SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-060159-103

DATE: NOVEMBER 22, 2017

BEFORE THE HONOURABLE MR. JUSTICE MARK G. PEACOCK, J.S.C.

SIMMS SIGAL & CO. LTD
Plaintiff

v.
COSTCO WHOLESALE CANADA LTD.
Defendant

RECTIFIED JUDGMENT

INTRODUCTION

A. Through inadvertence, the figure of $361,005.44 was left out of line 1 of paragraph [508] and erroneously reflected as being $722,010.89 at the end of paragraph 2 of Annex A to the judgment. That figure has now been correctly inserted in paragraph [508] of this Rectified Judgment as well as in the Rectified Annex A.

B. In their pleadings, Simms claimed "…Costs against Costco, including solicitor-client fees, expert's fees and disbursements" and Costco claimed "… costs against Plaintiff, including solicitor-client fees, experts fees and disbursements (…)". Through inadvertence, the term "judicial costs" was used in paragraph [580] and

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this should have read “legal costs including experts fees” and this has been rectified also.

[1] Simms, a Montreal-based distributor to Canadian high-end apparel retailers, asserts that Costco Wholesale Canada Ltd. (“Costco”) induced Rock & Republic Enterprises Inc.[1], a California apparel manufacturer, to breach its Exclusive Distributorship Agreement (“EDA”) with Simms. Costco bought R & R high-end jeans, amongst other apparel, from a Canadian third party intermediary. Costco sold the jeans for $99.00 in 65 of its Canadian stores while the Canadian high-end retailers purchasing from Simms were selling R & R jeans for $300.00. For convenience, the Court has prepared an Executive Summary attached as Annex A at the end of the judgment, as well as a Table of Contents.

[2] Simms claims its high-end market for R & R apparel (mainly jeans)[2] was decimated by a conspiracy between Costco, R & R and American and Canadian intermediaries who knowingly permitted Costco to acquire the Product in breach of Simms’ EDA. As a result, Simms claims damages for loss of sales and reputation in excess of $4,500,000.00 as well as punitive damages of $500,000.00 and its extra-judicial legal costs.

[3] In its defence, Costco asserts in the alternative: (a) that either R & R authorized the third party sale to Costco or (b) that the goods were legally purchased by Costco on the “grey market”.[3] As for causality, Costco asserts that any causal link is interrupted by R & R’s Chapter 11 Bankruptcy Court proceedings[4] in the United States: (a) where the U.S. Bankruptcy Court “rejected” Simms’ EDA with R & R; and (b) in the course of which Chapter 11 proceedings, the R & R trademark was sold to a fourth party at arm's length.

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1 Hereafter, “R & R”.

2 Hereafter, the “Product”. This term will be used to describe all R & R apparel bought by Simms from R & R as well as R & R apparel bought by Costco and sold in Canada.

3 Costco had its original outside counsel from the beginning of this matter (the “original attorneys”) and trial counsel were substituted in replacement of original outside counsel in the months before trial. In Costco’s original attorneys’ letter of November 18, 2009 (Exhibit P-8), they state: “Canadian courts on numerous occasions have refused the efforts of trademark owners or their authorized distributors to prohibit any activities in the nature of grey marketing.” The letter then cites jurisprudence to the effect that a trademark holder cannot complain where its goods are being sold in a geographical market where it does not want them sold. The Court understands that Costco is asserting in this letter that it legitimately purchased the goods on the “grey market” and therefore has a right to sell them in Canada. Costco purchased the goods in Canada from a Canadian company, ABFI. Costco continued to advance the grey market argument in its July 29, 2016 Re-Amended and Modified Contestation but Costco employee Pamela Janek testified that this dispute regarding the Product was not a “grey market” issue. This divergence leaves the Court perplexed.

4 Hereafter, the “Chapter 11 proceedings” or the “U.S. Bankruptcy Court proceedings”.

[4] Moreover and through the evidence of three different experts (two in accounting and one in marketing), Costco asserts that Simms did not suffer the damages it alleges.

[5] In its own Counterclaim, Costco alleges that Simms' allegations of conspiracy are unproven and defamatory and that Simms knew or should have known through the Chapter 11 proceedings that its conspiracy allegations had no foundation and should have been withdrawn. Six weeks before trial, Costco amended its Defence to add a Counterclaim which seeks damages of more than $1,000,000.00 caused by Simms' alleged defamatory pleading and abuse of process, including moral damages, reimbursement of all legal and expert fees incurred to date and an additional $100,000.00 as punitive damages under the *Quebec Charter of Human Rights and Freedoms* for intentional damage to its reputation caused by Simms' abuse of process.[5]

FACTUAL OVERVIEW

[6] The original legal proceedings began on September 6, 2010. Six years later, the 10-day trial commenced on September 12, 2016.

[7] The evidence consisted of extensive documentary evidence including transcripts from the R & R Chapter 11 proceedings filed on April 1, 2010 and evidence from multiple experts regarding the existence and quantification of damages. The Court also benefited from detailed summaries of argument by both parties.

[8] Neither party called any witness from R & R, except for filing affidavit and transcript evidence. However, witnesses on both sides testified that R & R representatives, including R & R senior management, were duplicitous. This duplicity involved R & R giving lip-service to Simms' exclusivity in Canada vis-à-vis Simms, while at the same time, R & R knew that R & R goods were being sold to Costco for sale in Canada.

[9] By email of May 20, 2010 (D-15) – after Simms complained again to R & R of its Canadian market being negatively affected by Costco sales – the President of R & R disingenuously writes to Ms. Linda Sigal, President of Simms: "I know this is terrible (Court's note: the Costco Sales of R & R merchandise) and we just finished a meeting (sic) we are continuing our investigation (…).We obviously want this to stop but in the meantime any suggestions?" R & R knows full well that since November 2009, Costco has ordered and sold R & R goods obtained from intermediaries known to R & R.

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[5] To avoid any confusion with the pleadings of Costco's original attorneys, the Court specifies that this amendment was undertaken by Costco's trial counsel who were substituted into the proceedings on July 19, 2016.

i) Simms' Business and Contractual Obligations with R & R

[10] Ms. Sigal is the president of Simms, which she founded in or about 1993 with Mr. Simms.

[11] At 59 years of age when she testified, Ms. Sigal has extensive experience in the wholesale distribution of high-end women's clothing to retail stores across Canada. She has been in the business since graduating in 1977 in fashion merchandising from LaSalle College.

[12] Simms has always dealt with brands for which it had exclusive distributorship agreements and as of 2009, Simms benefited from between 25 and 30 different exclusive distribution agreements. Simms began in business with 6 employees. In 2016, Simms has between 45 and 50 employees, providing services to 4 different fashion distribution companies, including Simms, under one roof at a large distribution centre in Montreal. All 4 of the companies do exclusive brand distribution to Canadian retailers.

[13] Ms. Sigal testifies that exclusive distribution agreements are the necessary means to ensure the distributor has the protection necessary "to do the job properly" due to the investment in the clothing brand that the distributor must make to market the clothing line. For example, the distributor must, amongst other things:

a) analyze through which high-end retailers across Canada the product would best be sold;

b) once the exclusive distributor contracts with the chosen retailers, then the distributor must visit all of the stores to promote the clothing line and assist the sales staff in marketing and selling the product including providing free clothing for the sales staff to wear; and

c) ensure proper advertising in high-end image magazines such as in-store publications for Holt Renfrew and Harry Rosen.

[14] Ms. Sigal confirms that she has never been involved in non-exclusive distribution and that such an arrangement is not part of the high-end fashion distribution industry in Canada.

[15] She adds that there is no free market in branded high fashion goods since if its retailer clients do not sell the product at the price Simms suggests, "they will not get the goods again".

[16] Ms. Natalie Torossian, former Simms' employee, testifies on behalf of Simms. She also is a graduate of LaSalle College in fashion marketing. She worked at Simms from 2004-2013 and was the brand manager for the R & R brand at Simms.

[17] Ms. Torossian confirms that in the high-end clothing business, the manufacturer and distributor seek to create an image for the brand. According to her, the consumer who purchases R & R jeans at the premium price of $300 a pair is "paying for an image", "since buying high-end makes them feel part of the elite".

[18] Ms. Sigal confirms that "it is all about image" and the need to "translate the image". According to her, R & R was synonymous with "sexy and cool" and "edgy".

[19] Since 2006, Ms. Torossian was the "R & R ambassador" in Canada. She visited 90% of the stores of Simms' retailer clients. She forwarded all the public relations materials concerning R & R to the retailers. Seventy five percent of her sales for R & R were with 7 retail chains.

[20] Before Simms' first three year exclusive distributorship agreement with R & R (Exhibit P-1, signed February 13, 2006), there had been a prior exclusive distributor in Canada, a Toronto-based company.

[21] As part of her approach to R & R to convince them that Simms was their best choice to become the exclusive distributor, Ms. Sigal, explained to the R & R senior management representative that she has developed close business relationships over the years with high-end retailers across Canada since she had always dealt in that market.

[22] Ms. Sigal testifies that even though she had been approached by the Hudson's Bay Company to carry R & R jeans, she turned them down since they were "not cool enough".

[23] However, she also said that less than 2% of Simms' sales of the R & R product went through Winners, Simms preferred "clearance vendor". She described Winners as a "necessary evil in the business" for the sole purpose of clearing out end of season merchandise.

[24] Ms. Sigal confirms that R & R was the "jewel in the crown" of her 4 company group. She noted that the "landed cost" of the jeans to her was $100 per pair. Simms would sell to its retailer clients for $200 per pair, who were required by Simms to sell the jeans for in the order of $300 per pair.

[25] Ms. Sigal indicates that she first found out about Costco's distribution of R & R product in Canada on November 9, 2009, at which point she advised R & R immediately. Ms. Molly Sussman at R & R told Ms. Sigal to have Simms' staff go out and buy pairs of the Costco jeans so that R & R could be given the "cut numbers", with the clear implication that R & R would then investigate how Costco sourced this premium product. In fact, the evidence discloses that R & R knew from the beginning that Costco was obtaining the goods from Quetico/ABFI[6]

[6] The American intermediary Quetico owns the Canadian intermediary ABFI.

and even provided a confidential letter to confirm Quetico's right to distribute R & R goods, without any geographic restriction.

[26] Ms. Sigal indicates that in her extensive career in this business, such a sale - "behind the back" - of an exclusive distributor, had never occurred.

[27] She said there was an intense period of 2 to 3 weeks in November 2009 where, via the internet, customers of her high-end retailer clients were calling her retailer clients: "thieves". Ms. Sigal said that the jeans being sold by Costco were available in all sizes – not like the scattering of sizes that Simms would sell at clearance through Winners.

ii) Costco Pre-Contractual Discussions with Intermediaries

[28] The Court finds as a fact the following summaries of the evidence of Costco's Ms. Pamela Janek who was the buyer responsible for purchasing the Product from ABFI. These summaries are of her examination on discovery filed into the Court record (Exhibit P - 72) and show pinpoint citations:

(Page 74)

- She (Ms. Janek) knew that Costco US was selling authentic R & R merchandise across the United States. However, she does not indicate when she heard this and no question is asked on this timing.

(Page 75)

- She admits that approximately 65 Costco stores in Canada sold R & R merchandise in 2010.

(Page 167)

- Prior to purchasing R & R goods in 2009, she was aware that R & R jeans were being sold in Canada. She knew they were being sold at high-end retail stores, including Holt Renfrew.
  She was aware that the R & R jeans were being sold at a premium price (over $200.00).

(Page 183)

- She was aware that certain brands sell or distribute goods through distribution agreements or licence agreements. <u>She knew as a matter of common practice that certain brands limited distribution of their goods within a specific territory</u>. However, she was not asked whether she assumed or knew whether this was the case for the R & R brand;

(this Court's emphasis)

(Page 184)

- Before purchasing R & R jeans, she knew they were being offered for sale at other retail outlets in Canada;
- After receiving the first cease-and-desist letter in November 2009, she knew that Simms' CA number (as required by Canadian labelling laws) appeared on garments that Costco was selling [7] (this Court's emphasis);
- After receiving Simms' cease-and-desist letter, Ms. Janek was not curious whether her vendor was entitled to sell R & R apparel in Canada – she says she satisfied herself that the vendor agreement (her vendor was ABFI) permitted Costco to sell the goods in Canada.
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(Page 93)

- Ms. Janek's position was that she had purchased from an authorized distributor, and therefore if R & R had authorized the distribution, Costco was not required to go back to R & R and confirm that they could sell the goods in Canada. (see also page 93)

[29] Ms. Ells, Ms. Janek's superior, testifies that her main preoccupation is not to buy counterfeit goods. She says that she relied on the word of Kontakt and Quetico that R & R knew where the Product would be sold since this is a guarantee of authenticity. She relied on Kontakt and Quetico as "trusted" vendors since they had both done business with Costco since the late 1990's.

iii) First Purchase

[30] In his initial approach on June 11, 2009 to try and interest Costco in purchasing the R & R Product, Mr. Michael Rolnick of the American intermediary, Kontakt International ("Kontakt"), asserts boldly: "This brand (Court note: R & R) is carried by every high-end retailer in the world" (this Court's emphasis).

[31] On June 17, 2009, Costco orders 8960 units of R & R women's jeans from Mr. Rolnick (D-10 p. 11). In one of her original emails to Mr. Rolnick of June 17, 2009, Ms. Janek confirmed that labelling for the R & R product must be in French and English for the Canadian market, which included Quebec.

[32] A full list of Costco order confirmations for the R & R product (D-64)[8] shows that the first confirmation order for ladies' jeans (P-23; also at P-54) was dated July 29, 2009. The order is to ABFI and in the "To" line shows the name of Michael Rolnick. Two styles of ladies' jeans are ordered and 9184 units are

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[7] Instead of the Simms' CA number, Ms. Ells recognized that the Product should have had either: an ABFI CA number, an R & R CA number or R & R's address, to meet Canadian labelling requirements.

[8] The first Costco order of R & R product is June 17, 2009 and the last filled order is June 11, 2010. Subsequent orders were ultimately cancelled by Costco.

booked, the total cost of which is $771,456. The confirmation is subject to "Costco Canada apparel policies" and the sale price is noted at $98.99. ABFI is to ship the Product from Montréal for $84 per unit. Therefore the margin with the Costco selling price is $14.99 per unit.

[33] Costco starts to sell these R & R women's jeans in their Canadian stores in November 2009. Unlike the U.S.-manufactured R & R jeans sold through Simms, the majority of the Product sold at Costco was manufactured in Guatemala. The evidence is that to the consumer, the jeans looked identical, irrespective of the country of manufacture.

[34] Ms. Sigal and Ms. Torossian testify that following the R & R jeans going on sale at Costco in November 2009, there was an intense 2-3 weeks when Simms was inundated with their retailers' complaints.

[35] Ms. Torossian said her retailers were complaining that their reputations were being questioned by their customers. The complaints started up again in May 2010; her retailers no longer wanted to carry the R & R brand, since "high-end boutiques" can't carry the same brands as sold by Costco[9].

[36] In Ms. Sigal's own words: "We lost face and we lost sales". In counter-proof, she testified that she was embarrassed that she could not control the situation. Her testimony, which was not diminished on cross examination, was that her customers placed the responsibility for the Costco sales on Ms. Sigal. She was devastated by this loss of confidence.

ABFI Contract

[37] ABFI signed a Vendor Agreement with Costco on October 18, 2004 (Exhibit P-21 tab 5) which incorporates Costco Wholesale's Standard Terms Canada (2001). In that latter document, the vendor i.e. ABFI, warrants to Costco that Costco's resale of the merchandise will not infringe a patent, trademark, tradename… "or any other right". As "Vendor", ABFI agrees to defend and hold harmless Costco and indemnify Costco against any alleged infringement of "any other right" regarding the merchandise.

[38] The Court has not been made aware of any legal proceedings taken by Costco against Mr. Rolnick and his company Kontakt or Mr. Agakanian and his companies ABFI and Quetico in relation to Costco's purchases of the Product from ABFI.

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[9] Exhibit D-12 at p. 27.

iv) Cease-and-desist Letters

[39] The first and second cease-and-desist letters sent by Simms to Costco are dated Thursday November 12 and Monday, November 16, 2009 respectively (P-4 and P-7). [10]

v) What Happens after the First Two Cease-and-desist Letters?

[40] Mr. Agakanian is a principal at Quetico, who purchases the Product from R & R for re-sale to Costco. He testifies that as soon as he learned about the allegations of exclusivity from Simms' cease-and-desist letters (sometime in November 2009), he telephones Mr. Rolnick and Mr. Rolnick telephones R & R. Mr. Rolnick calls him back and says there is nothing to worry about but that R & R is "dealing with" the Canadian distributor i.e. Simms. [11]

[41] Thereafter there is a meeting with R & R at which Mr. Agakanian attends. Mr. Agakanian asks Eddie Bromberg of R & R to see a copy of the EDA. Mr. Agakanian did see the document (he does not say whether he read it) but Mr. Bromberg told him "that is confidential information. I can't give it to you".

[42] Mr. Agakanian testifies that Mr. Bromberg did not say that there was an exclusive distributorship agreement between R & R and Simms but rather that "their distributor in Canada (Court's note: Simms) is out of their agreement, or they have not performed up to their agreement, and they (R & R) can sell and they can do whatever they want with their brand, that is what I was told".

[43] Mr. Agakanian also testifies further, when asked the question whether he was taking what R & R was telling them at face value: "We are talking with the mark holder. They are telling us we are dealing with it. And I even… I believe I had a conversation with Chris, their attorney, which (sic) he said that they're in breach of their contract (Court's note: Simms is in breach of their contract) and we (i.e. R & R) are sending letters to them and we're taking care of it."

[44] Hence, Mr. Agakanian confirms that he accepted what he was being told by R & R's attorney. There is no evidence that Mr. Agakanian sought any further information on the nature of any geographic exclusivity that Simms might have had.

Costco Continues to Sell Goods Despite Improper CA number

[45] On November 12, 2009, Simms' attorneys' first cease and desist letter advises of the exclusive distributorship agreement and requires that Costco not sell the Product with Simms' CA number.

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[10] The third cease and desist letter is sent after the second wave of Costco sales and is dated July 20, 2010 (P-13).

