

516 Lord Nicholls in the leading opinion commented that contract and tort damages are not always confined to a recoupment of financial loss, and, in a suitable case, damages for breach of contract may be measured by the entire benefit gained by the wrongdoer from the breach, noting at 397-398:

> When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefit he has received from his breach of contract...
>
> ...The law recognises that damages are not always a sufficient remedy for breach of contract... in certain circumstances an account of profits is ordered in preference to an award of damages...
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> ...An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, **coupled with the characterization of some contractual obligations as fiduciary**, will provide an adequate response to a breach of contract. It will only be in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.
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> [emphasis added]

517 While not offering specific guidance, Lord Nicholls commented that the mere fact that a breach of contract was "cynical and deliberate", that the breach enabled a defendant to enter into a more profitable contract elsewhere, or the mere fact of "skimped performance" would not be a sufficient basis for departing from the general principle of expectancy damages. Before an account of profits is ordered, there must be "something more."

518 That "something more" may be as identified by Professor McCamus in the *Law of Contracts*, at page 974:

> The principal argument in favour of granting this form of relief in a contractual context is that some breaches of contract are as offensive or wrongful as many breaches of

> fiduciary obligation or breaches of confidence. Accordingly, just as the accounting of profits remedy is available in these other contexts, so too it should be available in the context of a heinous or unusually wrongful breach of contract. A further and perhaps more persuasive argument in support is that courts will, in any event, order disgorgement of profits in a case of contract breach where any other result would be unjust, even in the absence of an explicit doctrine permitting the granting of such relief.

519 *Attorney General v. Blake* has been considered and applied in several Canadian cases. The Supreme Court of Canada acknowledged the possibility of disgorgement as a remedy for breach of contract under Canadian law in *Bank of America Canada v. Mutual Trust Co.*, *2002 SCC 43*, *[2002] 2 S.C.R. 601* at para. *30* where the Court stated:

> ...In contract, restitution damages can be invoked when a defendant has, as a result of his or her own breach, profited in excess of his or her expected profit had the contract been performed but the plaintiff's loss is less than the defendant's gain. So the plaintiff can be fully paid his damages with a surplus left in the hands of the defendant. This occurs with what has been described as an efficient breach of contract. In some but not all cases, the defendant may be required to pay such profits to the plaintiff as restitution damages (citation omitted).

520 While the Supreme Court referred to such a claim as restitution because it was dealing with profits earned by the defendant, such a claim can be considered disgorgement.

521 In a decision that pre-dated *Blake, Jostens Canada Ltd. v. Gibsons Studio Ltd.*, *1999 BCCA 273*, the British Columbia Court of Appeal upheld the trial judge's decision that none of the alleged fiduciary obligations in a breach of contract case survived the cessation of the relationship between the parties. However, the Court held that, in competing against its principal prior to the end of the relationship, the agent had breached its contract, and as a result, the plaintiff was entitled either to damages at law or an account of profits acquired at equity.

522 Thus, case law has provided that disgorgement of the wrongdoer's profits is an appropriate remedy in at least three distinct circumstances:

- where the wrongdoer's profits exceed the expected profit had the contract been performed;
- where the relationship, while not amounting to a fiduciary relationship, is akin to a fiduciary relationship; and
- where damages are inadequate and the plaintiff has a legitimate interest in preventing the defendant's profit-making activity.

523 Indutech submits that all three of these circumstances apply in the present case (if the relationship between it and BGS and GPD is not found to be fiduciary in nature). Indutech therefore seeks disgorgement of the benefits obtained by the Gibbs Group under contractual law principles.

524 As I have found the relationship to be fiduciary in nature, it is not necessary to resort to

contractual disgorgement principles to justify the remedy of an account of profits. If, however, I am wrong in that determination, this is an appropriate case to award an account of profits for the breaches of contract pursuant to the *Blake* principles. This was not merely a cynical breach of a purely commercial contract, as even if the relationship between Indutech and the Gibbs Group did not give rise to fiduciary obligations, it was so close and the breaches so broad, deliberate and immediate to the execution of the Agreements that they were, as Professor McCamus has put it, as offensive and wrongful as many breaches of fiduciary obligations.