[11] Examination of Mr. Agakanian (D-58) on March 18, 2011 ("Mr. Agakanian examination") by Simms counsel but filed by Costco at p.60 line 17.

[46] Despite this, there is no evidence that Costco removes the impugned Product from their shelves. In any event, if it did so, it did not advise Simms.

[47] The issue of Costco selling goods with the wrong CA number only gets resolved two months later when Ms. Janek advises both Messrs. Agakanian and Rolnick on Jan 26, 2010 that "R & R needs to include R & R's full company name and full address of their place of business in the U.S. in lieu of a CA number".

Duplicitous Conduct of R & R: Statement of June 11, 2010 (P-12)

[48] On November 17, 2009, Ms. Sussman of R & R writes to another R & R employee confirming that Aritzia, one of Simms' important clients "really wants a formal statement from R & R that they can circulate amongst their stores" i.e. to show their customers that R & R has no involvement in Costco sales of R & R merchandise.

[49] By email of the same date, Ms. Sigal follows up with Ms. Sussman wanting to know when this statement "in solidarity" will be received. Ms. Sigal gets no answer. That statement eventually comes out on June 11, 2010, seven months after R & R was requested to produce such a statement. In part, that statement said:

> ***Rock & Republic is also aware that products bearing the brand's trademark have recently appeared at Costco in Canada. It is important our loyal customers are reassured that Costco is not on Rock and Republic's customer list and a full investigation concerning this matter is ongoing based on these findings. Also to put further speculation to rest, there is no connection between the Costco Product and the recent Chapter 11 filing, Rock and Republic maintained its premium lifestyle brand image, not that of a discount warehouse. Rock and Republic takes its integrity and brand image very seriously along with that of its valued partners in Canada and will pursue further investigations of this matter". (***this Court's emphasis***)***

[50] The timing of this statement on June 11, 2010 is perplexing since the second wave of Costco sales began one month earlier in May 2010. The Court notes the following half-truths and untruths contained in that letter: while Costco was not on R & R's "customer list" (since Costco bought from the intermediary, ABFI, and not from R & R), R & R certainly knew that the Product it sold to Quetico in the U.S. was destined for retail sale by Costco in Canada; there is no evidence of any further R & R "investigation"; and the reference to R & R wishing to keep its premium lifestyle brand is not correct in view of R & R's knowledge that the Product was being sold at Costco.

vi) Second and Third Purchases: Second Delivery Only

[51] D-64 shows the following order confirmations by Costco of the R & R Product:

1. Ladies' jeans: January 28, 2010, April 16, 2010, June 23, 2010 and August 3, 2010;
2. Ladies' T-shirts: January 28, 2010, June 28, 2010 and August 3, 2010; and
3. Men's jeans: January 13, 2010 and June 11, 2010.

[52] Orders for the three different products in June and August 2010 were ultimately cancelled by Costco.

vii) R & R allows Simms to Cancel Fourth Quarter 2010 Order

[53] On July 22, 2010, Simms' representatives spoke with R & R's representatives – namely R & R president Andrea Bernholtz and chief operating officer Rick Spielberg – to discuss Simms' deteriorating sales situation in Canada.

[54] During that discussion, R & R informed Simms that it was investigating how Costco had come into possession of the Product. It "appeared" to R & R that Costco had been able to purchase a large quantity of goods and that the situation was likely going to take quite a while to clarify.

[55] R & R suggested that Simms consider cancelling its order for the fourth quarter of 2010 due to Simms' losses from the Costco sales. This proposal was confirmed in an email (P-19) dated July 22, 2010 addressed by Mr. Spielberg to Ms. Sigal.

[56] Simms had already ordered $2,019,380 worth of Product from R & R for sale as part of the 2010 Fall and Winter seasons.[12]

[57] On July 22, 2010, Mr. Rick Spielberg, chief operating officer of R & R, confirms that Simms may cancel orders and "take a break" (P-19).

viii) R & R Alleges Breach of Contract and Simms Responds

[58] At the same time that R & R is allowing Simms to cancel certain orders, R & R enters into a contract with Kontakt and Quetico for, amongst other things, the sale of 18,032 pairs of jeans (the same quantity as for the Costco order confirmation dated June 11, 2010 (P-54) that was cancelled later (D-64)). These are all Guatemalan-made. Since the Products ordered here are to have English/French

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[12] Simms argues: "That R & R would allow Simms to cancel such a large order underscores the extent of the damage that Costco has caused through its unauthorized sale of Products in large quantities at discount prices and Simms now believes that R & R's suggestion that it cancel the order was a ruse contrived by R & R in order to serve as the pretext for the notice of termination of the Exclusive Distribution Agreement (Exhibit P-2A) and subsequently the Motion to Reject (Exhibit P-2C), so as to remove any impediment to its ability to do business with Costco."

bilingual labelling, the Court determines on the balance of probabilities that this Product is going to be sold to Costco for the Canadian market.

[59] On August 2, 2010 and with no prior warning, R & R sends a Notice of Termination[13] of the EDA to Simms alleging Simms violation of the EDA by cancelling orders in the amount of $261,825.00 without agreement by both parties. R & R warns that the EDA will be terminated unless the breaches are cured within 30 days.

[60] On August 5, 2010, Simms responds (P-2C) by rejecting R & R's alleged grounds to terminate and asserting that it will "vigorously resist" any R & R attempts to terminate the EDA.

[61] Nonetheless, R & R then terminates the EDA by letter of September 3, 2010.[14]

ix) R & R Motion to Have EDA Rejected in U.S. Bankruptcy proceedings

[62] By a "Debtor's Motion" before the United States Bankruptcy Court Southern District of New York, R & R seeks to have that court reject the EDA as of April 1, 2010, the date that R & R files its voluntary petition for relief under Chapter 11 of the *US Bankruptcy Code*.

[63] R & R alleges that Simms breached the EDA and that R & R terminated the EDA as of September 3, 2010. R & R asserts that Simms' sales have steadily decreased: "In 2008 Simms sales were: a) in 2008: $9,248,707; b) in 2009: $6,795,710 and c) in 2010, year to date: $2,228,852". R & R asserts that "the rejection of the agreement will allow R & R to substantially increase sales in Canada".

[64] As of this date, it must be remembered that the only sales of R & R Products made in Canada other than through Simms' clients, had been made through Costco.

[65] Simms files an Objection to this Debtor's Motion. At paragraph 36 of that Objection, Simms makes reference to the June 11, 2010 "statement" of Rock and Republic.

[66] At page 9 of the Objection, Simms indicates that Costco confirmed in an affidavit in this proceeding that it had sold 46,244 units of R & R jeans between November 2009 and August 22, 2010.

[67] At paragraph 54 of the Objection, Simms asserts: "The Debtor's true motives seem to be to (1) continue to contract with Simms while pursuing future relationships with Costco[15] and (2) bully Simms into withdrawing its suit against

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[13] Exhibit P-2H at p. 10.

[14] Ibid, at p. 17.

[15] In September 2010, R & R writes to Simms to try and get Simms to return as a distributor to Simms' former clients.

Costco relating to Costco's sale of the R & R merchandise". Simms had instituted the present suit against Costco on September 6, 2010.

[68] A hearing is held on September 8, 2010. [16]

[69] Prior to September 13, 2010, Simms withdrew its Objection and by order dated September 13, 2010, the United States Bankruptcy Court rejected the EDA retroactive to August 12, 2010.

[70] On September 22, 2010, Costco files its Contestation to the present Simms' proceedings before this Court.

[71] On October 21, 2010, Simms files its Proof of Claim in the U.S. Bankruptcy proceedings.

x) Sale of Trade Mark to VF: R & R becomes a Second Tier Brand

[72] On March 30, 2011, the VF Corporation purchased the trademarks for R & R (D-35, pages 5, 6). All of the remaining executory contracts that R & R was a party to, but for a few specifically identified contracts, are rejected in the US Bankruptcy proceedings.

[73] The Court understands that in 2012, R & R products were being sold at Kohl's, a middle to lower end retailer, in the U.S.

FAULT

Simms' Allegations

[74] Simms has no contractual relations with Costco. Its claim is based exclusively on extra-contractual liability, in particular a fault known as "contractual interference".

[75] Under Quebec Civil Code ("*CCQ")* art. 1457, a person commits an extra-contractual fault where they fail to abide by the rules of conduct "according to circumstances, usage and law" and cause injury to another.

[76] The Court must determine whether there are any applicable legal rules of conduct between Simms and Costco which have been transgressed.

[77] In its 24-page, 142 paragraph Re-Amended Motion to Institute Proceedings, the Court summarizes and cites the following Simms' allegations against Costco:

a) that Costco knew of the EDA as shown by its involvement in "Project X", an alleged scheme with R & R for Costco to acquire the relevant goods through a trail that began with two American intermediaries: Quetico and Kontakt[17], and then to ABFI, a Canadian

[16] Exhibit P-2DD, transcript of proceedings before U.S. Bankruptcy Court.
[17] Re-Amended Motion to Institute Proceedings ("Re-Amended Motion"), paras. 30 and 91.

company belonging to the Quetico owners. It was ABFI which directly sold the goods to Costco;

b) as a result of Simms' two cease-and-desist letters of November 12, 2009 and November 16, 2009, Simms advised Costco that Simms was the "exclusive Canadian distributor" but without specific references to the EDA or its exclusive distributorship clauses[18]. In particular, Simms alleges at paragraph 70:

> 70. **Thus by way of summary, in November of 2009:**
>
> **i) Costco admitted it was selling goods with Simms' CA number;**
> **ii) Costco admitted it was selling R & R Merchandise that was part of the Rock & Republic Line that it had not purchased from Simms;**
> **iii) Costco was aware that Simms was the exclusive distributor in Canada of the garments, forming part of the Rock & Republic Line that it was selling in its stores;**
> **iv) Costco knew that it was selling R & R Merchandise in violation of Simms' exclusive rights;**
> **v) Costco would not disclose the source of the goods it was selling in its stores in flagrant violation of Simms' rights; and**
> **vi) Costco advised that it would continue selling R & R Merchandise in its stores irrespective of the fact that it had no right to do so;** and

c) Costco induced R & R: (a) to breach the EDA and also (b) to have the EDA "rejected" by the U.S. Bankruptcy Court through R & R's application in the U.S. Chapter 11 proceedings.[19]

Costco Response

[78] Initially, Costco argued a "grey market defence". However, in her examination on discovery, Ms. Janek confirmed that this was not a grey market case.

[79] In all events, from the point that Costco received the first cease-and-desist letter, Costco was put on notice of the EDA between R & R and Simms for Canada. Once it knows this, the issue before this Court is whether Costco can simply purchase from an intermediary, in this case ABFI in Canada, and thereby seek to avoid the consequences of the EDA. To allow it to do so could negate any binding

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[18] Re-Amended Motion, paras. 58 and 70.
[19] Re-Amended Motion, para. 103.

value of an exclusive distributorship agreement and the benefit accruing to both contractual parties (Simms and R & R) through that agreement.

[80] Costco argues that the first time that it had effective knowledge of Simms' contractual rights was on August 6, 2010 when it was sued and Simms filed the EDA as an exhibit.

[81] Costco argues that it wanted to sell “legitimate goods” and that the letter the intermediaries received from R & R saying they had the right to sell the goods, without mention of any restrictions (geographic or otherwise), ensured that Costco was within its rights to re-sell the goods at retail in Canada.

[82] Costco argues that it was a victim of R & R and that its last shipment of jeans was on June 11, 2010.

Governing Law: The Quasi-Delict of Contractual Interference and Elements to Prove

[83] Costco argues that Simms must prove that Costco knew the content and scope of the contractual obligation and that mere knowledge of the existence of the obligation is not sufficient.

[84] Analyzing whether a fault has been committed starts with a determination of what Costco knew and when. .

[85] In particular, the Court must determine whether Costco knew that R & R had contractually bound itself to distribute its apparel in Canada exclusively through Simms and whether Costco committed any fault by not further informing itself based upon what it knew?

[86] The Court will analyze the applicable law as follows: (a) an overview, (b) the principles established by the Court of Appeal, (c) the judgments of the three levels of courts in *Trudel* v. *Clairol*, and finally, (d) Costco’s jurisprudence.

[87] To begin with, the Court must determine if Costco owes any duties to Simms under *CCQ* art. 1457. The *Quebec Civil Code* requires that those duties be exercised in good faith (*CCQ* art. 6) and any legal rights Costco may have, may not be exercised “with the intent of injuring another or in an excessive and unreasonable manner contrary to the requirements of good faith” (*CCQ* art. 7).

[88] As the doctrine notes: ***« Inciter quelqu’un, en toute connaissance de cause, même implicitement, à violer son engagement contractuel envers un autre constitue indéniablement la violation d’une « règle de conduite qui, suivant***

les circonstances et les usages … s'impose » à cette personne, selon l'heureuse formule de l'article 1457 du Code civil du Québec ».[20]

[89] On its face, another article of the *CCQ,* art. 1440 would appear to shelter third parties from the effects of contracts to which they are not party: "A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law".

[90] However, as the doctrine notes: ***« L'opposabilité des contrats a connu depuis une cinquantaine d'années un développement phénoménal et de nombreuses ramifications … Si le tiers se rend complice de la violation du contrat par une des parties, il commet une faute et l'autre partie peut exercer les droits extracontractuels contre lui »***.[21]

[91] "Contractual interference" is an extra-contractual fault under *CCQ* art. 1457 which arises where a third party either (i) incites a contracting party to breach its contractual obligations or (ii) participates with that party in breaching those obligations.[22] This fault of "contractual interference" is established according to the jurisprudence and doctrine where:

a. a plaintiff proves: (i) the wrongdoer's sufficient knowledge of the contractual obligation which is being breached; and (ii) the wrongdoer's incitement or complicity in the breaching or termination of that contractual obligation; and

b. a plaintiff need not prove intent to do harm[23]. However, the Court agrees with legal scholars Lluelles and Moore cited in Costco's authorities that the wrongdoer must be shown to have "…***conscience que son comportement était très probablement susceptible de causer un préjudice à ce contractant***" and act, in the minimum, with "***un mépris caracterisé des intérêts d'autrui***…"[24] (this Court's emphasis).

[92] To determine the state of the law, the Court must look to the evolution in the jurisprudence in this developing area of law.

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[20] Pierre-Gabriel JOBIN & Nathalie VÉZINA, Baudouin et Jobin : Les obligations, 7ème éd. (Cowansville, Que: Yvon Blais, 2013) at para 487.

[21] JOBIN, Pierre Gabriel et VEZINA, Nathalie, *Les effets du contrat à l'égard des tiers – Introduction*. Les obligations, 7ème édition, 2013, EYB 2013 OBL65.

[22] *Plani-Gestion Millionnaire Inc*. v. *Société des loteries du Québec*, 2011 QCCS 1084, at paras. 64, 65.

[23] Ibid, para. 64. See also JOBIN, Pierre Gabriel et VEZINA, Nathalie, *Les effets du contrat à l'égard des tiers – La responsabilité d'un tiers envers le contractant*. Les obligations, 7ème édition, 2013, EYB 2013 OBL70, at para. 487.

[24] Didier LLUELLES and Benoît MOORE, *Droit des obligations*, 2è éd., Montréal, Éditions Thémis, 2012, at para 2455.

[93] Although not a contractual interference case, the Court of Appeal[25] has determined that knowledge of the existence of a contract, depending on the particular circumstances, may be sufficient to render that contract opposable to a third party. The third party manufacturer knew that the transaction it was proposing with its distributor would have breached property rights contracted by the distributor with another arms' length purchaser. As the Court of Appeal judgment says:

> ***« Elle* (the manufacturer) *était donc consciente du fait que d'accepter la propriété d'une scie promise à un autre entraînait la violation par Uraken (Ed. Note: the distributor), du moins à première vue, du contrat la liant à Skeena (Ed. note: the purchaser)*** ». [26]

[94] Although this case was not pleaded in relation to *CCQ art.* 1457, Mr. Justice Baudouin, for the majority, said this regarding the principle of opposability of contracts to third parties:

> "***Si ces dernières pouvaient en effet complètement ignorer les contrats conclus entre d'autres parties, ces mêmes contrats risqueraient, entre les contractants originaux, de n'avoir aucune force obligatoire. L'exemple des clauses de non-concurrence illustre bien ce principe. Le contrat s'impose donc au tiers non comme un acte juridique mais comme un fait juridique ».*** [27]
>
> *(*this Court's emphasis*)*

Hence, in the present case, the exclusive distribution agreement between R & R and Simms becomes a juridical fact within the knowledge of Costco.

[95] Seven years later, Mr. Justice Baudouin considered an actual contractual interference claim in *Sobeys Québec inc.* v. *3764681 Canada inc.* [28], wherein he stated:

> ***25. La jurisprudence, toutefois, admet qu'un tiers qui, sciemment et en toute connaissance de cause, viole un contrat intervenu entre d'autres personnes, puisse être tenu légalement responsable (Voir : Trudel c. Clairol 1974 CanLII 167 (CSC), [1975] 2 R.C.S. 236 ; Beaulieu c. Bizier 1988 CanLII 333 (QC CA),[1988] R.D.J. 108 C.A. ; Voyages Robillard c. Consultour 1993 CanLII 4399 (QC CA), [1994] R.D.J. 178 C.A. ; Boucherie Côté inc. c. Le Fruitier d'Auteuil inc., 1999 CanLII 13736 (QC CA), J.E. 99-707 (C.A.); Trisud c. 152817 Canada inc. [2000] R.R.A. 124 C.S. ; Dostie c. Sabourin [2000] R.J.Q. 1026 C.A.).***

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[25] *Veisto-Rakenne Rautio Ky* v. *Skeena Equipment Sales & Leasing Ltd.*, [1995] RDJ 432 (C.A.).
[26] Ibid.
[27] Ibid.
[28] *Sobeys Québec inc***.** c. *3764681 Canada inc.,* J.E. 2002-415 (C.A.) paras. 25 and 26.

> ***26. Il est nécessaire cependant, vu le principe de l'effet relatif des contrats, que la personne ait connaissance de la clause d'une part, et soit de mauvaise foi en y contrevenant, d'autre part.***
>
> *(*this Court's emphasis*)*

[96] Neither Mr. Justice Baudouin nor the case law he cited precisely defines what the expression "***en toute connaissance de cause***" actually means. For example, must the third party have a copy of the contract and have read the actual clause in question?

[97] In the cases of *Trudel* v. *Clairol Inc. of Canada*[29] and *Dostie* v. *Sabourin*[30], the third party wrongdoers were fixed legally with sufficient knowledge although neither had a copy nor ever read the contract in issue. In the first case of *Trudel*, sufficient knowledge arose from: (a) a warning printed on the carton of six bottles of hair dye that the product could only be sold "for professional use" and (b) from the defendant's understanding that the jobber/vendor from whom he bought the product did not have the right to sell him the product.

[98] In the second case, the alleged third party wrongdoer was aware of the non-competition clause from having been told by the instrumenting notary that the wrongdoer's business partner in the purchase of a business had previously contracted to abstain from having an interest in such a business within a particular geographic radius. There is no evidence that the wrongdoer ever had a copy of or read the actual clause.

[99] In *Boucherie Côté Inc*. v. *Fruitier D'Auteuil Inc.*, the Court of Appeal upheld the motion to dismiss on an omission in the pleading that the plaintiff had failed to allege that the third party had any knowledge of the non-competition clause in issue[31]:

> ***[5] Puisque la déclaration en injonction permanente ne contient aucune allégation quant à une prétendue connaissance des dispositions de la clause d'exclusivité par Le Fruitier, les faits allégués ne donnent pas ouverture à la conclusion recherchée.***

[100] Professors Jobin and Vezina are critical of this Court of Appeal judgment calling it ***"jurisprudence discutable car elle suppose un mécanisme qui n'existe pas de publicité de tel droit ou alors une démarche individuelle de publicité plus fiable est laissée à la charge du titulaire du droit".***[32]

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29 [1975] 2 S.C.R. 236.

30 2000 CanLII 11311 (QC CA).

31 1999 CanLII 13736 (QCCA), para. 5.

32 JOBIN, Pierre Gabriel et VEZINA, Nathalie, *Les effets du contrat à l'égard des tiers – Le principe de l'effet relatif du contrat*. Les obligations, 7ème édition, 2013, EYB 2013 OBL66, at para. 453. These authors note the distinction with immoveable rights whereby the general public are effectively put on

[101] This Court returns to the 2002 *Sobeys* case and the finding by Mr. Justice Baudouin that the third party "***qui, sciemment et en toute connaissance de cause viole un contrat intervenu entre d'autres personnes, puisse être tenu légalement responsable***". At paragraph 27 of that judgment, Mr. Justice Baudouin indicates that it is "***presque certain***" that before it purchased the property, the third party had read the clause for which it was later alleged to have induced a breach.

xi) Duty to Not Cause Injury to Another and to Inform Oneself: Acting in Good Faith in the Circumstances (CCQ art. 1457 and 6 and 7)

[102] In *Dostie v Sabourin* (hereafter, *Dostie*) the Court of Appeal reiterated, without framing the fault in terms of a failure to inform oneself:

> ***[36] [T]oute personne qui, avec connaissance, aide autrui à enfreindre les obligations contractuelles pesant sur lui, par exemple celle de ne pas faire concurrence à l'acheteur de son fonds de commerce, commet une faute extracontractuelle à l'égard de la victime de cet acte.[33]***

[103] Professor Vincent Karim also refrains from framing the issue in terms of failure to inform oneself:

> ***Une tierce personne qui, en toute connaissance de cause, participe à la violation d'un contrat en brimant ainsi les droits d'une partie contractante, commet une faute extracontractuelle. Il est important de mentionner que le tiers doit intentionnellement commettre un acte qui nuit au bon déroulement du contrat, sans quoi il n'y a pas de faute de la part du tiers. En effet, la connaissance par le tiers des obligations ou des droits prévus dans le contrat entre des parties est nécessaire pour engager sa responsabilité suivant une action qui contrevient à une clause contractuelle.[34]***
>
> (this Court's emphasis)

[104] While generally the obligation to inform arises in the context of a contractual relationship, in the leading case of *Bail,* the Supreme Court of Canada noted that "a duty to inform may also arise independently of any contractual relationship".[35] This Court infers that the obligation to inform oneself may also arise in an extra-contractual context, again as one of means.

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notice of rights by registration "at large" in the Registry Office. Clearly, there is no such public registry mechanism for "at large" notification in the case of these commercial contracts particularly those which contain non-competition clauses and confidentiality clauses. This lack of any formalized registry illustrates the problem raised in the present case as to who should notify whom and of what.

33 *Dostie v. Sabourin*, [2000] RJQ 1026, AZ-50071094 (C.A.).

34 Vincent KARIM, *Les obligations*, vol. 1, 4è éd. (Montreal, QC, Wilson & Lafleur, 2015) at para 2116.

35 *Bank of Montreal* v. *Bail*, [1992] 2 SCR 554, 558.

[105] Furthermore, the Quebec Court of Appeal found sufficient fault where a third party "knowingly" participated in a breach of contract:

> ***« Le seul moyen d'opposer [une clause d'exclusivité] aux tiers est de recourir à la responsabilité délictuelle (maintenant qualifiée comme extracontractuelle). <u>Un tiers commet une faute s'il s'associe sciemment à la violation d'un contrat</u> […] Dans le cas d'une clause d'exclusivité si un locataire viole sciemment les droits d'un autre locataire, il engage sa responsabilité ».***[36]

(this Court's emphasis)

[106] If Costco "closed it eyes" in the circumstances after what Simms informed Costco in the cease and desist letters, that may constitute a fault and – in the abstract – may be sufficient to hold Costco liable for "knowingly", in effect, inducing or aiding R & R in violating its contract with Simms. To borrow the words of the Supreme Court of Canada, "everyone has a moral obligation not to contribute to the breach of a validly assumed undertaking".[37]

[107] The legal principle that a party cannot close its eyes in evident circumstances to avoid legal liability has been applied by the Superior Court [38] and in the doctrine [39] :

> ***La notion d'aveuglement volontaire a été développée en droit criminel.***
>
> ***En droit civil, cette notion est parfois citée pour illustrer la négligence ou à tout le moins l'absence de prudence et de diligence d'une partie.***
>
> ∞
>
> ***Analysis: Fault: What Costco Knew and When, and Did Costco Breach a Duty owed to Simms?***

xii) Costco's Mission Statement and Code of Ethics (D-63)

[108] The first rule in Costco's Mission Statement is "obey the law". It amplifies on this obligation in its Code of Ethics with the following statement: "The law is irrefutable. Absent a moral imperative to challenge the law, we must conduct our business in total compliance with the laws of every community where we do business". At the end of its Code of Ethics, Costco says: "these guidelines are simply common sense rules for the conduct of our business… If you are ever in doubt as to what

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[36] *Boucherie Côté inc.* c. *Fruitier d'Auteuil inc.*, [1999] R.L. 335, AZ-50060911 (C.A.) at p. 4-5.

[37] *Supra* note 29, paras. 241-242.

[38] *Avant Garde International Inc.* v. *Giant Tiger Stores Limited*, 2013 QCCS 5056; see also *9018-0928 Québec inc.* v. *Café Suprême Canada Inc*., REJB 2002-32882, par. 19 ;

[39] Vincent KARIM, *Les obligations*, 4e éd., 2015, Wilson & Lafleur, par. 2118

course of action to take on a business matter that is open to varying ethical interpretations, **TAKE THE HIGH ROAD AND DO WHAT IS RIGHT**" (same emphasis in original document) . [40]

xiii) Extent of Knowledge Required and Whether and What Costco Should Have Known in the Circumstances?

Governing Law

[109] In *Trudel* v. *Clairol Inc. of Canada* and in particular in the Superior Court and Court of Appeal judgments[41], the issue of the extent of knowledge required to prove contractual interference is analyzed.

[110] This Court will begin with the trial judgment in *Clairol inc. of Canada* v. *Trudel*[42]. The trial judge found there was no probable evidence that Trudel purchased the impugned goods from any parties who had signed the undertaking with Clairol. It is important to consider the trial judge's reasoning that flows from this finding:

> ***19 Le défendeur connaît la politique et les instructions de la demanderesse quant à la vente de ses produits. La prohibition conventionnelle de la revente en détail est dénoncée dans la présente action; elle était déjà exprimée dans l'avis inscrit sur l'emballage du produit depuis 1966:***
>
> > ***Pour usage professionnel seulement ... ce produit est réservé à l'usage exclusive des salons de coiffure ... Il est strictement interdit de vendre ou d'offrir en vente ce produit à toute autre personne...***
>
> ***20 Dans son interrogatoire préliminaire, le défendeur déclare: "Les jobbers avaient pas le droit de nous vendre. Il nous l'ont vendu pareil". Le défendeur a acheté et revendu le produit contrairement à cette prohibition, parce qu'il y avait une différence de prix intéressante entre le produit pour usage professionnel et le produit pour usage personnel.***
>
> ***21 Faut-il dire que le défendeur est absolument libre d'agir comme il l'entend, pourvu qu'il réussisse à se procurer le produit d'une personne autre qu'un grossiste lié par contrat à la demanderesse? Bien, sûr, il n'a pas le devoir de rechercher les obligations assumées par son vendeur ou par un vendeur précédent. Cependant, lorsque les obligations imposées par le fabricant à tous les vendeurs sont portées à sa connaissance, comme dans le présent cas, il ne doit pas faciliter leur violation. Il serait trop facile***

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[40] Exhibit D-63.
[41] [1972] C.A. 53, at p. 204.
[42] 1968 CarswellQue 12 (C.S.).

> ***d'échapper à la prohibition en trouvant un intermédiaire qui n'aurait pas acheté directement de la demanderesse mais qui s'approvisionnerait subrepticement d'un agent infidèle de la demanderesse.***
>
> ***22 Le défendeur a l'obligation de ne pas nuire à la demanderesse en favorisant même indirectement la violation de l'engagement déjà cité; car cet engagement de ne pas revendre le produit en détail est justifiée à la fois par un intérêt sérieux de la demanderesse et, dans une certaine mesure, par l'intérêt public. Chacun a l'obligation morale de ne pas favoriser la violation d'un engagement validement assumé; la violation de cette obligation morale est sanctionnée par le droit civil (G. Ripert, La règle morale dans les obligations civiles, 3e éd. Paris 1935, n. 170, page 336).***
>
> *(*this Court's emphasis*)*

[111] Accordingly, the blameworthy conduct as found by the trial judge was not based on any direct contractual breach by the jobber vendor from whom Trudel bought the products (since there is no evidence that that jobber / vendor had signed a contract with Clairol) but rather Trudel's blameworthy conduct was his retail sale of the product to "non-professionals" despite his understanding that the jobber / vendor was not allowed to sell him the "professional only" product in the first place. The trial judge recognized that to allow him to do so would render illusory the manufacturer Clairol's right to control the distribution of the products through authorized vendors who were bound to respect Clairol's restrictions.

[112] Next, the Court of Appeal noted as follows:

> ***"It is not altogether clear where Appellant (Trudel) obtained his stock of the dye pack for professional use. He claims to have obtained it from a distributor or jobber who was not bound by contract with Respondent (Clairol) and the trial judge found there was no evidence that Appellant (Trudel) had directly incited a breach of a contract between Respondent and the distributor. He nevertheless found the Appellant's conduct constituted fault and that Respondent was entitled to relief by way of injunction".***
>
> *(*this Court's emphasis*)*

[113] There is no mention in the Court of Appeal judgment as to how, or even whether, Trudel was aware of the contractual restriction between the wholesalers and the manufacturer. The contractual obligation was embodied in an undertaking signed by the wholesalers who were restricted by the manufacturer to distribute the product "for professional use only" to hair care professionals. However, the Court of Appeal is at pains to cite the "warning" on the carton of the six bottles marked "for professional use only" which states that: the product can only be sold to

professional beauty salons; that sale to anyone else is absolutely prohibited; and that “these cartons are sold to the trade through specialized distributors who sign an undertaking in the form of “to sell only to beauty salons, beauty schools and licensed beauticians”.

[114] The Supreme Court of Canada judgment makes no reference to Trudel's knowledge, presumed or otherwise, of the content or scope of the restrictions in the undertakings signed between the authorized wholesalers and the manufacturer.

[115] In the circumstances, this Court interprets that sufficient knowledge was implied to Trudel (a) through the printed “warning” on the shipping boxes even though there is no proof that Mr. Trudel had read it or that it contained the full content of the undertaking; and (b) because of Trudel’s general understanding that the “professional use only” product was not to be “for retail sale” and that he should not have been able to buy it himself for retail sale.

[116] What is Costco’s position? Costco asserts that it had no duty to inform itself following the two cease-and-desist letters. The Court now analyzes the jurisprudence cited by Costco in support of this proposition.

[117] The first two judgments involve the commercial activities of a Mr. Martin Poitras, who had been employed for a period by Zoom Media inc., before leaving to set up his own competing advertising company. The issue concerned whether Mr. Poitras and his companies were committing a fault when they contracted with restaurant-bars for the placement of advertising in those restaurant-bars that had exclusive contracts for the placement of similar advertisements with Zoom, Mr. Poitras’ former employer. In two different legal actions, Zoom Media inc. instituted contractual interference proceedings against Mr. Poitras and his companies.

[118] In the first case, Mr. Justice Jacques Dufresne of the Court of Appeal, sitting as a sole judge, was required to determine whether to grant the suspension – pending appeal – of a permanent injunction that had been granted by the Superior Court.

[119] Mr. Justice Dufresne determined under art. *CCP* art. 760, that there was a *prima facie* demonstration of weakness in the trial judgment because:

a. the trial judge did not decide whether the third parties ***« connaissaient la portée réelle des clauses contractuelles d’exclusivité »****;*and

b. the trial judge found that there was “wilful blindness” by Mr. Poitras, even though: (i) when some restaurant-bars mentioned to him that they already had a contract with Zoom, Mr. Poitras suggested they obtain legal advice as to whether they could legally contract with him and (ii) other restaurant-bars told him that they did not know whether they were bound by any exclusivity with Zoom.

[120] At paragraph 20, Mr. Justice Dufresne notes that the plaintiff has the burden of showing: « ***la portée de la clause en litige, sa validité, sa connaissance par le tiers et l'incitation de ce dernier à la partie contractante de la violer*** ».

[121] Accordingly, Mr. Justice Dufresne does not determine as a matter of law that a third party has no obligation to inform itself. What is reasonable behaviour for alleged wrongdoers including whether they have a legal duty to inform themselves – the test for *CCQ* art. 1457 – must always be determined based on the specific circumstances and the overriding duties in CCQ art. 6 and 7 of acting in good faith and not acting in an unreasonable manner which injures another.

[122] Next, Costco submits that Simms' assertion of exclusivity in the Simms' cease-and-desist letters do not fix Costco with sufficient knowledge that Simms' had the exclusive distribution rights contained in the EDA. In support of this proposition, Costco cites the 2013 Court of Appeal case in *Newad Media inc.* v*. Red Cat Media inc.*[43].

[123] Again, that case involves Mr. Poitras and his companies and the allegation they participated in contractual interference. This case demonstrates the importance for the Court to undertake a subjective/objective analysis of the alleged specific circumstances from the perspective of the alleged wrongdoer[44]. The Court of Appeal notes at paragraph 28 that: "***les intimés admettent qu'ils connaissent l'existence des contrats liant l'appelante aux Établissements et même l'existence d'une certaine exclusivité. Toutefois, selon leur compréhension, cette exclusivité était limitée à certains types de publicité et à certains emplacements****"* (this Court's emphasis).

[124] The Court of Appeal confirms that Mr. Poitras and his companies were not in bad faith and had no intent to contravene the plaintiff's contracts with restaurant-bar owners. The *Newad* judgment is important for the approach that the Court of Appeal takes to analyzing these cases involving "interference with exclusivity":

a. firstly, the Court of Appeal analyzes the scope of the exclusivity clauses to determine whether they are valid; and

b. secondly, it looks at the surrounding circumstances to determine what the third party knew or should have known and accordingly what was a reasonable response by the third party in the circumstances.

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[43] 2013 QCCA 129.

[44] Professor Vincent KARIM notes that in determining what actions constitute good faith, the Court must appreciate the circumstances of each case, which requires the Court to use a combined subjective/objective analysis: what would a reasonable person have done having the aptitudes and abilities of the alleged wrongdoer if that reasonable person were placed in the same circumstances. (Vincent KARIM, *Les obligations, Volume I*, page 881 at para. 2108, Wilson & Lafleur, Montréal, 2015).

[125] On the particular facts of the *Newad* case, the Court of Appeal emphasizes the following:

a. that there were numerous different contracts with different restaurant-bars which had clauses with variable exclusivity regarding the exclusive placement of advertisements, for example, exclusivity :

i. only for restrooms; or

ii. only for coatrooms and certain quarters; or

iii. only close to public telephones; or

iv. "wall to wall" exclusivity throughout the premises.

b. as well, the Court of Appeal noted that the trial judge had found that there was ambiguity in the exclusivity clause that the plaintiff was relying on: the exclusivity was limited to the nature of the plaintiff's specific product, which was a different product from that of Mr. Poitras and his companies.

[126] As for the other considerations, the Court of Appeal found that it was reasonable to assume Mr. Poitras had no intention to breach the exclusivity restrictions since: (a) he reasonably assumed there was variable exclusivity since there were advertisements from other competing advertising companies in the same establishments with whom he was contracting and not only those of the plaintiff; and as well, (b) he had been told that certain clients had received clearances from their legal departments and in this, it was also reasonable for him to assume his actions were legal.

[127] Two of the three other judgments that Costco cites in support were both cases involving non-competition clauses where it was not proven that the third party had knowledge of the non-competition restrictions.[45]

[128] The third case, *Lamarre* v. *Allard*[46], is distinguishable on its facts. The Court must provide the following short explanation to show why. In that case, the Superior Court determined that the defendant journalist knew that an out-of-court settlement was confidential[47], but nonetheless made reference to that confidential settlement in his news reporting. However, it was not proven that the journalist knew the content of the confidentiality clause and the Court gave the journalist the benefit of the doubt by deciding that it was "not unreasonable" for the journalist to believe that the confidentiality requirement related only to the quantum of the settlement. Accordingly, the Court found that the journalist did not have sufficient knowledge to establish the fault of contractual interference under *CCQ* art. 1457.