B. **Damages for Breach of Fiduciary Duty and other Torts**

525 There are several remedies available for breach of fiduciary duty, including equitable compensation and disgorgement/ account of profits: Jeff Berryman, "*Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals"* (1999) 37 Alta L. Rev. 95 at 98.

526 According to Sopinka J. in *Lac Minerals Ltd.* at 618 (in dissent but not on this issue) the general rule regarding remedies for breach of confidence and breach of fiduciary duty is as follows:

> The conventional remedies for breach of confidence are an accounting of profits or damages. An injunction may be coupled with either of these remedies in appropriate circumstances. A restitutionary remedy is appropriate in cases involving fiduciaries because they are required to disgorge any benefits derived from the breach of trust. In a breach of confidence case, the focus is on the loss to the plaintiff and, as in tort actions, the particular position of the plaintiff must be examined. The object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed. Accordingly this object is generally achieved by an award of damages, and a restitutionary remedy is inappropriate. [emphasis added]

527 The comment of Wilson J.at page 631 of *Lac Minerals Ltd.* is also noteworthy:

> It seems to be that when the same conduct gives rise to alternate causes of action, one at common law and the other in equity, and the available remedies are different, the court should consider which will provide the more appropriate remedy to the innocent party and give the innocent party the benefit of that remedy.

528 If the plaintiff establishes that a loss has likely been suffered, the difficulty in determining the amount of the loss can never excuse the wrongdoer from paying damages. If the amount is difficult to estimate, the court must do its best with the material available to estimate the damage, unless the plaintiff has failed to adduce evidence: *PTI Group Inc. v. BOT Engineering & Construction Ltd.* *(1995), 166 A.R. 104* (Q.B.) at paras. 15, 16.

(a) **Equitable Compensation**

529 In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 556, McLachlin J. (as she then was) provided a succinct summary of the law respecting equitable compensation:

> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with

> restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties.

530 The rationale for such an award of equitable compensation appears to rest in restoration, rather than restitution.

531 Indutech submits that the sales diverted by the Gibbs Group to Indutech's competitors, both generally and as part of the Millenium Project, were misappropriated business opportunities. The value of these misappropriated corporate opportunities to Indutech was the profit that Indutech stood to earn on these opportunities. Indutech claims equitable compensation for this loss.

532 Clearly, restitution is not appropriate with respect to this claim. Indutech may be entitled to claim an account of profits, but in this case, for diversions other than the Millenium diversions, the loss of profit to Indutech is greater that the commissions earned on the diversions by the Gibbs Group, and Indutech has chosen to claim for loss of profit for these diversions.

533 While Indutech is correct that its claim for diversion damage falls within the category of equitable compensation by virtue of the defendants' breach of fiduciary duties or knowing assistance, the claim also falls within the category of expectancy damages arising from the breach of contract with respect to BGS and GPD.

534 It is most appropriate to award these damages under the heading of breach of contract against BGS and GPD and against Guy Gibbs, Barry Gibbs and 724192, on the basis of either their breaches of fiduciary duty, knowing assistance in breaches of fiduciary duty, inducing breach of contract or participation in a conspiracy. The Gibbs Group defendants are jointly and severally liable for this award of damages in the amount of $530,289.

535 A subset of the diversions claim is the work diverted to Cladtech. Restitution and/or account of profits are not appropriate on this claim against these defendants. Liability for the loss of profits with respect to this work also rests on the Cladtech defendants on the basis of knowing assistance to breach of fiduciary obligations, inducing breach of contract or conspiracy. Barry Kossowan, Kossowan Holdings, 974038, 1036795 and Cladtech are thus also jointly and severally liable with the Gibbs Group defendants for this portion of the award of damages, being $39,462.84.

536 The calculation of this subset of damages against the Cladtech defendants requires clarification. The gross proceeds of sales obtained by Cladtech from orders diverted to it by the Gibbs Group was $109, 619.01. In some cases, the product was sold through BGS, and where BGS was involved, the profit obtained by BGS was calculated separately as part of profits from diversions, and information as to cost of production was obtained from BGS's records. In the case of invoices from Cladtech to either BGS or the ultimate customer, there is no evidence from Cladtech's records as to profit margin. It is reasonable in the circumstances to use the figure of 36%, the average profit that Indutech would earn on sold product according to the opinion of Mr. Copeland. The Cladtech defendants submit that this profit margin is too high, but did not present any evidence to counter it or to establish Cladtech's actual profit margin on these sales.

537 The Millenium Project diversions require separate analysis. Indutech claims disgorgement or account of profits for work diverted on the Millenium Project to Triten and Bendtec, and for profits earned by the Gibbs Group from purchase orders issued to them by MCC, and this will be referenced later in these reasons. Indutech also, however, claims equitable compensation for profits it would have earned on a specific sales order, 50 - 418 for 24 spools that it submits was wrongfully removed from Indutech through the actions of the Gibbs Group.

538 I find that this latter claim for profits in the amount of $257,428 is a valid and sustainable claim for equitable compensation for the opportunity for profit lost to Indutech arising from breach of fiduciary duty and knowing assistance to breach of fiduciary duty by the Gibbs Group. While the claim could also be founded in breach of contract with respect to BGS and GPD, it differs from the other diverted sales claim as it is calculated on the basis of net profit to Indutech rather than actual sales information involving Indutech's competitors.

539 I find the Gibbs Group defendants to be jointly and severally liable for this award of damages in the amount of $257,428.

540 Also falling into this category of damages is the claim for loss of 2004 revenue from MSI (as agent for Suncor) arising from the early termination of the 2002 Agency Agreement.

541 Indutech points out that between 2002 and June of 2004, BGS acted on behalf of Indutech in dealing with MSI on various buy/sell transactions. Indutech relied on BGS to promote its interests with MSI and to ensure that it was the preferred manufacturer with Suncor. That relationship ended, however, in June of 2004 with service of the Statement of Claim on BGS. Thereafter, Indutech had to take steps to re-establish its presence with MSI/Suncor and ensure that all bid inquiries were referred to its offices.

542 Ms. McGowan testified that, from June to December of 2004, Indutech received orders for sales of $147,840 from MSI. In 2005, Indutech sales from MSI increased to $560,210. Indutech submits that the evidence establishes that in 2004 BGS failed to fully promote Indutech's interests, as reflected by the numerous diversions that coincided with the establishment of Cladtech. As a consequence of the termination of the 2002 Agency Agreement, Indutech lost

sales for the balance of the 2004 year estimated to be in the approximate amount of $150,000 (being one-third of the difference between 2004 and 2005 sales). Assuming that Indutech's net profit was 36% on the manufacture of its CCO products as stated by Mr. Copeland, Indutech calculates its damages under this heading to be $54,000.

543 This is another claim where neither restitution nor account of profits is appropriate. It is primarily a post-contractual claim. Indutech concedes that it is based on an arbitrary number with respect to loss of sales, arising both from BGS's failure to promote Indutech's interests prior to the termination of the Agency Agreement and the time it took for Indutech to re-establish sales with MSI in 2005. For these reasons, it is more appropriate to characterize this claim as a claim in equitable compensation, rather than in expectancy damages.

544 It is clear that it is very difficult to calculate how much MSI business was lost to Indutech in 2004 but I am satisfied that Indutech suffered economic loss from the early termination of the 2002 Agreement necessitated by the discovery of the Gibbs Group's breaches. As noted in *Polar Ice Express Inc. v. Arctic Glacier Inc.*, *2007 ABQB 717*, *434 A.R. 261* at paras. 116, 117, where damage can be inferred from this kind of economic tort, the plaintiff is entitled to damages not limited to those available for breach of contract.