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[45] *Ortho Concept Québec inc.* v. *Autonomie-santé inc.*, [2005] R.J.Q. 256 (C.S.) and *Haghshenas-Zand v. Leblanc,* 2015 QCCS 2124.

[46] 2008 QCCS 5266.

[47] Ibid at para. 64.

[129] Costco's Ms. Ells testifies that exclusivity could have meant many different types of exclusivity. However, with an experienced retailer such as Ms. Ells, and on the face of the clear assertion in the Simms' cease and desist letters of an "exclusive distributorship agreement" and R & R's refusal to allow its distribution letter to Quetico to be shown to Simms, it is unreasonable for Ms. Ells to not believe Simms that Simms was the only entity allowed by R & R to purchase and distribute R & R merchandise in Canada.

[130] The Court concludes from this review of the jurisprudence that this Court must:

a. determine the legality and interpretation of the exclusivity clause in the EDA, irrespective of whether Costco ever read or received a copy of the EDA;

b. determine whether Costco committed a fault through contractual interference

xiv) Rights of Simms under EDA: Legality and Interpretation of the EDA

LEGALITY: Whether (a) the EDA and (b) Simms' contracts with its Retailers, are null and void if they contravene the price maintenance provisions in the federal Competition Act?

[131] During the trial, this issue was raised by the Court, although it was not addressed in the parties' pleadings. In the Supreme Court of Canada *Trudel* judgment[48], Mr. Justice Pigeon declared that such an omission in the pleadings did not relieve the court "of the obligation of declaring of its own motion a nullity on account of public order".

[132] Prior to final argument, the Court raised these issues for the parties because:

- in paragraph 5.1.1 of the EDA, R & R requires the Distributor to provide its retailers with "a current list of suggested retail prices";
- Ms. Sigal of Simms testified that Simms instructs its retailers that they must sell the R & R jeans for $295.00 per pair or higher, failing which Simms will not sell them the jeans; and
- Simms' claim for damages was based on its ability to require its retail distributors to only sell for the "$295.00 plus" price.

[48] *Trudel*, *supra* note 29, at page 244.

[133] Coincidental with the relevant time period of this case, the price maintenance provisions of the federal *Competition Act* were modified in March 2009.[49]

[134] The modifications had two important effects that relate directly to this issue:

a. criminal price maintenance under the former art. 61 was repealed and replaced by section 76 whereby price maintenance was not unlawful but was reviewable by the Competition Tribunal 50;

b. as part of that review, the Competition Tribunal had to find conduct "which is having or is likely to have adverse effect on the competition in the market" (this Court's emphasis). The doctrine notes that price maintenance may be "pro-competition" or "neutral", as well as being "contrary to competition": the qualification chosen depends on the proof and circumstances of each case.

[135] At page 244 of the *Trudel* judgment, Mr. Justice Pigeon notes that for a civil contract to be declared a nullity due to public order, the Court "… will have to find all elements required to conclude that a violation of the law had been committed".

[136] For the present case, the Court concludes there is no such evidential foundation to warrant a declaration of invalidity either for the EDA or for Simms' contracts with its retailers because:

- the EDA at paragraph 5.1.1 states that: "The Distributor and retailers shall be free to determine the price at which they sell the Products". A legal author notes the use of such wording is "useful" in defense to price maintenance allegations 51 ; and
- as for the contracts between Simms and its retailers, there is no evidence to prove that price maintenance by Simms has any "adverse effect on competition in the market".

[137] Accordingly, for the purposes of this hearing, the Court concludes that any price maintenance does not affect the enforceability of the EDA.

INTERPRETATION: Whether Clauses of EDA are Clear and Unambiguous

[138] On February 13, 2006, R & R signed a first "International Distribution Agreement" with Simms for a three-year term providing under paragraph 2.1: "the Company hereby appoints the Distributor as the exclusive distributor with authority to sell the Products only to **Approved Retailers** (as discussed in Section 2.5) located

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[49] See James B. Musgrove, Editor, *Fundamentals of Canadian Competition Law, 3rd Edition* (Canadian Bar Association: Ottawa, 2015) at page 157 and following.

[50] Ibid., page 173.

[51] Ibid., page 173.

in the Territory (regardless of whether the Distributor makes such sales in the United States or European show rooms) …". "Territory" is defined as "the country of Canada only".

[139] For this litigation, the operative agreement that was in force[52] was the second agreement signed by R & R and Simms on March 1, 2009 with a three-year term to December 31, 2012 i.e. the EDA.

[140] Under the EDA, the governing law was that of the State of California.[53] However, this Court will apply Quebec law since California law was neither pleaded nor proven by the parties.[54]

[141] Costco argues that the EDA provides Simms with a limited exclusive right to sell "only to **Approved Retailers**" although Simms provided no list of "Approved Retailers" to R & R.

[142] The relevant exclusivity clause is paragraph 2.1: "Subject to the terms and conditions of this Agreement, the Company grants to the Distributor a limited exclusive non-transferable right to distribute, market and sell the Products only to **Approved Retailers** in the Territory, during the term…" The EDA defines Products as "the Rock & Republic" line of denim, ready-to-wear apparel and accessories: no distinction is made based on the gender (i.e. men/women), age (adult or children) or type of apparel (tee-shirts v. jeans).

[143] The EDA requires that Simms submit a list of "Approved Retailers" at least once each Spring and Fall season. Since this clause was for the benefit of R & R, the fact this was not done does not affect Simms' obligation to "only sell the Products to first class, 'high-end' retail departments or clothing stores, such as, …Neiman Marcus … and other similar stores (such stores, the 'Approved Retailers')".

[144] R & R retains "all rights other than those expressly granted to the Distributor"[55], which includes the right to open stores in Canada. However, the EDA makes it clear that only Simms can sell the Products in Canada to retail stores (which must be "first class, high-end"). This interpretation is reinforced:

a. by paragraph 3.5.1 which requires R & R "continue to take reasonable steps to ensure that its other customers and distributors do not ship the Products into the Territory" and paragraph 2.7 to the same effect (this Court's emphasis);

b. that R & R "will adjust or discontinue website sales in the Territory if such sales materially adversely impact Distributors' business in the Territory" 56;

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52 Exhibit P-2.
53 Para. 10.7.2, Exhibit P-2.
54 *CCQ*. art. 2809 para. 2.
55 Para. 2.1., Exhibit P-2.
56 Ibid.

c. under paragraph 7.3.4, it is only "upon expiration or termination of this Agreement" that R & R "or its designate may sell Products to retail stores, wholesalers and distributors within the Territory …" (this Court's emphasis)

[145] Accordingly, the legal relationship that arises from the EDA is the following:

a. R & R agreed that the only sales of its Products in Canada by Simms were to high-end third party retail stores (unless R & R opened its own retail stores);

b. Costco was a club-store, not a high-end retailer for the purposes of the EDA;

c. Simms could not sell the Products to Costco;

d. Therefore, Costco could not purchase the Products in Canada since only Simms had the right ("the limited exclusive right") to distribute the Products in Canada.

[146] The EDA was valid and the exclusivity clause was unambiguous: R & R contracted to Simms the right to be the exclusive distributor of the Products in Canada where the sole distribution was to be to high-end third party retailers[57]. This interpretation of the EDA as confirmed by R & R itself in the U.S. Bankruptcy proceedings in which R & R sought to have the EDA "rejected" i.e. terminated by the U.S. court. Furthermore, the Honourable Arthur J. Gonzalez, Chief U.S. Bankruptcy Court Judge, confirms this interpretation in his order and opinion of December 22, 2011. [58] He determines that the combined effect of para. 2.1 and 7.3.4 of the EDA, notwithstanding the use of the term "limited", gave Simms "the bargained-for right to an almost exclusively competition-less market for R & R's Products in Canada while the EDA remained in force".

xv) Analysis: Was Any Contractual Interference Committed by Costco?

First of Two Time Periods: Period from First Contact re: Product up to Receipt of Simms' Cease-and-Desist Letters

[147] In its Re-Amended Motion, Simms asserts that Costco's knowledge of Simms' exclusive distributorship rights in the EDA arose out of Costco's alleged participation in a scheme called "Project X".

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[57] A recent Supreme Court of Canada common law judgment states "… a decision maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract (*Sattva Capital Corp.* v. *Creston Moly Corp.,* [2014] 2 SCR 633 at para. 47. This is found in Quebec at *CCQ* art. 1425, 1426. The ordinary meaning of "exclusive" is "not obtainable elsewhere".

[58] Exhibit P-2-I at pages 11 and 12.

[148] In paragraphs 20 through 23 inclusive of the Re-Amended Motion to Institute Proceedings, Simms asserts that Costco was aware that "the sale of the merchandise in Canada by Costco would violate Simms' exclusivity" and that a scheme had been worked out between Costco, R & R and two American companies acting as intermediaries between R & R and Costco – Quetico and Kontakt – who allegedly acquired the goods from R & R and then shipped them to Quetico's sister company in Canada, ABFI, for sale to Costco for ultimate retail sale in Canada.

[149] In its Amended Motion dated November 30, 2010, Simms added new paragraphs 90-103 inclusive under the heading "PROJECT X" – THE CONSPIRACY TO SUPPLY R & R MERCHANDISE TO COSTCO IN BREACH OF THE EXCLUSIVE DISTRIBUTION AGREEMENT AND COSTCO'S PARTICIPATION IN SUCH CONSPIRACY".

[150] Simms asserts in its Re-Amended Motion that Costco had knowledge of its exclusivity from in or about January 2009. Simms makes the following assertions:

> ***98- Likewise, Costco knew that the goods had been manufactured by R & R specifically for sale in Costco's Canadian stores and it knew that that supply of such goods to it had to be camouflaged because of the existence of the Exclusive Distribution Agreement.***
>
> ***…***
>
> ***102- It is therefore clear from the foregoing that the parties colluded and that Costco knowingly participated in the "Project X" scheme for the express purpose of selling Rock & Republic merchandise in Canada in violation of Simms' rights. Costco is therefore liable to Simms for the damages it has suffered as a result of the scheme described above.***

[151] Prior to the first cease-and-desist letter, the Court determines that Simms has not proven on the balance of probabilities that Costco had any knowledge of the EDA.

[152] For the reasons that follow, the Court finds that the use of the term "Project X" – to describe the sale of R & R goods ultimately to Costco – in and of itself is unusual and strange terminology but does not prove that Costco knew about the EDA with Simms.

[153] Internal R & R documents refer to the ultimate sale of R & R products to Costco as "Project X". While this appellation is unusual and in hindsight may appear to Simms to be suspicious, there is no direct evidence that Costco knew that "Project X" referred to the manufacture of R & R goods – not in the United States where they were normally made – but rather in Guatemala. These Guatemalan R & R jeans were made expressly by R & R for re- sale through Quetico to Costco in Canada but there is insufficient evidence to prove – at the outset – that Costco knew that it was not getting the original "Made in America" product.

[154] Prior to the first cease-and-desist letter, it is clear that R & R was "double-dealing" behind Simms' back with Costco, but it is not proven that Costco was aware of this double-dealing.

[155] The R & R double-dealing is clearly exposed in the affidavit of Mr. Jeffrey D. Lurie, R & R's Chief Restructuring Officer, in his September 7, 2010 affidavit in the U.S. Bankruptcy proceedings:

> ***"3- Simms is R & R's exclusive distributor in Canada of R & R's line of denim, ready-to-wear apparel and accessories. The agreement expires on December 31, 2012.*** **(This Court's note: the EDA)**
>
> ***4- The R & R products that Simms distributes in Canada for R & R are premium goods (the "premium goods") which are manufactured in the United States. R & R's gross margin for the premium goods is 33% (including a 25% distributor discount that R & R provides to Simms").***
>
> ***5- The agreement with Simms prohibits R & R from selling any R & R goods in Canada, including second-tier products (the "second-tier goods"). The second-tier goods are manufactured for R & R off-shore (this Court's note: this is in fact in Guatemala) and are manufactured less expensively than the premium goods (this Court's note: which are manufactured in the United States).***
>
> ***6- When the agreement (Court note: the EDA) was executed, R & R believed it was prudent to limit sales in Canada to only R & R premium goods. The Debtor (Court note: R & R) recently determined, however, that there is an untapped market in Canada for discounted goods in general, and for R & R's second-tier goods, specifically that sale of the second-tier goods in Canada will be more profitable to R & R than will the continuation of the exclusive distributorship agreement with Simms which prevents sale in Canada by R & R of second-tier goods or any R & R goods". [59]***
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> (this Court's emphasis)

[156] As seen, the original contact with Costco to see whether it had any interest in purchasing R & R goods was made by Mr. Michael Rolnick in early June 2009. [60]

[157] Mr. Rolnick contacted Costco buyer Ms. Pamela Janek. She testifies to knowing that R & R jeans were sold at high-end stores in Canada like Holt Renfrew, for over $200. Transcripts of her examinations on discovery were filed by Simms.

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[59] Exhibit D-24.

[60] Exhibit D-10. Mr. Rolnick was the principal in the American intermediary company, Kontakt.

She was not called as a witness by Costco: the Court was told she was no longer in Costco's employ.

[158] Ms. Debbie Ells was Ms. Janek's direct supervisor and a former buyer herself. She is called at trial as a witness by Costco, at which time she was a senior V.P. and General Merchandise Manager. She started with Costco as an assistant buyer in 1993. Ms. Ells knew also that R & R jeans were a premium brand as she had seen them at Holt Renfrew.

[159] Ms. Ells said Ms. Janek was very dedicated to Costco and was a good and detail-oriented employee.

[160] Ms. Ells testified that Costco was a members only wholesale club whose average members have $99,000 of household income, own their own home and are university or college educated.

[161] While both buyers clearly saw an opportunity for Costco, there is no evidence that they knew anything about the EDA with Simms. Ms. Ells was at pains to explain the "treasure hunt effect" at Costco where Costco seeks to impress and surprise its regular customers. This effect generates goodwill when customers find products that they normally would not find at Costco – at much reduced prices from the ordinary marketplace. According to Ms. Ells, Costco sells R & R jeans for under $100, when they were known to sell in the ordinary marketplace in the order of $300. This created the exact "treasure hunt" effect sought by Costco.

[162] From the evidence, the Court infers that "Project X" was a term used by certain "in the know" R & R senior managers to refer to the sale of these "second-tier goods" to Costco. It is likely that this suspicious terminology may have been developed by this R & R senior management team to keep the R & R operations' employees who were dealing directly with Simms "in the dark" about these "back channel" sales to Costco.

[163] While internal R & R emails refer to "Project X", there is nothing in this title alone that would cause Costco employees to conclude that R & R was trying to hide an exclusive distributorship agreement.[61]

[164] In the August 21, 2009 email from Mr. Rolnick to Ms. Janek, there is a reference in the subject line to R & R. However, an October 15, 2009 email from Ms. Janek to Mr. Rolnick and Mr. Agakanian refers to "Project X purchase orders and shipping".[62] Ms. Janek did not testify as to what she knew "Project X" meant in her discovery transcripts and Costco did not call her as a witness at trial.

[165] R & R clearly knew that Costco was the ultimate purchaser. In her August 21, 2009 email to Mr. Rolnick, Ms. Janek says that Costco does not want "whiskers

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[61] Exhibits P-16 B and C.

[62] This reference by a Costco employee to "Project X" raises an inference that Costco knew what "Project X" meant. Without further proof, this inference does not reach the level of probability.

at thigh", industry terminology meaning that a particular dye feature should not be used on the jeans. On the same day, Mr. Rolnick confirms to Ms. Janek that he spoke to R & R and that they "know what whiskers mean and will remove."

[166] In an internal R & R memo dated October 12, 2010, reference is made to the "Project X" account". Why did R & R not refer simply to Costco? The Court postulates an answer in an earlier paragraph. Furthermore, there is an internal discussion within Costco as to whether Costco should purchase these goods directly or undertake the purchase through a company related to Costco. In an email dated August 21, 2009, Ms. Janek of Costco was told that "Rock clearly knows the goods are going to Costco". Ms. Janek was advised by Costco's U.S. parent that the sale could be made directly to Costco by ABFI since R & R was aware that the sale was going to Costco (D-10).

[167] The Court understands, in the context of everything that has transpired since 2009, that Simms could have reasonable suspicions concerning the use of the "Project X" appellation. However, such reasonable suspicions - in the context of the evidence produced in this file - do not reach the level of balance of probabilities.

[168] Ms. Sigal raises in her testimony why Costco, following the cease and desist letters, could not have checked the R & R website to determine if R & R had Canadian distributors. According to her, the R & R website under the heading "Distributors" showed Simms as the sole R & R distributor for Canada.

[169] However, no confirmatory evidence, i.e., screenshot, was filed to prove the state of the R & R website in June 2009 when it was first viewed by Ms. Janek. Moreover, there is no evidence that the R & R website referred to any exclusive distributorship arrangement between R & R and Simms.

[170] Ms. Janek on or about June 17, 2009 reviews the R & R website to check colours for the R & R jeans for the Costco order. There is no evidence that she saw any pulldown menu relating to distributors.

[171] Without any evidence of what the R & R website looked like at the time, the Court cannot say Ms. Janek was at fault for not seeing nor checking the pulldown menu that existed regarding "Distributors".

[172] A final point before concluding this section. The Court is left perplexed at the lack of any complaint by Costco when it was told it was buying first tier American-made product and in fact received second tier Guatemalan-made product.

[173] The Court refers to one of the original emails of June 8, 2009 from Mr. Rolnick to Ms. Janek seeking to interest her in purchasing the R & R goods. He says: "I have done a deal with Rock and Republic and U.S.A. (this Court's note: Costco U.S.A.) is purchasing as well. I am getting the 3 top sellers. The normal U.S.A. wholesale

is 95-$120. Goods are made in U.S.A and delivery is in U.S.A.[63] Your cost will be $84 Canadian. If you are interested, I can send you the line sheets of 3 styles. Please let me know today". (Exhibit D-10).[64]

[174] On the basis of these representations and further emails, Ms. Janek places an order on June 17, 2009 with Mr. Rolnick for 8,960 pairs of 4 different styles of R & R women's jeans, wherein the unit cost is $84.00 Canadian, freight prepaid to Costco Canadian stores with the indication that the selling price for Costco will be $99.99.