545 In *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* *(1996), 187 A.R. 81*, leave to appeal to SCC ref'd *[1996] SCCA No. 511*, the Court of Appeal accepted the summary and analysis of the tort of unlawful interference with economic interests provided by Berger J. (as he then was) in the trial decision *(1994), 151 A.R. 1* at para. 388:

> It is not incumbent on the plaintiff, once it has established that damages have been suffered, to prove to a mathematical certainty the amount of the damages sustained. As the Alberta Court of Appeal recently observed in *Nathu v. Imbrook Properties Ltd.*, [1992] 4 W.W.R. 373 at 378-79, any difficulties that may arise in measuring the damages with precision do not relieve the defendants of the necessity of paying compensation; the process of assessing damages is essentially a matter of judicial assessment rather than exact, scientific calculation. This is particularly so where damages are at large.

546 The defendants submit that damages under this heading should be limited to three months of profit, as the 2002 Agency Agreement provided for a three month notice of termination.

547 This is a claim for damages arising from breach of fiduciary obligation, not from breach of contract. The requirement that Indutech re-establish itself with MSI arose, not just from the termination of the contract, but from serious breaches of fiduciary duty committed by the Gibbs Group defendants, which caused damage to Indutech quite apart from the early termination.

548 The contractual limitation should not serve to limit damages in these circumstances, as damages in that limited amount would not put Indutech in the position it would have been in had the breaches not occurred.

549 While it is unclear whether the usual rules with respect to mitigation apply when

considering equitable compensation for breach of fiduciary duty, there is no evidence here of a failure to mitigate.

550 Indutech took action to terminate the Agency Agreement within a reasonable time after learning of the breaches. The period of time between contract termination in June of 2004 and year end was certainly not an unreasonable period of time for Indutech to re-establish its direct relationship with MSI, particularly given that Indutech was dealing with Ms. Kohlsmith as one of MSI's representatives for that period of time, and her partiality towards Guy Gibbs and BGS was clear from her testimony. Despite Ms. Kohlsmiths criticisms, direct sales to MSI by Indutech increased from $18,841 from January 1 to when the agency agreement was terminated in early June to $147,840 for the rest of the year.

551 I find that, on a common sense view of causation, this is a justifiable claim for loss and restoration of that loss on the basis of breach of fiduciary duties, knowing assistance to these breaches, inducing breach of contract and/or conspiracy. Thus, the Gibbs Group defendants are also jointly and severally liable for damages under this category in the amount of $54,000.

(b) **Disgorgement/Account of Profits**

552 Even where a principal could not have made a profit on its own, the fiduciary is still required to disgorge the profit: *Hodgkinson* at 422. Disgorgement focuses on the actual gains made by the fiduciary and is independent from any losses incurred by the person to whom the fiduciary duty is owned: *Lac Minerals Ltd.*, at 595. The important policy consideration that breaches of fiduciary duty should be discouraged was provided as a basis for considering disgorgement remedies: *Lac Minerals Ltd.* at 600.

553 There is great flexibility in awarding an account of profits remedy. In *Canadian Aero Service Ltd. v. O'Malley*, *[1974] S.C.R. 592* at *621-622*, the Supreme Court of Canada explained that the liability of the defendants for breach of fiduciary duty does not depend upon proof by the plaintiff that, but for their intervention, it would have obtained the benefit for itself. Further, it is not a condition of recovery of damages that the plaintiff establish what its profits would have been or what it had lost by failing to realize the corporate opportunity. The plaintiff was "entitled to compel the faithless fiduciary to answer for their default according to their gain.": *Canadian Aero* at 621-622.

554 In *Hanson v. Clifford (1996), 83 B.C.A.C. 261* (sub nom. *Clifford & Associates Consulting Ltd. v. Clifford*), at para. 21 the British Columbia Court of Appeal noted that in the case of breach of fiduciary duty, if the profits made by the business that obtained them in breach of the fiduciary duty are greater that the loss suffered by the plaintiff, then disgorgement is the appropriate remedy.

555 In *Canson,* the Supreme Court dismissed appeals from the decision of the trial judge wherein he ordered damages in the amount of the secret profit (despite the fact this amount exceeded the actual value) and additionally ordered damages for consequential losses. The Court ultimately held that secret profits made by agents or from the misuse of confidential information must be accounted for: *Canson* at 557.

556 Indutech seeks disgorgement of the amounts wrongfully earned by the Gibbs Group in breach of their fiduciary duties and knowing assistance to same. I find that Indutech is entitled to the remedy of disgorgement of these profits in accordance with the principles described herein from the Gibbs Group defendants jointly and severally as follows:

i) 5% mark-up profits - $186,828

ii) bulk welding wire profits - $309,554

iii) Millenium Project - MCC Purchase Orders - $292,876 Triten/Bendtec - $273,848.60

557 Some of the sales of bulk welding wire were to Cladtech. Total gross margins on sales to Cladtech were $18,097. While the Cladtech defendants did not receive the benefit of profits from these sales, they are liable to Indutech with respect to knowing assistance to breach of fiduciary duties and conspiracy with respect to this breach.

558 Although the liability of the Cladtech defendants under this heading cannot be characterized as disgorgement of profits, it is awarded as general damages at large. As noted in Fridman, *The Law of Torts in Canada* at 803:

> Once a cause of action has been established, damages are at large. This means that the court can award whatever is deemed appropriate in the circumstances.

559 In this case, I find that it is appropriate that the Cladtech defendants be jointly and severally liable with the Gibbs Group defendants for the portion of profit derived from the sale of bulk welding wire to Cladtech.

560 Indutech also claims disgorgement of commissions earned by the Gibbs Group with respect to diverted work other than the Millenium Project. Since I have awarded damages in the amount of profits that Indutech would have earned on this diverted work, it would be a duplication to also order disgorgement of profits, which is appropriate only when other measures of damage cannot do justice.

C. **Punitive Damages**

561 Indutech claims punitive damages against the defendants in the amount of $150,000. Punitive or exemplary damages are intended to punish the wrongdoer rather than to compensate the plaintiff.

562 In *Vorvis v. Insurance Corporation of B.C.*, *[1989] 1 S.C.R. 1085* the Supreme Court of Canada stated that to obtain punitive damages in a breach of contract case, the plaintiff must first show that the defendant has committed an "independent actionable wrong", separate and apart from the breach of contract. Secondly, the plaintiff must also show that the conduct is of

such an extreme nature that it is deserving of condemnation by the court in the form of punitive damages. Both of these prerequisites to an award of punitive damages are present in this case.

563 In *Whiten v. Pilot Insurance Co.*, *2002 SCC 18*, *[2002] 1 S.C.R. 595* at paras. *67-76*, Binnie J. summarized the general principals with respect to punitive damages. The following are relevant to this case:

a) While punitive damages are largely restricted to intentional torts or breach of fiduciary duty, they are available in exceptional cases of breach of contract.

b) The general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation ("the means by which the jury or judge expresses its outrage at the egregious conduct").

c) Since the primary vehicle of punishment is criminal law, punitive damages should be awarded with restraint, and only in exceptional cases.

d) The incantation of the time-honoured pejoratives ("high-handed," "oppressive", vindictive", etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount... A more principled and less exhortatory approach is desirable.

e) Punitive damages should promote rationality (for example, how, *in particular,* an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose).

f) It is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others.

g) The proper focus is not on the plaintiff's loss but on the defendant's misconduct. A mechanical or formulaic approach does not allow sufficiently for the many variables that ought to be taken into account in arriving at a just award.

h) The governing rule for quantum is *proportionality*. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). [emphasis added]

564 In determining whether a punitive damages award is rationally proportionate, Binnie J. listed the following relevant considerations at paras. 111-125:

1. the blameworthiness of the defendant's conduct, and in particular, whether the conduct was planned and deliberate, the intent and motive of the defendant, whether the defendant persisted in the outrageous conduct over a lengthy period of time, whether the defendant conceded or attempted to cover up its misconduct, the defendant's awareness that he was doing wrong, whether the defendant profited from the misconduct, and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff;

2. the plaintiff's degree of vulnerability;
3. the harm or potential harm directed specifically at the plaintiff;
4. the need for deterrence;
5. other penalties (civil and criminal) inflicted on the defendant for the same misconduct; and
6. the advantage wrongfully gained by the defendant from the misconduct.