[175] The Court is perplexed that the representations made to Costco were for the premium product (i.e. made in the U.S.A.) but the product delivered in November 2009 and sold by Costco was a 2nd tier product, i.e. the jeans were made in Guatemala - not the U.S.A as were the first tier R & R goods (see Exhibit P-16C at p.10).

[176] It is inconceivable that Costco would not have noted this fundamental difference between what was originally represented - American-made goods and what was at the time received: Guatemalan-made goods. However, there is no evidence that Costco made any complaint about this important discrepancy to ABFI, Quetico or Kontakt. The goods that it received are inferior to what was represented. Mr. Lurie confirms this. Yet Costco says nothing. What did Costco know about this? The Court is left perplexed since this issue was left unexplained.

[177] Costco clearly knew it received Guatemalan-made goods. In fact, Ms. Janek wrote to a Costco customer in Edmonton in May 2010 to say that the R & R jeans originating in Guatemala were not "grey market goods" because they came from an authorized distributor. Ms. Janek considers ABFI to be the authorized distributor. In this regard, she is incorrect since the authorized distributor is actually Quetico according to R & R's September 18, 2009 letter (D-5).

[178] However, getting back to the issue of the place of origin, one inference is that Costco was informed and accepted that the product they were purchasing was made in Guatemala, not in the U.S.A. (as were the first-tier R & R goods). If so, however, why did Costco pay the price for first tier goods?

[179] Nonetheless, even with this, Simms has not proven that Costco knew about the EDA before Costco received the first cease and desist letter on November 12, 2009. However, once Costco had that knowledge through Simms' cease-and-desist letter, it failed to stop selling the Product in its stores.

Second of Two Time Periods: At and After the Cease-and-desist Letters

Costco Placing Second Order and Subsequent Retail Sales in 2010

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[63] D-10 at p. 4. Subsequent evidence proves both of these statements wrong: the goods were made mainly in Guatemala and delivery was in Canada.

[64] Ibid.

[180] Ms. Janek testified that as long as Costco was dealing with an authorized and trusted distributor that it was not necessary for her to "go back to the brand holder".[65] She supported this affirmation by relying on the September 18, 2009 R & R letter which provided to Quetico a non-restricted right to re-sell only specified orders for particular R & R product of a specified "style/color". She added that since the authorized distributor knew that Costco was selling the goods in Canada that the authorized distributor necessarily had the authorization to sell the goods for distribution in Canada.[66] In her experience, the trademark owner would be aware of the geographic market to which the authorized distributor was selling the goods.

[181] Ms. Janek also referred to the letter that she received from Mr. Rolnick on Sept. 12, 2009. On reviewing the letter, the Court finds that this letter should have been a red flag for Costco. Why?

[182] Firstly, because in response to a demand from Ms. Janek for a letter confirming that R & R knew about the Costco purchase, all that she received from Mr. Rolnick was an unsigned letter from R & R's President[67] dated September 15, 2009. The letter said: "You are authorized to re-sell such goods from time to time without restriction". This letter was addressed to Mr. Rolnick and "Quetico/DSJS". DSJS was an intermediary working for Sam's Place, which had a connection to the Walmart stores, and which had nothing to do with Costco. Furthermore, the authorization referred to "certain goods" without particularizing them.

[183] When Ms. Janek asked for a further and better confirmation from Mr. Rolnick, she received a copy of a Sept 18, 2009 letter from the President of R & R addressed to "Mr. Rolnick and Quetico" in which the "Re: line"[68] said "Confirmation of Purchase and Sale of R & R Goods". In the body of the letter it referred to the fact that "you have purchased authentic R & R goods" from R & R and "are authorized" to resell the goods. However, Mr. Rolnick did not purchase the goods, only Quetico did. The letter listed four separate purchase order numbers for a total of 9,234 units. However, the number of units and colour were not same as what Costco had ordered from ABFI (see Exhibit D-64 p. 2). Also, there was no reference to the re-sale being in Canada nor Costco being the purchaser. Most importantly, there was no mention at all of ABFI's role. Put bluntly, Ms. Janek did not get a letter with the content that she asked for.

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65 Examination on Discovery of Ms. Janek, February 24, 2011 at p. 93 and 94 (Exhibit P-72).

66 *Supra* p. 98. Ms. Ells used this logic: Quetico bought the Product from R & R and then sold it to Costco through ABFI (D-9, D-64). The September 18, 2009 letter from R & R to Mr. Rolnick and Quetico shows that these orders were for the Product going to Costco and this was sufficient for Ms. Ells to accept that R & R gave Quetico authority to sell to Costco. Ms. Ells says that Costco does not check behind distribution agreements but rather accepts what their trusted vendor tells them.

67 Exhibit D-5.

68 Exhibit D-6.

[184] Moreover, Ms. Janek was suspicious herself. She asked Mr. Agakanian if the letter was backdated (Exhibit D-8). Importantly, she also asks for scanned copies of the four purchase orders that are referred to in the R & R letter. There is no evidence that she gets these four purchase orders since only 2 pages (content not described) (Exhibit D-7) are sent by Mr. Agakanian. When she asks whether there is anything else, Mr. Agakanian responds with a sarcastic email ("… you want a copy of the 30% deposit that we wire and copy of the LC that is written to R & R, blood. My first born? ME :") and Ms. Janek does not pursue the matter further.

[185] Importantly, Costco knows that Simms' first cease-and-desist letter is correct in that the goods being sold by Costco bear the Simms CA number[69]. Ms. Janek also has it confirmed to her at that time by Mr. Agakanian that R & R is "dealing with a very mad distributor (this Court's note: Simms). This will all be resolved promptly."[70]

[186] Costco relies on the fact that they were dealing with a trusted intermediary. Costco has filed no evidence that it was ever advised that, in fact, R & R had "resolved promptly" the matter with Simms. Accordingly, there was no reason for Costco to believe it could ignore the cease and desist letters.

[187] Costco allowed itself to limit its focus to the issue of authenticity of the Product despite being put on notice by Simms that the up-front issue with Simms was the EDA. If Costco was not prepared to deal directly with Simms to resolve the issue, it needed to have the issue of the EDA asked and answered by R & R. Costco failed to do either.

[188] The Court determines that, in the context of Costco's post cease-and-desist knowledge that Simms was alleging an exclusive distributorship agreement for Canada, Ms. Janek on behalf of Costco was at fault in not seeking: (a) some confirmation emanating from R & R that they knew the goods were being sold in Canada by Costco and (b) that there was no Simms EDA that would prevent such sales. The Court determines that this omission by Costco constituted a fault in the context of what Costco knew Simms was alleging in the cease-and-desist letters.

[189] There were at least two reasonable courses for Costco to pursue to ensure it was not running afoul of the law: (a) getting satisfactory proof from Simms of the EDA (if Costco was not prepared to believe Simms attorneys' assertions) and

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[69] Exhibits P-5 and D-3. Based on the limited evidence provided, the Court understands that the CA number is a federal government regulation for clothing to ensure that the Canadian consumer can check the registry in Canada and establish the provenance of the clothing i.e. the manufacturer or Canadian importer or distributor.

[70] Exhibit D-4.

particularly, the exclusivity clause in issue and (b) thereafter, confronting ABFI and Quetico with same.

[190] The Court now comes to a critical red flag. As regards the R & R September 18 letter, Mr. Rolnick tells Ms. Janek that this "is the letter that Costco has been waiting for. Please do not release the letter to the distributor"[71] (this Court's emphasis). This last statement should have put Costco on notice to a problem. Mr. Rolnick knew of the cease-and-desist letter sent by Simms and knew that Simms was alleging exclusivity. If this R & R authorization letter was supposed to "authorize the sale" which was "known to R & R", why should the letter not be allowed to be shown to Simms to resolve the whole issue? This should have been a clear warning to Ms. Janek and Costco that something was amiss.

[191] Despite not being given the complete "authorization letter" they sought, Costco did not ask for anything further. The evidence is clear that Ms. Janek was overseen by Ms. Ells and internal Costco legal counsel.

[192] However, the contract between ABFI and Costco (a Vendor agreement signed on October 18, 2004 and in force at all relevant times) mentions nothing about ABFI warranting that the goods may be sold in Canada nor that it has the trademark holder's authorization to do so [72]. As noted earlier, there is however the hold harmless and indemnification clause.

[193] Ms. Janek acted as a buyer purchasing women's apparel for Costco since 2009. She testifies that she told Ms. Ells that R & R knew the merchandise was going to Costco[73]: as Ms. Janek wrote to her superior Ms. Ells on November 12, 2009 ""Costco purchased from ABFI. The owners are the same for both Quetico and ABFI. Quetico is their U.S. Company. On this transaction they did an intercompany sale from Quetico to ABFI in Canada. Quetico issued an L C (this Court's note: "Letter of Credit") directly to Rock and Republic as the vendor has indicated below."

[194] As an undertaking to her examination on discovery, Ms. Janek provided copies of "all orders made by Costco for the R & R merchandise in 2009, 2010, and 2011 that were cancelled". These documents were filed by Simms as P-43. They show that on Aug. 3, 2010: Costco prepared orders of 16,200 units of certain ladies' jeans (P-43 p, 3); 16,200 units of other ladies' jeans (P-43 p, 6); 16,000 units of other ladies' jeans (P-43 p, 12); and 24,000 units of other ladies' jeans (P-43 p, 15). The total is 72,400 pairs of ladies jeans.

[195] These ladies' jeans orders were cancelled in the period from August 16 to August 20, 2010 (exhibit P-42). Mr. Agakanian confirms to R & R by email of August 18, 2010 that "50,000 pairs of men's jeans are confirmed and on schedule" (P-42).

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[71] Exhibit D-6.
[72] Exhibit P-21-5.
[73] *Supra* note 65 at p. 193.

These later jeans are being made for Costco since Ms. Ells and Ms. Janek are copied on the email.

[196] However, at the September 8, 2010 hearing before the U.S. Bankruptcy Court, legal counsel for R & R told that court that R & R "wishes to have the contract with Simms rejected so it will be free now to sell in other distribution channels. However, the debtor is restricted from selling that product in Canada by virtue of the distribution agreement (this Court's note: the EDA)". R & R's lawyer suggests that those channels include channels for a discount product for customers like Costco. He says that R & R "wishes to sell these products which are actually different than the product it is selling to Simms and the product that is part of the Simms' agreement".[74]

[197] Furthermore, R & R's lawyer asserts that R & R has an order for 50,000 units which is in production for shipment in mid-October and a second order in hand "which is dependent upon this particular contract being rejected, which is identical to the first order, which is another 50,000 units" (this Court's emphasis).

[198] R & R's lawyer then goes on to say[75]: "And by the way, the goods that are being sold to Costco are different goods altogether than were being sold to Simms, these are not high-end goods. These are goods that are being made offshore, probably in Guatemala; different kind of denim, different kind of dyes, no cost really to the debtor (this Court's note: R & R). It is pure profit to the debtor, the 58% gross margins which it will make"

[199] On direct examination at that September 8, 2010 hearing, Mr. Lurie, the chief restructuring officer for R & R states that for the Canadian market, R & R "currently has an order for 50,000 units on hand due to be shipped toward the end of September/first week in October. It also has an order pending for… an additional 50,000 units.[76]" Based on the above evidence, this must be the order for Costco.

[200] Costco argues that R & R made these representations which were "ill-founded" and a pretext and "cannot be attributed in any way whatsoever to actions by Costco as it had already decided at that time not to purchase R & R products anymore, had notified its vendors of this and had canceled orders" (Costco Summary of Argument before this Court, paragraph 20). The above-noted evidence contradicts these assertions.

[201] Also, Ms. Ells testifies that she did not know about the U.S. Bankruptcy proceedings before Simms took these proceedings and she says that Costco was not involved in the U.S. Bankruptcy proceedings nor did she know that R & R wanted to terminate the EDA so that R & R could do business with Simms.

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[74] Exhibit P-2 DD at page 5.
[75] Ibid. at page 9.
[76] Ibid. at page 25.

[202] While this may have been the case for Ms. Ells personally, the evidence shows that Costco must have known what R & R was doing to get free from its obligations to Simms. The clearest example is that R & R 's CEO takes the trouble to copy Costco's original Montreal counsel on a Sept. 3, 2010 letter to Simms in which he confirms that R & R has terminated the EDA pursuant to the August 2, 2010 notice (D-12 at p. 84).

[203] Furthermore and on the balance of probabilities, the circumstantial evidence proves that Costco must have had some knowledge of what R & R was undertaking in the U.S. Bankruptcy proceedings, particularly as regards the rejection of the EDA. The chronology makes this point: in late July, 2010, Costco places more orders for the Product (P-66); in July-August 2010 there is an exchange of correspondence between Simms counsel and Costco counsel following the July 20,2010 "second wave" cease and desist letter (again reasserting the exclusivity) (P-13,15,16); on Aug. 2, 2010, R & R sends its first letter of cancellation to Simms PP-2B); on August 6, 2010 Simms institutes the present action against Costco and on Sept. 1, 2010, R & R takes its Motion to Reject in the U.S. Bankruptcy proceedings.

[204] This evidence demonstrates that Costco must have had knowledge of these actions taken by R & R - which had the express purpose of promoting further sales to Costco[77].

[205] In addition, on July 29, 2010, a contract was entered into between R & R and Kontakt and Quetico for the purchase of: 54,096 pairs of men's jeans (Neil style), 18,032 pairs of men's jeans (Floyd style) and another 36,064 pairs, all of which jeans were to be made in Guatemala. This contract did not allow the jeans to be re-sold in the U.S. or Europe and the buyer was given the right to reject the contract after October 15, 2010.

[206] The Court infers that this contract must have been destined for Costco because:

1. the contract required all products "have English/French bilingual labelling";
2. The only evidence for orders for R & R jeans that was placed through Quetico and Kontakt was for Costco;
3. The 50,000 units referred to for the first purchase order correspond to the order in the July 29, 2010 contract;
4. There is no evidence that as of the date of the hearing before the Bankruptcy Court, September 8, 2010, that this contract had been terminated. Therefore, the clear inference is that the references made

[77] This conclusion is further supported by the interest of both Costco and ABFI to put the Simms' issue behind them.

by R & R counsel and Mr. Lurie in the U.S. bankruptcy proceedings were with respect to this contract (i.e. the proposed sale was to Costco in October 2010).

5. By email of August 18, 2010, Mr. Agakanian confirms to Ms. Ells that Costco has cancelled the order for ladies jeans but that the "55,000 men's jeans are confirmed and on schedule". She thanks him for the update. The obvious inference is that the order for the men's jeans was still in effect78;

6. As late as November 3, 2010, the president of R & R writes that she spoke to Ms. Sigal to offer Ms. Sigal a "part of the action" "for her (this Court's note: Ms. Sigal) to drop the case so we can sell to Costco79". If Costco had said that they were not doing any more business with R & R, why would the R & R president have made this statement? The context in which the statement is made gives it a ring of truth.

[207] The orders placed by Costco through ABFI and Quetico for the R & R products were the *sine qua non* conditions of the R & R application in the U.S. In particular, the large orders which are the subject matter of the July 29, 2010 contract between R & R and Quetico and Kontakt permitted R & R to make the successful argument before the U.S. bankruptcy judge that the Simms' contract was "burdensome", thereby providing the justification for the rejection of the EDA by that court.

[208] While there is no direct evidence of Costco's active participation in those proceedings, a finding of Costco's actual knowledge or active participation are not determinative. Even if Costco did not know that in placing these orders it was providing the justification to R & R to have the EDA rejected, Costco knew or should have known that their orders would lead to a direct breach of the EDA by R & R.

[209] Ms. Ells testifies that she was aware there could be different types of exclusive distributorship agreements based on classification (men's' suits v. denim), gender, age etc. and also that a manufacturer could have several exclusive distributorship agreements within the same territory. Also, she says that if she knew that a particular party had an exclusive distributorship agreement but that another party came to Costco to sell goods governed by that agreement, that she would not purchase the goods from the other party.

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78 Exhibit P-42.
79 Exhibit P-73-12.

[210] With such knowledge, Costco was at fault for not going further to determine the bona fides of Simms' claim to exclusivity before Costco sold more of the Product following the notice constituted by the cease and desist letters.

[211] Accordingly, by placing these orders, even the orders that were ultimately cancelled, Costco knew or should have known that it was inducing R & R to breach the EDA. For these reasons, Costco committed successive and ongoing faults including, up to, and during the U.S. bankruptcy proceedings of which its orders were an essential component.

COSTCO'S GREY MARKET DEFENCE

[212] Costco argues alternatively that "even if Costco's purchases would be deemed not to be authorized by the trademark holder, then they would be considered grey market goods, a legitimate practise[80] ".

[213] A definition of grey market or parallel imports is contained in the U.S. case of *Omega S.A*. v. *Costco Wholesale Corporation* (decided on September 3, 2008 by the United States Court of Appeals, 9th circuit). In footnote 12 of that case, the following definition was given: "Grey market" goods or "parallel imports" are genuine products possessing a brand name protected by a trademark or copyright. They are typically manufactured abroad and purchased and imported into the United States by third parties, thereby bypassing the authorized U.S. distribution channels" (this Court's emphasis). Retailers are able to sell these products at a discount because the grey market arbitrates international discrepancies in the manufacturer's pricing systems".

[214] Costco's argument fails for the following reasons. Firstly, while Simms alleges "passing off" in its original cease-and-desist letter, the present proceedings are not based on federal copyright law, but rather on civil fault under *CCQ* art. 1457. Secondly, on the basis that Costco knows or is deemed to know that R & R has agreed not to sell its merchandise to anyone but Simms for distribution in Canada, how is this judicial fact to be respected and enforced if Costco can simply shield itself with a letter from an "authorized vendor". By way of analogy, Costco cannot be allowed to "come in through the back door" when it is legally prevented from accessing the house "through the front door" because of the exclusivity clause.

CONCLUSION ON FAULT

[215] It is sufficient for Simms to prove, as it has done, that Costco has committed a civil fault. In the Sobeys' judgment of the Court of Appeal, Mr. Justice Baudouin decides that the principle of the relative effect of contracts requires proof not only

[80] Defendant's argument, para. 31.

of knowledge of the exclusivity clause but also bad faith on the part of the defendant.[81]

[216] The dual requirement of fault and bad faith has been cited in other subsequent Court of Appeal judgments.