565 Indutech submits that this is an appropriate case to award punitive damages given the following:

(i) the presence of fiduciary obligations;

(ii) the planned and deliberate nature of the conduct (in particular, the conscious and flagrant contractual and fiduciary breaches);

(iii) the intent and motive of the Gibbs Group to further their own ends at any cost;

(iv) the fact that the impugned conduct took place over the entire span of the Agency Agreements;

(v) the admitted attempts by the Gibbs Group to conceal their conduct from Indutech;

(vi) the awareness by the Gibbs Group that they were acting in breach of both the 2000 Agency Agreements and 2002 Agency Agreement;

(vi) the profits earned by the Gibbs Group in pursuing this course of conduct (including the subsequent sale of the CCO machines by 1036795 for approximately $1.5 million);

(viii) Indutech's degree of vulnerability; and

(ix) the need to deter these types of blatant contractual and fiduciary breaches of duty.

566 With respect to the Cladtech defendants, while they participated in conduct that was ethically reprehensible, they are liable (personally in the case of Mr. Kossowan who was the main actor) for disgorgement of profit and damages at large for their participation. The damages at large award is aimed particularly at recognizing the harm this conduct caused to Indutech. No further punitive damages are necessary or appropriate to reinforce this message against these defendants.

567 The conduct of the Gibbs Group defendants, however, is many degrees more blameworthy. While trying to avoid the trap of falling into the "dyslogistic judicial epithets" abhorred by Binnie J., there is no doubt that the Gibbs Group defendants only abided by their contractual obligations to Indutech when it was convenient for them to do so. Their primary, perhaps only, object was self-interest and profit. The breaches go to the heart of the relationship between Indutech and the Gibbs Group defendants. While perhaps somewhat shop-worn, the words "egregious", "cynical" and "blatant" appear appropriate to the circumstances. What the Gibbs Group defendants accomplished was to manipulate the market in specialized steel

products to their own advantage for the four years of the Agency Agreement while lulling Indutech with contractual commitments that promised loyalty and exclusivity.

568 While the compensatory awards that have been made are substantial and liability extends to Guy Gibbs and Barry Gibbs personally, they are insufficient to satisfy the need for deterrence and denunciation. The message must be delivered that this type of conduct in business has grave monetary consequences. The Gibbs Group defendants profited from their association with Indutech in ways that they have not been required to account for in the awards of compensatory damages. Given the scope of damages awarded under other categories, an award of punitive damages in the requested amount of $150,000 is not disproportionate and is sufficient to provide the necessary message. The Gibbs Group are therefore jointly and severally liable for punitive damages in that amount.

569 In summary, the damages awarded to Indutech as against the Gibbs Group defendants jointly and severally are as follows:

	Category of Claim	**Commissions/ Gross Margins**	**Damages**
1	Profits wrongfully earned by the Gibbs Group from the supply of bulk welding wire	$309,554.00	
2	Profits wrongfully earned by the Gibbs Group for mark-ups in excess of 5%	$186,028.00	
3	Profits that Indutech would have earned on diverted work, excluding the Millenium Project		$530,289.00
4	Millenium Project - 2000 (a) Fees and profits wrongfully earned by the Gibbs Group through purchase orders issued to it by MCC (b) Commissions wrongfully earned by the Gibbs Group for work diverted to Triten/Bendtec (c) Profits Indutech would have earned on Sales Order 50-418 for 24 spools at a value calculated as follows $737,194.00 - 22,116.00 (3% BGS Commission) $715,078.00 $257,428.00 Net Profit to Indutech @ 36%	 $292,876.00 $273,848.60	 $257,428.00
5	Loss of 2004 revenue from MSI (Suncor) re: termination of BGS as Agent: $150,000.00 loss in sales $54,000.00 net profit to Indutech @ 36%		$54,000.00
6	Punitive Damages		$150,000.00

570 The damages awarded to Indutech as against the Cladtech defendants jointly and severally with the Gibbs Group defendants are as follows:

	Category of Claim	Damages
1	Damages at large with respect to the purchase of bulk welding wire - subset of 1 above	$18,097
3	Profits that Indutech would have earned on work diverted to Cladtech - subset of 3 above	$39,462.84

571 Indutech is also entitled to interest on the damages awarded, other than punitive damages, in accordance with the *Judgment Interest Act*, R.S.A. 2000 , c. J-1. If there are any issues arising from the calculation of interest, or the apportionment of liability for interest, the parties may make further submissions.

Counter Claim

572 GPD filed a counterclaim and alleges that it is owed commissions pursuant to the 2002 Agency Agreement that Indutech has failed to pay. The commissions that remain unpaid are agreed to be $113,563.

573 Indutech notified the Gibbs Group that it was in breach of the 2002 Agency Agreement by serving them with the Statement of Claim in this action on June 11, 2004. When the Gibbs Group failed to cure the breach within fourteen days, the 2002 Agency Agreement was deemed terminated pursuant to clause 4.9 on June 11, 2004.

574 The 2002 Agency Agreement does not address the payment of commissions following termination of the Agreement for breaches. However, paragraph 6 of the 2002 Agency Agreement addresses payment of commissions during a contemplated three month notice period which would follow a termination for reasons other than a breach of the Agreement. It states that commissions are only payable on purchase orders received prior to notification of termination, and precludes commissions on future orders related to pre-existing contracts.

575 No commissions are payable after the termination of an agency relationship unless there is an express term in the contract to the contrary: *Greycombe Associates Ltd. v. Northern Stag Industries Ltd.* (1976), 14 O.R. (2d) 201 (H.C.J.) at para. 23.

576 While BGS and GPD may be entitled to commissions payable to the date of termination under contract, where there is a breach of fiduciary duty, such as in this case, a fiduciary must disgorge benefits obtained from its role as a fiduciary, in some cases even where the beneficiary of the fiduciary duty benefited from services provided by the fiduciary.

577 In *McBride Metal Fabricating Corp. v. H & W Sales Company Inc*. (2002), 59 O.R. (3d) 97 (C.A.), McBride and H&W were parties to an agreement pursuant to which H&W was appointed to sell McBride's products on an exclusive basis to one automotive company, and on a non-

exclusive basis to the remainder of the automotive industry. In 1994, a decade into the agreement Mr. McBride learned of H&W's ownership interest in Sequoia Tubular and immediately terminated the agreement.

578 The trial judge held that H&W breached its fiduciary duty in 1994, and that McBride would have terminated at that time had disclosure of H&W's interest in Sequoia Tubular been made. The issue on appeal was whether McBride was obligated to pay H&W commissions over the two year period following termination pursuant to the ramp-down clause contained in the agreement.

579 The Ontario Court of Appeal upheld the trial judge's decision that commissions over the ramp-down period were not payable. It noted that where there has been a fiduciary breach, the principal is entitled to repudiate the contract and refuse to pay commissions in respect of the breach. Furthermore, the Sequoia Tubular and other transactions were equally tainted by the fiduciary breach, and as a result, H&W was not entitled to commissions after 1996 on these sales.

580 I find in this case that Indutech would have terminated the Agency Agreements promptly had it known of the breaches being committed by the Gibbs Group, particularly the establishment of Cladtech. I find that by early 2004, the Gibbs Group had given up any pretence of compliance with the Agency Agreements. I note that some of the more egregious breaches occurred during this time.

581 Guy Gibbs specifically contemplated terminating the 2002 Agency Agreement in December of 2003 or early January 2004. He decided against doing so because of the large projects Indutech was involved in manufacturing and the fact that Indutech might decide not to manufacture the products if the Agreement was terminated. He was also aware of the magnitude of the commissions that BGS would receive from this work.

582 I find, therefore, that an equitable remedy, rather than a contractual one, is appropriate in the matter of the counter-claim for commissions, and that it would be repugnant and inequitable to require Indutech to pay the commissions and reward the Gibbs Group for their dishonest but successful strategy of concealing their breaches of contract and of fiduciary duty. I therefore dismiss the counter claim in its entirety.