[217] This Court relies on legal authors Lluelles and Moore who interpret that what the Court of Appeal means in referring to "***mauvaise foi***" is really a "***mépris caractérisé des intérêts d'autrui***" [82] ,that is a component of "the fault". In other words, bad faith is not a separate standalone condition but rather a component of the fault that must be proven.

[218] The *Quebec Charter*'s preamble speaks to the fact that rights are inseparable from obligations ("Whereas the rights and freedoms of the human person are inseparable from the rights and freedoms of others…."). Similarly, in *CCQ* art. 7, no one may exercise a right with the intent of injuring another, including where the wrongdoer is reckless (in criminal law the term "wilful blindness" has a related connotation). Accordingly, a business that is aware that another business is protected by an exclusive distributorship agreement cannot knowingly do anything that contravenes rights under the agreement even where it is not bound by that agreement, whether one calls that conduct "bad faith" or the "reckless disregard for the rights of others". The fault arises even where the wrongdoer has not specifically set out to harm the rights holder but where, if they thought about it, those are the probable consequences of their actions.

[219] Both Ms. Ells and Ms. Janek, experienced as they were in the retail clothing business, could not ignore the probable negative impact on Simms of the Costco sales due to the substantial price differential i.e. their R & R Product would be sold at one third of Simms' customers' retail price. Ms. Ells confirmed that Costco was a retailer and that "every other retailer was competition". At the same time, Ms. Ells who was aware of the "buzz" around the R & R brand having been to a Holt Renfrew store herself, knew or should have known that Costco would benefit, without having expended any money on marketing, with the consumer desire to purchase this premium brand product at one third of the normal price (the Costco "treasure hunt" effect).

[220] After receiving the first cease-and-desist letter, Costco was told by Simms that only Simms was the exclusive Canadian distributor of authentic R & R merchandise in Canada. The Court has already determined that as a result of the cease-and-desist letters Costco was fixed with sufficient knowledge of the Simms' exclusivity that it was required to respect that exclusivity. Under cross-

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[81] *Sobeys*, *supra* note 28 at para. 26.; applied in *Newad Media inc. v. Red Cat Media inc.*, 2013 QCCA 129.

[82] *Supra* note 24 at para. 2455.

examination, Ms. Ells admits that she had no reason to believe that Simms assertion of exclusivity was untrue.

[221] Costco asserts that it never "helped or encouraged R & R to… breach" the EDA.

[222] This assertion is not supported by the evidence. The fact that Costco chose to ignore the uncontradicted assertion of exclusivity by Simms in the context of everything that Costco knew or should have known, proves that Costco's subsequent orders to and through ABFI and Quetico to R & R were undertaken with the effective knowledge that they were inducing the breach of contract between R & R and Simms.

[223] This implied intention by Costco demonstrates the fault on Costco's part.

CAUSATION: DID COSTCO'S CONTRACTUAL INTERFERENCES CAUSE DAMAGES TO SIMMS?

GOVERNING LAW

[224] *CCQ* art. 1607 requires that Simms prove on the balance of probabilities that it has suffered damages which are "an immediate and direct consequence" of Costco's alleged faults.

ANALYSIS

DOES COSTCO SELLING THE FIRST SHIPMENT WITH THE SIMMS CA NUMBER CONSTITUTE AN ACTIONABLE CIVIL FAULT UNDER *CCQ* ART. 1457?

[225] Federal labelling law requires that garments must be labelled and identify the person by or for whom they are manufactured[83]. Companies can register federally for a CA number that identifies them instead of using a tag showing their name and postal address[84].

[226] While Costco is not presumed to know of the EDA before the first cease-and-desist letter, it is presumed to ensure that the garments it sells have the proper CA number.

[227] The first shipment sold by Costco in November 2009 had the Simms' CA number. All subsequent sales had corrected CA numbers[85].

[228] The units ordered and received by Costco from ABFI are:

[229] July 29, 2009: 9,184 pairs of ladies' jeans (sold in Costco stores in November 2009);

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[83] *Textile Labelling Act*, R.S.C. 1985, c. T-10, art. 6(b) (iii).
[84] *Textile Labelling and Advertising Regulations*, C.R.C., c. 1551, art. 12(1).
[85] Exhibit P-56.

[230] January 13, 2010: 4,088 units of men's jeans; and

[231] January 28, 2010: 46,084 units of women's jeans and 19,200 units of women's tee shirts (revised May 6, 2010 but same number of tee shirts) (sold in Costco stores beginning in May 2010).

[232] As noted already, Costco places further orders in June and August 2010 but these are cancelled.

[233] Selling the goods in breach of the Federal labelling regulations constituted a statutory breach since the regulations were expressly legislated to prevent this confusion.

[234] However, even if this statutory breach was a civil fault, there is no causal link between such alleged civil fault – the sale with incorrect CA numbers[86] – and damages caused to Simms' market for the R & R product. [87] One purpose of the Textile Labelling Act is to protect consumers against misrepresentation in labelling[88]. There is no evidence any Costco consumers were misled i.e. purchased the Product believing the CA number was that of Simms or that Simms suffered any damages as a result of its CA number appearing on the labels of merchandise sold at Costco. In addition, there is no evidence that any prosecution under the Act occurred with respect to the mislabelled merchandise. Unlike in the Supreme Court of Canada judgment in *Morin v. Blais*, the mischief sought to be avoided by identifiable labelling was fixing responsibility for the goods upon an identified manufacturer/distributor and not the protection of exclusive distribution agreements. Simms has not proven that this particular breach of a statutory duty caused the damages it alleges.

[235] Accordingly, the Court determines that the mislabelling on Costco shelves does not constitute a starting point for Simms' damages in November 2009.

[236] Ms. Janek finally resolves the CA issue by January 26, 2010.[89] .

FACTORS CAUSING THE REDUCTION OF SIMMS' SALES OF R & R PRODUCTS

xvi) Effect of Costco's Sales on Declining R & R Sales for Simms

[237] The evidence discloses that Costco sales caused:

1. Simms' customers to cancel orders and not to repeat orders;

2. Devalued the high-end cachet of the R & R brand in Simms' market of

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[86] Exhibit P-13 tab B at p. 10 for photo of wrong CA number.

[87] *Morin* v. *Blais*, [1977] 1 SCR 570.

[88] Competition Bureau, *Guide to the Textile Labelling and Advertising Regulations*, September 2000, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01249.html>.

[89] Exhibit P-21-22.

high-end retailers; and

3. Negatively impacted Simms' reputation.

[238] The evidence discloses also that the result of Costco sales of the Product reduced R & R sales for Simms and probably rendered Simms' market situation much more difficult than it would have otherwise been. However, the evidence also discloses that there were other factors unrelated to Costco that contributed to declining sales of the Product by Simms. The Court will now analyze those factors and explain this conclusion.

[239] The Court appends as Annex B, Table 2 from the report of Costco's expert accountant, Mr. Alain Lajoie, which shows Costco's monthly sales for 2008, 2009, and 2010[90]. Costco sells the approximate 49,000 units of R & R product in two main time periods: (a) beginning on November 1 for the month of November 2009; and (b) beginning in the month of May 2010.

[240] The November 2009 Costco sales have a direct impact as the following comparison demonstrates. In December 2008, Simms sales were $433,677.00 and in December 2009, they had dropped to $281,514.00. If one continues the comparison, sales for January 2010 are roughly 1/8 of what they were in January 2009. While February 2010 sales are increased approximately $45,000 from sales of the same time in 2009, sales for March and April 2010 are down, respectively, approximately 50% and 33%. After the May 2010 influx of R & R product in Costco stores, an important decline in Simms' sales is also evident.

[241] Costco argues that its sales are not the cause of Simms' damages but rather there are other "very probable" sources for the decrease in sales: the R & R bankruptcy, the economic recession which began in 2008, changing market trends in high-end denim, and the simple fact of the constant decrease in Simms' sales of R & R product from 2008: down 8% in 2008 and 12.6% in 2009, as direct evidence of declining interest in the product.

[242] Firstly, the evidence shows that the Costco sales detrimentally effected the "premium brand perception" amongst Simms' clients. Ms. Sigal testified that the key to the R & R image was keeping it "exclusive, chic, and edgy". Also, she and Ms. Torossian testified to the four "clothing" seasons of their business:

- Spring: January to April
- Summer: May, June
- Fall: July, August, September
- Holiday: October, November, December.

Of these four seasons, Spring and Fall have the biggest volume.

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[90] Exhibit D-61, at page 9.

[243] Ms. Sigal and Ms. Torossian, both experienced professionals in the retail business of high-end women's clothing, confirmed that complaints were received from their high-end retail store clients following the Costco entry into the market in November 2009. Their evidence is uncontradicted to the effect that that the only difference apparent to a consumer between the Simms jean and the Costco jean would be the interior tag showing that the Costco jeans were made in Guatemala since in all other respects, they were indistinguishable from the premium brand sold at Simms' retailers' high-end stores.[91]

[244] Ms. Sigal testifies that she received many complaint emails after May 2010 to the same effect.[92] She could not get re-orders: where she was accustomed to 100% re-orders, she was now getting 3% re-orders.

[245] She sought to do damage control with her clients and agreed to take R & R product back from her clients.

[246] Simms asserted - in the U.S. bankruptcy proceedings - that in December 2009, it reasonably believed that the Costco problem was resolved since it had sent several cease-and-desist letters to Costco and Costco's attorneys and moreover, it was no longer receiving complaints from its customers. In the circumstances, the Court finds this assumption by Simms to be reasonable.

[247] It is only in the beginning of May 2010 that the 65 Costco stores across Canada begin to sell the second wave of R & R products i.e. the 46,000+ units of R & R products.

[248] Simms receives a series of emails from 5 different retail store clients (Exhibit P- 17) – dated from May 19, 2010 through to June 18, 2010 – wherein these retail store clients cancel orders with Simms citing Costco sales as the reason. For the reasons that follow and since the actual clients did not testify at trial, the Court can initially only take from these emails that this is what the clients told Simms, not that the Costco sales were the proven reason that they cancelled their orders with Simms.

[249] One of those emails, Exhibit P-17 A, under the heading "damage control" is sent to Ms. Torossian. The email from the Simms' client is dated June 8, 2010 and states: "This Costco issue is really affecting us, was there (at Costco) today and saw at least 50 women swarming over the denim, not to mention you have retailers that are discounting the brand and telling her staff and clients that Rock is bankrupt and going out of business… Let us talk."

[250] Other of the P-17 emails indicate:

- ***"we cannot carry brands of clothing that Costco is selling because we are a high-end boutique";***

[91] Exhibit P-18.
[92] Exhibit P-17.

- ***"Rock and Republic jeans are being sold in Costco for $98, which is way below our cost and they have a ton of it… We cannot sell any of our product";***
- ***"After … discovering R & R in Costco, I will have to cancel all fall purchase orders"; "…with Costco carrying older style Rocks for $99! I feel that this has drastically hurt our Rock business over the past couple of months and we have maybe sold 2 pairs total. I have had numerous customers call me and tell me they have purchased them there. This is not good for the brand or for either of us! Due to the decrease in sales AND the fact that they continue to get new shipments at Costco, I would like to cancel my fall 2010 order and anything for my summer order that is yet to be shipped"; and***
- ***"My customers are very brand conscious so I know they will see the brand differently, even if it is just the basic styles being sold at Costco, they will not care… I have already had someone mention this."***

[251] Costco argues that although the emails filed in evidence by Simms with respect to the cancelled orders are admissible to show that the statements were made, they are inadmissible as evidence of the truth of those statements.

[252] Three of the emails refer to the bankruptcy, but all emails assert Costco as a reason for cancellation.

[253] The Court agrees with Costco that these emails cannot be accepted by the Court for the truth of the statement that these retailers cancelled their orders because of the Costco sales. The Court comes to this conclusion for the following reasons:

[254] *CCQ* art. 2869 allows the statement of a witness to take the place of testimony where the parties consent: there is no consent here;

[255] *CCQ* art. 2870 permits a statement made by a person who does not appear as a witness to be introduced into evidence – with the Court's authorization – where it is impossible for the witness to attend and where there are sufficient guarantees of the reliability of the statement. The article requires that notice must be given to the adverse party. None of these criteria are met here.

[256] Other than these 2 articles from the Quebec Civil Code, the Code of Civil Procedure[93] permits a written statement that "is only designed to prove a fact that is secondary to the dispute that has been notified to the other parties beforehand." The conditions of this article have not been met by Simms. *CCP* art. 174 (3) requires that the joint declaration state "a list of those witnesses whose evidence a party intends to present in the form of sworn statements…" In

[93] *CCP* art. 292.

the present joint declaration, Costco only admitted to receipt and not to the content of Exhibit P-17.

[257] Furthermore, the facts of these emails are not "secondary facts". A primary fact is one which is essential for the plaintiff to prove as a foundation for the syllogism necessary to win its case. In the present case, that syllogism would be: "Damages are caused to Simms due to lost sales since its retailer customers cancelled or refused to purchase because of Costco's sales of the R & R product". Accordingly, the facts sought to be proven by the emails are not secondary facts but primary facts.

[258] However, the circumstantial evidence is sufficiently serious, precise and coherent to prove that this probably was the reason why these high-end retail stores cancelled their orders because:

a. the same type of complaints came from different retailers in different provinces;

b. the emails all came within a short period immediately after Costco supplied its stores across Canada with the R & R products; and

c. it is logical that a high-end store would not want to order more R & R product that it would have to sell at the $300 price required by Simms when Costco was effectively able to sell an identical (to the consumers' eyes) product for $100. The Court accepts Ms. Sigal's testimony that the consumer that is prepared to pay $300 for a pair of jeans is "buying exclusivity". That customer will not buy that jean if it can be purchased by Costco's customers for $100 per pair.

[259] Moreover, Exhibit P-18 shows the effect of the Internet: a fashion blogger advises their readers in the lower mainland of British Columbia that the R & R jeans being sold at Costco are authentic and indicates where they may be purchased.

[260] The Court is satisfied that the first wave of Costco sales in November 2009 have three effects: (a) they reduce the exclusivity of the R & R brand and take customers away from Simms' high-end retailers since the Costco price is one third of the high-end retailer price; (b) this creates animosity against the R & R brand (and Simms) for those high-end customers who have purchased the $300 jeans only to find out that the jeans which look for all intents and purposes like their jeans, may be purchased for one third the price at Costco; and (c) the high-end store customers who have bought the cheaper jeans at Costco in November 2009 or in the spring of 2010 as Ms. Torossian said, are less likely to purchase additional or other pairs of R & R jeans in the summer of 2010 or later on, at Simms' high-end retailers.

xvii) Other Contributing Factors to Declining R & R Sales for Simms in 2009

[261] After Simms became aware of the first Costco sales, internal R & R communications in November 2009 indicate that Ms. Sigal had expressed to Ms. Molly Sussman, one of her prime contacts at R & R, Ms. Sigal's extreme anger[94]. Ms. Sussman's comprehension of Ms. Sigal's communication was that "this could definitely be the last straw; she (Ms. Sigal) said that she expects us to do everything in our power to get the jeans out of Costco. I did not give her any info. Of course, let me know when you can discuss" (this Court's emphasis). This reference is from an email sent by Ms. Sussman to Ms. Andrea Bernholtz, the president of R & R.

[262] Ms. Torossian testifies that 75% of Simms' sales of R & R products are with only seven Canadian retail firms and that all of these clients were upset with the "Costco effect". The evidence shows that in November 2009 Costco is selling both R & R U.S.-made and R & R Guatemalan-made garments in the same styles as Simms but in different colours.

[263] As noted, Simms files into evidence various letters it received from angry customers (Exhibit P-17 A).

[264] At the same time, correspondence between Simms and R & R demonstrates that Simms recognizes, even before November 2009, that there are other factors diminishing R & R sales.

[265] Firstly, Ms. Sussman questions – to her superiors – the lack of justification for Simms' sales projections. In an internal R & R email dated May 18, 2009, Ms. Sussman makes reference to the 3-year sales projections that Simms provided under paragraph 2.8 of the EDA (P-2). Ms. Sussman notes that Simms has forecast the following projected R & R sales: 2009: $8.5 million; 2010: $9 million; 2011: $ 9.5 million, and 2012: $10 million in sales. This projected forecast, prepared by Ms. Sigal and Ms. Torossian, is based on a straight line increment of $500,000 for each year. No other justification is given for such an increase. Ms. Sigal testifies that her business philosophy is to "under-promise and over-perform".

[266] However, the Court cannot accept that these Simms sales projections are proven on the balance of probabilities.

[267] The following additional important contributing factors arise in correspondence between Ms. Sigal and Ms. Sussman beginning on November 20, 2009, approximately two weeks after the original Costco sales (Exhibit P-11). Such details constitute an admission by Simms, after the first wave of Costco sales but

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[94] The Court infers that this extreme anger expressed by Ms. Sigal to her R & R counterpart was later understood by Mr. Rolnick when he told Costco that R & RR & R was dealing with a "very mad distributor".

before the second wave, that there were other factors at play in the marketplace reducing Simms' sales. This also corroborates that Simms' R & R sales going forward were more likely to have stagnated in 2010, and not increased as Simms had projected.

[268] In her November 20, 2009 email communication to Ms. Sussman of R & R Ms. Sigal argues [95] that :

> ***"… <u>in order to get back on track</u> I really need to drop our prices. This is not as much a Costco issue, <u>but more of a reaction to slowing retail sales in 2009</u>… but in these economic times I feel there has been <u>a big shift in attitude</u>".***
>
> (this Court's emphasis)

[269] Furthermore, Ms. Sigal confirms that her retailer customers are "buying cheaper brands than they ever bought before". Ms. Sigal raises – for R & R's appreciation – issues that Ms. Sigal is facing with certain of her retailers (but which she does not blame on the "Costco effect"): for one of the largest retail customers, she says that she has had to give markdowns, and for another, she says that she has to sell only on consignment. For these reasons, Ms. Sigal argues to Ms. Sussman that Simms should benefit from a 30% discount from R & R across the board for 2010.

[270] In the ensuing correspondence, Ms. Sussman gives no hint to Ms. Sigal of what she knows about Costco selling the R & R products.

[271] In fact, beginning on November 20, 2009, Ms. Sussman advises Ms. Sigal that R & R is not interested in reducing prices and that the issues raised by Ms. Sigal are "more about redefining who we are as a brand." Ms. Sussman confirms on November 23, 2009 that R & R is not prepared to give a discount to Simms to which Ms. Sigal responds with discouragement: "It looks like we are not getting a statement from Rock any time soon (Court's note: a statement regarding how Costco came into possession of this merchandise and denials from R & R that they knew or were involved). So now we have no statement and no news of financial compensation to offer to our customers to get out of this mess… When will we be able to have an answer from Andrea (Court's note: the R & R President) …?"

[272] The following evidence explains certain problems with sales by Simms of R & R Product unconnected to Costco:

a. in 2009, R & R complained about the lack of detail in Simms' marketing plans for the R & R product (D-11 p. 2);

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[95] Exhibit D-11 at p. 48.

b. on Sept. 8, 2009, R & R expresses internal concerns about "Simms women's business …not performing well at all at the retail level" (D-11 p. 5);

c. on October 15, 2009, an internal R & R email from Ms. Sussman refers to Ms. Sigal being "very concerned with selling to Holt and Aritzia", in part due to the missed jeggings trend and that "Aritiza is alarmed at Rock Women's numbers in a big way" (D-11, p. 7). "Jeggings" were a product design that became popular but which R & R did not offer in its product line.

[273] This is all hearsay evidence and in view of R & R's difficulty with telling the truth in this file, the Court measures these statements carefully. However, in the minimum, the Court determines that the little weight to be given to these statements nonetheless corroborates the probability that Simms' sales would flatten out in 2010 and 2011 and would not have had the upward progression that Simms asserts.

xviii) Incitement to have EDA Rejected under Chapter 11

[274] Costco argues that even without Costco orders R & R would have moved to have the EDA rejected just as R & R did with an exclusive distributorship for the US. [96]

[275] The evidence is to the contrary. The uncontradicted testimony of Ms. Sigal is that she was told by R & R senior managers at the Las Vegas trade show in 2010 that Costco had said that the R & R sales were the best they had ever had with this type of product.

[276] Even though orders were later cancelled, Costco did place orders both before and after R & R undertook its EDA rejection motion in the U.S. Bankruptcy proceedings.

[277] Also before the EDA was rejected by the US Bankruptcy Court, R & R entered into a distributorship agreement on July 29, 2010 with Quetico and Kontakt. The agreement excluded the U.S. and Europe and the labelling was to be bilingual: English/French; therefore, the probable conclusion is the goods were to be sold in Canada. Up to that point, Costco had been Quetico and Kontakt's only customer for the R & R Product in Canada. This distributorship agreement is highly irregular given that R & R was fully aware of the EDA and yet did not restrict these intermediaries from selling into Canada in contravention of Simms' rights.

[278] In its Motion to Reject, R & R gave as one of its reasons to reject, the fact that under the EDA, it could not sell to "other distribution channels … to customers like Costco". [97]

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[96] Exhibit D-30, P-21, P-22 and P-23.

[97] Exhibit 2-DD at p. 5.

[279] There is no evidence of direct discussions between Costco and R & R wherein the former incites the latter to take the rejection proceedings.

[280] As the following evidence demonstrates, the circumstantial evidence is serious, precise and coherent that Costco knew or should have known the probability of R & R seeking a rejection of the EDA through the US Bankruptcy proceedings as a result of its orders and most importantly, as a way of circumventing Simms' exclusivity

[281] Firstly, there are the original concerns expressed by Costco and the fact that the Costco's parent company had sold R & R merchandise (D-10) [98]. Secondly, Costco is aware of the R & R and Simms exclusivity agreement as a result of the November 2009 cease and desist letters. Thirdly, given the amount of orders placed by Costco (for example, the 50,000 unit order of Men's jeans), it is probable that R & R advised Costco of its Rejection Motion as a means of promoting Costco's trust. This is particularly probable given the July 20, 2010 and August 2, 2010 Simms' cease and desist letters that refer to Simms intention to institute injunction proceedings (P-13 and16). The proximity of the date of the R & R Rejection Motion – Sept. 1, 2010 – adds to this probability.

[282] R & R's Rejection Motion is a direct and logical result of the orders placed by Costco and is part and parcel on the continuum of contractual interference for which Costco is legally responsible. R & R's case in support of the Rejection Motion is based on the Costco orders and the potential for future Canadian sales (P-2DD at p. 5).

Novus Actus Interveniens

[283] Costco argues that:

> [41] […] ***the termination of the contracts to which R & R was a party […] results from the overall approach adopted in its reorganization process as part of the bankruptcy proceedings. <u>The Distribution Agreement would have been terminated whether or not Costco had been involved</u>.***[99]
>
> (this Court's emphasis)

[284] On January 28, 2010, Costco ordered 46,084 units of ladies' jeans and 19,200 units of ladies' tee shirts [100]

[285] In its argument, Costco asserts that R & R "used Costco as a pretext and made ill-founded representations in the U.S. bankruptcy proceedings" that cannot be

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[98] Costco's parent company is a major US retailer.
[99] Defendant's Argument, para 41.
[100] Exhibit D-64.

attributed to Costco "as it had already decided at the time not to purchase R & R products anymore and … had cancelled orders". [101]

[286] To determine whether this assertion is supported by the evidence, the Court will first review the general principle of an intervening cause (*"novus actus interveniens"*) which breaks the chain of causality between the alleged wrongdoer's actions and the damages. After reviewing the law, the Court will complete its analysis applying the law to the relevant facts. Costco chose not to call any R & R witnesses in person on this issue other than filing certain affidavits and transcripts from the Chapter 11 proceedings, but none of these affidavits address the issue of "Whether the Distribution Agreement would have been terminated whether or not Costco had been involved".

GOVERNING LAW

[287] Firstly, the law. Through proving *novus actus interveniens*, a defendant is able to demonstrate a "new element" that breaks the chain of causation:

> ***Dans sa recherche d'un lien causal ayant un caractère logique, direct et immédiat, la jurisprudence accorde une importance particulière à l'effet du novus actus interveniens, c'est-à-dire à l'événement nouveau, indépendant de la volonté de l'auteur de la faute et qui rompt la relation directe entre celle-ci et le préjudice, même si, selon le système de la causalité adéquate, l'acte fautif pouvait à lui seul objectivement provoquer le dommage et l'agent en prévoir les conséquences.***[102]
>
> (this Court's emphasis)

[288] Thus, the Superior Court has previously accepted *novus actus interveniens* which permits a defendant to exonerate themselves from liability by proving that their fault was not the direct cause of the damage.[103]

[289] Costco has the burden of proving *novus actus interveniens*.

[290] A "*novus actus interveniens*" can arise in any of the three following situations: (a) the fault of a third party, (b) the fault of the victim, and (c) a non-culpable event ("évènement non fautif"). In this case, Costco argues that a non-culpable event, the rejection of the "burdensome contract", constitutes *novus actus interveniens*.

[291] *Novus actus interveniens* cannot result from an act or event which has any link with the initial fault or constitutes a continuation of that fault. This is the second

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[101] Defendant's Argument, para. 20.

[102] Jean-Louis BAUDOUIN, Patrice DESLAURIERS & Benoît MOORE, *La responsabilité civile* (Montreal: Yvon Blais, 2014) at para 1-691.

[103] *Promutuel Lévisienne-Orléans, société mutuelle d'assurances générales c Service de techniciens en électricité du Québec, STEQ inc.*, 2010 QCCS 1608 at paras 163, 166.

of two essential conditions for the application of the doctrine of *novus actus interveniens* listed by Baudouin, Deslauriers and Moore:

> ***Pour que [le principe de novus actus interveniens] puisse s'appliquer, deux conditions essentielles sont requises. D'une part, il faut qu'il existe une disparition complète du lien entre la faute initiale et le dommage subi. D'autre part, il faut que ce lien survienne à nouveau, mais cette fois-ci en raison de l'existence d'un acte sans aucun rapport avec la faute initiale. Dans les autres hypothèses, il y a seulement continuation d'un même processus qui peut mener, dans certains cas, à un partage de responsabilité.***
>
> (this Court's emphasis)

[292] The Court's analysis and conclusions focus mainly on the second condition: the requirement for the absence of a link between the initial fault and the event or act alleged to constitute *novus actus interveniens*.

ANALYSIS:

xix) September 2010: Rejection of the "Burdensome" Contract by the U.S. Bankruptcy Court: Novus Actus Interveniens?

[293] Simms argues that Costco cannot claim the U.S. bankruptcy proceedings as a *novus actus interveniens* since Costco was responsible for R & R instituting the relevant application to reject the EDA in those proceedings.

[294] The Court agrees. The evidence from R & R's representatives shows that Costco was the direct cause of R & R making the application in rejection to the U.S. Bankruptcy Court. As such, Costco cannot invoke the rejection as an intervening cause, despite the fact that Costco later cancelled certain orders on which R & R relied in those proceedings.

[295] This determination by the Court is based on: (a) the following excerpts from the U.S. bankruptcy proceedings (Exhibit P-2DD) and (b) the Affidavit of the R & R restructuring officer Mr. Lurie in those proceedings (Exhibit D-24)[104]. In particular, the following excerpts from those proceedings are relevant:

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[104] These documents were filed respectively by both parties. There was no objection to their filing. The transcripts of the proceedings were prepared by a certified stenographer and are accepted as sworn evidence before this Court. The affidavit is a semi-authentic act under Quebec law for the reasons that follow and is also accepted as evidence. The Quebec Court of Appeal has held that affidavits sworn before a foreign public officer (specifically, a New York notary public), constitute semi authentic acts pursuant to article 2822 *CCQ (Ruthen (Succession de)* 1999, AZ-99011139, at 32 (QCCA)). Legal author Catherine Piché suggests that "*les copies des procédures judiciaires d'un tribunal étranger*" are also semi-authentic acts (Jean-Claude Royer, *La preuve civile, 5è éd.* by Catherine Piché (Montreal: Éditions Yvon Blais, 2016), at 253.

a) MR. SPIZZ [Attorney for R & R]

- "What the debtor wishes to do is reject the contract with Simms ***so it'll be free now to sell in other distribution channels***. Those channels, Your Honor, include channels for discount product, which -- ***to customers like Costco***. The product that the debtor wishes to sell are actually different than the product that it's selling with Simms and what is part of the Simms' agreement. However, the debtor is restricted from selling that product in Canada by virtue of the distribution agreement[105];
- The profit on that 4 million dollars [from Simms] in a whole year pales in comparison to the profit that the debtor will get on just these two orders that it has in hand now [from Costco][106];
- The debtor has – believes this market, which everybody knows is this large market for the discount goods in Canada – could conservatively bring in the debtor some 20 to 30 million dollars a year[107];
- [I]t's based upon business judgment of this debtor that, to allow it to free itself from the confines of this restrictive agreement with Simms, which has been very limited in nature, which sales have been declining, and even at its height was never anywhere near ***the kind of sales that the debtor has the ability to generate through the other distribution chain***[108]***."***

…

b) CROSS-EXAMINATION [of Mr. Lurie, Chief Restructuring Officer, R & R] BY MR. WEISS [Attorney for Simms]:

Q. You also referenced in your testimony, if I'm correct, that the second order is ***contingent upon the outcome of the rejection motion***?[109]

A. That order (this Court's note: "purchase order for goods") is pending, subject to the outcome of this rejection motion. Clearly if the motion to reject the contract was not granted, that order would not be a real order, would not be placed.

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[105] P-2DD, p. 5, lines 12-20.
[106] P-2DD, p. 6, lines 23-25.
[107] P-2DD, p. 7, lines 1-5.
[108] P-2DD, p. 9, lines 6-12.
[109] P-2DD, p. 27, lines 7-25.

> **Q.** Is there a specific requirement or contingency in this first order to the outcome of the rejection motion?
>
> **A.** I do not believe so. I do not know, but I do not believe so.[110]
>
> **THE COURT**:
>
> […] what would be the impact of getting – in your view, getting this decision by September 14th instead of today [September 8th]?[111]
>
> **THE WITNESS**:
>
> Your Honor, I can't – cannot honestly answer that question, because I don't know ***what the reaction of the buyer would be to the delay in the hearings*** with regard to accepting the first order or not. I don't know.[112]
>
> (this Court's emphasis)

[296] Given all the evidence and on the balance of probabilities, the purchase order must be for goods destined for Costco.

[297] The judgment of the U.S. Bankruptcy Court is dated September 13, 2010 but the rejection is effective as of August 12, 2010.[113]

[298] In his sworn affidavit (Exhibit D-24), Mr. Lurie, R & R's Chief Restructuring Officer, also stated:

> ***6. When the Agreement (this Court's note: the EDA) was executed, R & R believed it was prudent to limit sales in Canada to only R & R Premium Goods. The Debtors recently determined, however, that there is an untapped market in Canada for discounted goods in general, and for R & R's Second Tier Goods, specifically, and that sale of the Second Tier Goods[114] in Canada will be more profitable to R & R than will the continuation of the exclusive distributorship Agreement with Simms which prevents sales in Canada by R & R of Second Tier Goods or any R & R goods.***
>
> ***7. Once the Agreement has been rejected, R & R believes, as a conservative estimate, that it will be able to sell approximately $40 to $30 million per year of the Second Tier Goods in Canada, at a gross margin of 50%. Currently, R & R has in hand an order for 50,000 units at $48.00 per unit from a third party, Quetico, LLC, with***

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[110] P-2DD, p. 28, lines 1-8.
[111] P-2DD, p. 29, lines 18-19.
[112] P-2DD, p. 29, lines 24-25; p. 30, lines 1-2.
[113] Exhibit P2-F.
[114] An example of "Second Tier Goods" is an R & R jean manufactured in Guatemala.

> ***another order from Quetico, LLC for the same number of units at the same price pending. Both orders are contingent upon the rejection of the Simms Agreement. Each of these two orders has a gross margin of 58%.***
>
> ***[…]***
>
> ***10. Based upon the sheer volume of the Canadian discount market, and the fact that the Agreement prohibits R & R from selling Second Tier Goods in Canada, R & R firmly believes that the Agreement is extremely burdensome to the Debtor's assets … Since the rejection of the Agreement will make R & R more profitable, it is clearly a sound business decision."***[115]

[299] In the subsequent paragraphs of his affidavit, Mr. Lurie notes that since Simms' sales have been declining116 and since the Agreement prevents R & R from selling these more profitable Second Tier Goods in Canada (and also any other R & R goods), that there is "no business reason" to continue to perform under the EDA. He says that R & R's "decision to reject the Agreement was made in good faith, for no reason other than sound business justifications".

[300] This statement is disingenuous given :

a) on September 18, 2009, R & R wrote to Quetico and Mr. Rolnick of Kontakt[117] confirming that the goods could be sold without any geographic restriction on re-sale, knowing that the re-sale was for Costco for retail sale into Canada where the EDA prohibited those sales; and

b) while at the same time by its statement dated June 11, 2010 [118], R & R confirmed to "their loyal customers" that "Costco is not on Rock and Republic's customer list and a full investigation is ongoing concerning these findings". However, in a November 12, 2009 email from Mr. Rolnick to Mr. Agakanian and Costco's Ms. Janek, Mr. Rolnick confirms that "Rock owners are fully aware that the goods went to Costco (sic) and they are already dealing with a very mad distributor. This will be resolved promptly"

[301] The purchase orders in para. 7 of the R & R affidavit of Mr. Lurie are the Costco orders. The fact that the orders are "contingent upon the rejection of the Simms

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[115] D-24, p. 2-3.
[116] According to the affidavit, R & R sales to Simms were: $9,248,707 in 2008, $ 6,795,710 in 2009 and from January 1 to September 7, 2010, sales were only $2,228,852.
[117] Exhibit D-6.
[118] Exhibit P-12.

agreement[119]" is probable circumstantial evidence that Costco knew or should have known that the EDA was an absolute impediment to its purchase of the Products. The Court determines from all the Lurie evidence that – even though not a written condition – Costco would not purchase further Products if the EDA was still in force.

[302] In its argument, Costco cites this sworn affidavit of Mr. Lurie as evidence that "[t]he Distribution Agreement would have been terminated whether or not Costco had been involved"[120]. The Court disagrees. The affidavit proves the opposite. Mr. Lurie's specific references to the "untapped market in Canada" and the "sheer volume of the Canadian discount market" are thinly veiled references to Costco. In addition, Mr. Lurie refers to two specific orders for Quetico LLC; Quetico LLC was Costco's American intermediary for placing these orders with R & R, even though Costco purchased directly from ABFI in Canada.

[303] The evidence shows that Costco had a critical role in the "rejection proceedings": not only did R & R rely on orders placed by Costco (through Quetico) – and the profits they would generate – as the basis for its rejection argument that the EDA was "burdensome", but the orders themselves would probably be cancelled in the absence of the rejection of the EDA.

[304] In *Place Biermans inc v. C.D.*[121], the Superior Court held that where a defendant, by its negligence, creates conditions which allow for a second actor to commit a fault that causes damage, the defendant must be held responsible and cannot claim *novus actus interveniens*. In that case, the court found that a company managing a commercial shopping center was partially responsible for a fire that destroyed a restaurant because its negligent management of the premises created conditions which allowed a reckless teenager to commit arson. In those circumstances, even arson could not constitute an intervening cause:

> ***[59] Nous traiterons en premier lieu de la théorie de « l'actus novus interveniens » soulevée par les procureurs de GESTION. Le Tribunal est d'avis que cette théorie ne s'applique pas en l'espèce. En effet, il était prévisible, et la défenderesse GESTION ne pouvait ignorer qu'un bidon d'essence situé dans un cabanon non cadenassé à la sortie arrière du complexe commercial, attirerait la curiosité et la convoitise des jeunes qui se rendent là précisément pour consommer des drogues à l'abri des regards. Cette consommation de drogue implique généralement l'usage d'allumettes ou de briquet. Quoi de plus invitant pour des jeunes qu'un cabanon dont la porte n'est pas verrouillée […] Dans ces conditions, le risque était grand que le feu soit déclenché soit accidentellement, soit***

[119] This is the EDA.
[120] Defendant's Argument, para 41.
[121] *Place Biermans inc.* v. *C.D.*, 2010 QCCS 4170.