Costs

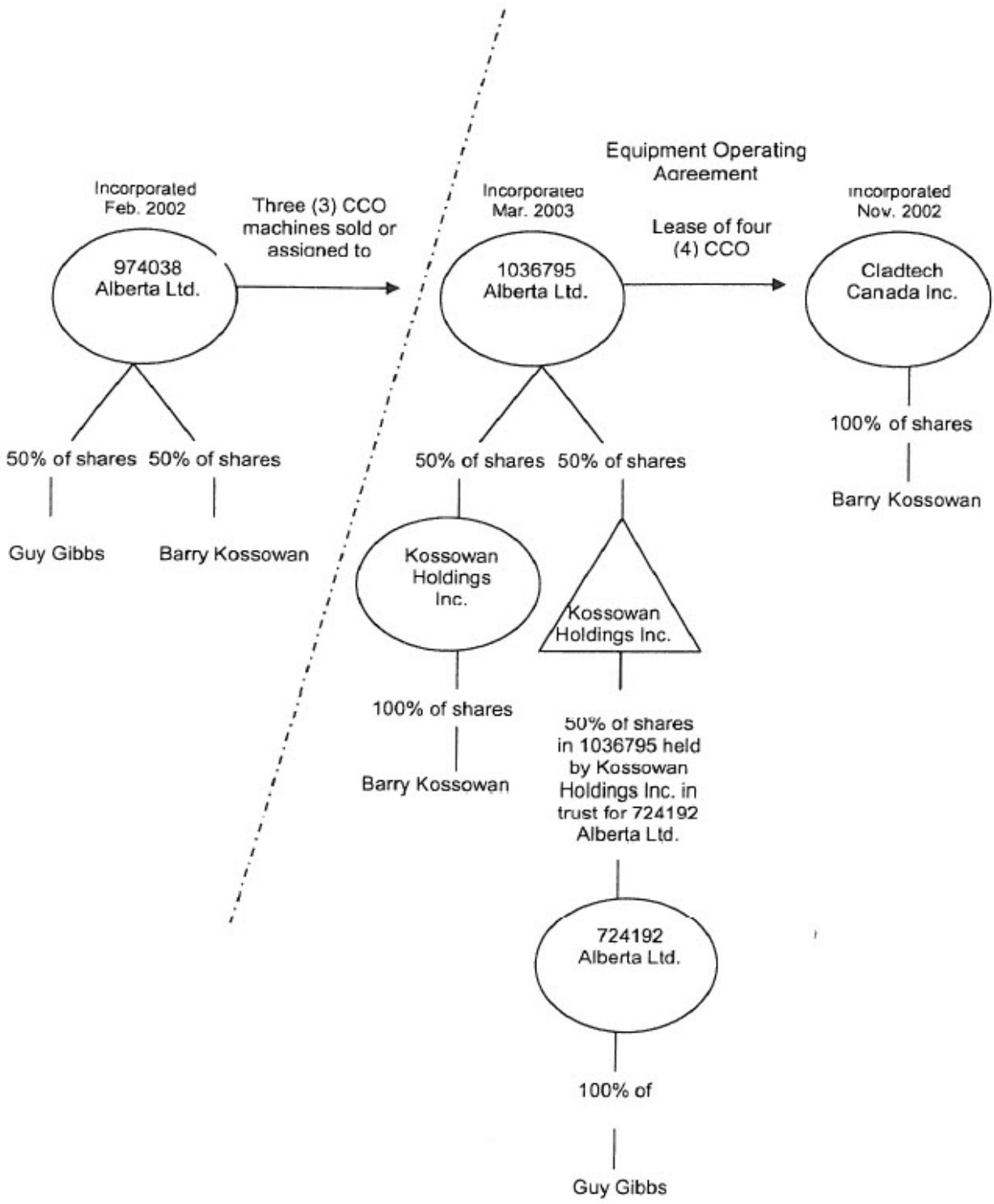
583 If the parties are unable to agree on costs, further submissions may be made on that issue.

B.E.C. ROMAINE J.

* * * * *

Appendix A

Cladtech Canada and Related Corporate Transactions



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