> ***<u>volontairement</u>, notamment comme ce fût le cas, à l'occasion de la consommation de drogue. Les jeunes sont connus pour leur curiosité, pour leur témérité, pour leur manque de jugement et parfois aussi pour leur penchant à se livrer à des mauvais coups.***
>
> (this Court's emphasis)

[305] In an earlier case, the Supreme Court of Canada held a defendant liable for a subsequent injury suffered by a plaintiff while he was using crutches to recover from a prior injury caused by the fault of the defendant. The Court reasoned that the plaintiff would not have been using crutches were it not for the original fault of the defendant, and that as such the defendant could not argue *novus actus interveniens* in the absence of any fault on the part of the plaintiff:

> ***Il est évident que si le jeune homme n'avait pas subi une première fracture par la faute de l'intimé, il n'aurait pas subi la seconde. On ne peut pas lui reprocher d'avoir marché avec des béquilles. Son médecin le lui avait prescrit. Évidemment, il lui avait également dit de ne pas faire porter son poids sur la jambe blessée mais de se supporter avec des béquilles. Cependant, sans le faire exprès, il a perdu l'équilibre en voulant passer dans une porte à ressort. Faut-il voir là une faute? Celui qui est obligé de marcher avec des béquilles n'est évidemment pas entraîné à le faire mais on ne peut sûrement pas le lui reprocher. <u>S'il est obligé de s'y aventurer, c'est comme conséquence du premier accident dont la responsabilité est imputable à l'intimé</u>.***
>
> ***[…]***
>
> ***Ici la preuve ne démontre pas que la seconde fracture soit le résultat d'une faute de la victime. Comme elle est évidemment par ailleurs la conséquence de la condition dans laquelle cette dernière s'est trouvée par suite du premier accident, il faut l'y rattacher.[122]***
>
> (this Court's emphasis)

[306] Based on the above jurisprudence, Quebec law confirms that where the defendant, by its fault, creates the conditions for an event that causes damages, and where that event is not otherwise attributable to the fault of a third party or the victim, the defendant cannot claim novus actus interveniens. In such circumstances, the event is merely the continuation, or a foreseeable consequence, of the defendant's original fault.

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[122] *Chartier et Chartier* v. *Laramée*, [1969] SCR 771, 777.

[307] In the present case, the evidence demonstrates that Costco – by offering to purchase the Product and purchasing the Product – created the conditions which allowed R & R to claim before the U.S. Bankruptcy Court that its contract with Simms was "burdensome". During the course of the bankruptcy proceedings, R & R's counsel referred numerous times to the orders placed by Costco (through Quetico) and the higher profits that could be generated by those orders.

[308] In these circumstances, Costco cannot invoke the rejection of the EDA as an intervening cause. The rejection is merely the continuation, or foreseeable consequence, of Costco's fault – inducing R & R to breach its contract with Simms by providing it with a more profitable alternative.

[309] Costco cannot shift its responsibility onto R & R. As noted earlier, before there was any "rejection application", Costco initiated its next important orders. As a result, Costco effectively required R & R to institute the "rejection application" if R & R wanted the orders. Accordingly, Costco shares responsibility for the "rejection application" being taken and therefore cannot claim that the application was the independent act of R & R. The rejection application does not constitute a novus actus interveniens.

[310] As another novus actus interveniens argument, Costco argues that "virtually all of the contracts to which R & R was a party were rejected on March 30, 2011". This was the date of the purchase of the R & R brand by VF Corporation became effective[123]. The Court will now analyze this argument.

xx) March 2011: Rejection of All R & R Contracts by the U.S. Bankruptcy Proceedings and Sale of R & R's Trademark to VF

[311] Simms asserts that its damages should be calculated up to the end of the EDA, December 31, 2012. Ms. Sigal also asserts that she could have done business with the new trademark holder, VF Corporation, and so continued the R & R business with the new trademark owner up to the end of the EDA and beyond.

[312] The evidence, on balance, does not support Simms' assertion.

[313] In the U.S. Bankruptcy proceedings on January 28, 2011, an Amended Disclosure Statement (Exhibit D-30) put forward by (a) the Debtors' Unofficial Commission of Unsecured Creditors, and (b) VF Corporation, put forward an arrangement in which paragraph 8.1 proposed rejection of all executory contracts that had not previously been rejected and also proposed the sale of the R & R trademarks.

[314] On March 23, 2011, the U.S. Bankruptcy Court approved the rejection of all outstanding executory contracts that had not previously been rejected and at the

[123] Exhibit D-35.

same time, the Court approved the sale of the R & R trademarks to VF Corporation.

[315] Both of these events, the rejection of all contracts and the sale of the trademarks, are independent from any prior faults of Costco.

[316] Consequently, the Court determines that this order by the U.S. Bankruptcy Court definitively marks the end of the period of Simms' damages since, in all events, the EDA would have been terminated by this date March 23, 2011 (rounded off by the Court for convenience to March 30, 2011).

[317] The sale of the trademark also constitutes a *novus actus* interveniens because the sale of R *&* R's trademark to VF cannot be linked to Costco's fault. Ms. Sigal's testimony that Simms would have done business with VF is speculative and not proven on the balance of probabilities.

[318] Accordingly, as regards the sale of the R *&* R trademark, Costco has also proven both elements of *novus actus interveniens* mentioned above. This intervening cause is only proven as of March 23, 2011, the date of the sale. Hence, Simms' claim for damages begins with the first cease-and-desist letter on November 12, 2009 and ends with the sale of the trademark on March 30, 2011, a period of about 15 months.

Legal Principles: Evaluating Expert Evidence

[319] The parties adduced conflicting expert evidence on the issues of causation and damages. How does the Court evaluate this conflicting evidence?

[320] Mr. Justice Joel Silcoff124 of the Superior Court undertook an extensive review of the principles applicable to expert evidence. This Court proposes to rely on those principles:

> ***"[431] As a general principle, the credibility, reliability and probative value of expert evidence is assessed in the same manner as is that of ordinary witnesses.***

Mr. Justice Silcoff added [125]:

> ***« A. DUTIES AND RESPONSIBILITIES OF EXPERT WITNESSES***
>
> ***[426] The duties and responsibilities of expert witnesses were discussed at length by Cresswell J. in the 1993 seminal and frequently cited U.K. Queen's Bench Division (Commercial Division) judgment in National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd ("The Ikarian Reefer").***

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[124] *Vidéotron ltée* c*. Bell ExpressVu, l.p.*, 2012 QCCS 3492 (appeal decision rendered on March 6, 2015 in *Vidéotron, s.e.n.c.* c*. Bell ExpressVu, l.p.*, 2015 QCCA 422) but this aspect of trial judgment not overturned.

[125] Ibid. at para 426.

The duties and responsibilities of expert witnesses in civil cases include the following:

1. ***Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v. Jordan, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).***
2. ***An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd. v. Commercial Union Assurance Co. Plc., [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and Re J. [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.***
3. ***An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J. sup.).***
4. ***An expert witness should make it clear when a particular question or issue falls outside his expertise.***
5. ***If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J. sup). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co. Ltd. And Others v. Weldon and Others, The Times, Nov. 9 1990 per Lord Justice Staughton).***
6. ***If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate, to the Court.***
7. ***Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports***

or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice). »

[321] The essence of these responsibilities are succinctly contained in *CCP* art. 22 which require that the expert "enlighten the Court" and do so "objectively, impartially and thoroughly".

[322] The Court will use one or more of the foregoing criteria to assess the probative and determinative value of the evidence adduced by each of the experts for the following issues.

xxi) Other Novus Actus Interveniens (Intervening Causes) Alleged by Costco[126]

Recession

[323] Principally for the issue of causation, Costco relies on the expert opinion of Mr. Jacques Nantel, Ph.D., recently retired as a full professor from the Université de Montreal, where he taught since 1981. Mr. Nantel was qualified as an expert in marketing, retail commerce and management of trademarks. He has experience sitting on the boards of directors of several Quebec companies but no high-end fashion retailers, except in children's clothing. He has no direct hands- on experience in high-end fashion retailing.

[324] His expert report on behalf of Costco entitled "A Marketing Perspective on the Case of Simms Sigal & Co. v. Costco Wholesale Canada Ltd." is dated October 29, 2013.

[325] Mr. Nantel opines that "the recession also had a dramatic impact…" He also states under his heading "Conclusions": "Further, in 2009 and 2010, the recession had a negative impact on retail sales, and more so for luxury products than for regular ones". He provides no authority for this conclusion and, accordingly, the Court finds more compelling "the on-the-ground evidence" of Ms. Sigal that her particular high-end brands were marginally or not affected at all by the recession.

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[126] Mr. Lajoie (Costco's accounting expert) at p. 7 of his report opines that "various factors could have played a role in the decrease in R & R sales in 2010". Amongst examples he gives are a slow-demand for high-end jeans due to the recession and the R & R bankruptcy. Since the Court must consider evidence on the "balance of probabilities", the evidence of Mr. Lajoie on this issue of causation is qualified by himself as "one of possibilities" and for this reason, is given less weight by the Court. Mr. Nantel's opinion is given on the basis of "likely effects" and accordingly, the Court will analyse the Costco position with particular consideration of Mr. Nantel's evidence on causation.

[326] Costco asserts that that the Court should choose the expert evidence of Mr. Nantel that asserts that the R & R sales would necessarily have decreased in 2009 and 2010[127].

[327] On the contrary, Ms. Sigal testifies that Simms' business in its other high-end lines was "robust" in referring to two other Simms' high-end brands: Lafayette and Rodriguez. She also made reference to the medium high-end brand of jeans that Simms carried, Rich-and-Skinny.

[328] Importantly, Mr. Lajoie, Costco's expert, at p.32 of his report makes reference to a competing denim line called True Religion for which ANV Clothing, one of the other three companies in the Simms' premises, was the distributor. During the recession, their sales increased: 2008: $8,891,771 and 2009: $9,811,355.

[329] The Supreme Court of Canada confirms that: "… causation can be inferred – even in the face of inconclusive or contrary expert evidence – from other evidence including merely circumstantial evidence".[128]

[330] Ms. Sigal used the expression "flat is the new up" to describe the phenomenon that in the new economy, as long as one could keep one's sales on the level, this should be considered as good as looking to increase sales each year, the barometer of success used in the past.

[331] Ms. Sigal has spent her professional career in high-end women's fashion. As noted earlier, she testifies that her business ethic is to "under-promise and over-perform". Since other of her high-end lines of clothing were either unaffected by the recession or were "flat" i.e. sales remained stable, she testified that she would have met her earlier sales projections which showed constant increased sales.

[332] Since Mr. Nantel did not refute these two real-life examples presented by Ms. Sigal, the Court cannot subscribe to his opinion that R & R as a high-end brand was negatively impacted by the recession. Under cross-examination, Mr. Nantel testified that "high-end buyers are not affected by the recession" but, without saying why, he did not put buyers of high-end jeans in this group.

[333] The Court determines that for Simms and its R & R brand, the recession of 2008-2010 would not have had a significant impact and therefore, the conclusion that necessarily must apply to those two brands mentioned by Ms. Sigal are that sufficient persons that have $200-$300 to spend on a pair of jeans continued to spend that money on those jeans even during this recession.

[334] The Court determines that the most probable outcome for R & R sales – had there not been the Costco competition – would have been for sales to have remained

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[127] This Court was faced with a similar conflict in another case where expert evidence was used by a defendant to contradict real time observations by plaintiffs (see *Delage* v. *Plantons A & P*, 2013 QCCS 2269 at para 173-174 and 2015 QCCA 7 at para 80-83).

[128] *British Columbia* v. *Fraser Health Authority,* [2016] 1 S.C.R. 587 at paragraph 38

stable for 2009-2010 and into the first quarter of 2011. This is more consistent with the industry mantra of the time that "flat was the new up" [129] i.e. meaning that in this difficult economic period, the high-end fashion industry was content if it simply maintained sales and suffered no decrease. It is also consistent with Ms. Sigal's own comment to R & R mentioned earlier that she was seeing a change in attitudes by consumers.

Changing market trends and constant decreasing sales.

[335] Ms. Sigal testified that every brand peaks and then levels off. In view of her lengthy experience in the business, the Court agrees with this testimony for the reasons that follow.

[336] In the case of Simms and the R & R line, sales show a decline from 2008 to 2009. Since the Costco contractual interference did not occur until November 2009, the diminishing sales more probably showed that the R & R brand had peaked and was now leveling off, after experiencing a decline in 2009. The evidence is that there were two "jeans trends" that R & R missed in this period: the "boyfriend jean' and the "jegging". However, the evidence before the Court is inadequate to show that these were probable factors in decreasing Simms' sales[130].

[337] Accordingly, going forward, from January 2010 onward up to March 30, 2011, the Court finds it more probable than not that – given this leveling off phenomenon – that Simms sales would have in all events levelled off in 2010-2011 to their pre-Costco volumes in 2009. This will be discussed further in the damages section.

[338] Major Restructuring for R & R and Chapter 11

[339] Mr. Nantel opines that the Chapter 11 filing "without doubt" had three detrimental effects on Simms: it diminished R & R's capacity to supply Simms; Simms' customers would seek new suppliers and avoid their binding obligations to Simms; and consumers and retailers do not want to be associated with failure and avoid purchasing the Product.

[340] Other than the imprecise testimony of Ms. Sigal as to certain delays in receipt of R & R Product in spring 2010, there is no hard evidence to support Mr. Nantel's opinions that satisfy the balance of probabilities.

[341] On a related subject, Mr. Nantel opines that: "In some cases, restructuring will require extending the distribution network in order to reach new consumers. This last consideration is important because it suggests that selling some of its products to the Costco network was a legitimate and necessary part of R & R's restructuring efforts to save the company and its brand. If Simms had cooperated by accepting the products be sold to a variety of channels, it would have mitigated

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[129] According to the testimony of Ms. Sigal. The Court prefers this testimony of Ms. Sigal because of her extensive experience in this specific industry.

[130] The Court draws the same conclusion regarding certain late 2010 spring deliveries from R & R.

its damages and would not have excluded itself from using the R & R brand and selling jeans under it" (this Court's emphasis).

[342] The Court cannot accept this opinion since it makes a legal determination ("legitimate") that is beyond the scope of this expert's qualifications and it ignores the following realities of the present case:

a) this opinion ignores Simms' legal rights to exclusive distributorship under the EDA. If other distribution channels were to be opened in Canada, R & R should have negotiated this opportunity with Simms (as would have been consistent with the EDA);

b) this opinion ignores that the EDA did allow R & R to set up its own company stores in Canada. The EDA allowed Simms to complain if its sales were affected by these stores, but this simply would have meant an additional negotiation between Simms and R & R. Such a concept of R & R Outlet Stores is more consistent with Mr. Nantel's example of Burberry, a high-end fashion brand, turning its "in difficulty" brand around. Mr. Nantel relies on this example of Burberry that was able to save itself by expanding its distribution channels through a series of its own factory stores that offered a limited range of its products at discounted prices. Mr. Nantel's assertion that Simms should have cooperated by accepting R & R products be sold through independent channels (including Costco) and thereby "mitigate its damages" ignores as well the fact that in 2010, R & R even approached Ms. Sigal to "offer her a piece of the action, if she drops the Costco lawsuit" (Exhibit P-37). This was hardly an approach consistent with the Burberry example. It ignores as well Simms' rights under the EDA. At the same time, when True Religion opened up its own retail outlets in Canada in 2011-2012, this cut the ANV sales of True Religion – ANV being in a similar position to Simms - by almost half;

c) finally, Mr. Nantel relies on a study by a Professor Grewal and others for the proposition that "the fact that a brand is sold at a discounted price does not necessarily affect how consumers will perceive it thereafter"; and "Grewal's study implies that offering a high quality product at a discount price does not degrade its brand image".

The Court has had an opportunity to consider the Grewal study and does not draw the same conclusions. While the study indicates that there "may" be a

suggestion that the adverse effects of price discounting – "may not hold for high quality products" – at least in the short term, Professor Grewal goes on to state:

i. "frequent price discounts may have adverse effects for the product's profitability… because the frequent price promotions by retailers and product managers could lead consumers to expect the lower discounted price"; and

ii. "moreover, frequent discounting may force manufacturers to offer bigger discounts in the subsequent price promotions to attract consumers".

[343] The evidence in this case, in particular Ms. Sigal's testimony, is preponderant that high-end brand consumers will turn away from purchasing that brand at high-end stores where the same product can be bought for one third of the price at Costco. While Mr. Nantel refers to the complaint letters filed by Simms at P-17 for other reasons, he does not mention that many of these letters complain of the "cut rate" pricing. The Court is left perplexed by this omission, particularly where at p. 5 of his report, Mr. Nantel says that "from a marketing point of view, it is clear that the sales and profit losses incurred by Simms cannot be attributed in any significant way to the fact that R & R jeans were sold at Costco" (this Court's emphasis). This assertion is unsupported and the evidence accepted by the Court is to the contrary.

[344] In the last paragraph to this report, Mr. Nantel opines that the two factors alone – the recession and the filing under Chapter 11 – "are certainly sufficient to very significantly harm any company".

[345] The Court determines that this general conclusion has not been proven on the balance of probabilities for the specific case of Simms and the R & R line. In addition, Mr. Nantel does not take into account the acumen, proven success and credibility of Ms. Sigal and Ms. Torossian as marketers of high-end women's fashion.

DAMAGES CLAIMED BY SIMMS

[346] The Court must evaluate the damages claim which consists of oral evidence from Ms. Sigal and Ms. Torossian and the expert evidence of business evaluation expert and accountant, Mr. Andrew Michelin ("Simms' expert"). He prepared an expert report dated February 17, 2011 for the U.S. bankruptcy proceedings and for the present proceedings, an update of that original report, now dated March 5, 2013.

[347] The Costco defence consists of the expert reports of accountant Mr. Alain Lajoie ("Costco's expert") and Prof. Jean Nollet, Ph.D., expert in accounting (including business statistics).

Governing Law

DIFFICULTIES IN THE EVALUATION OF QUANTUM: COURT OF APPEAL GUIDANCE

[348] The 2015 Court of Appeal judgment in *Dunkin' Brands Canada Ltd.* v*. Bertico inc.*[131] provides useful guidance on this issue:

> ***The judge has a duty to use the evidence adduced to fix the amount of the loss.***
>
> ***This Court has been resolute in distinguishing between the proof of the existence of damage, on the one hand, and proof of the quantum of damage for which the existence has been established, on the other.[132] Where fault is proven and the trier of fact ascertains that there is proof that some damage flows from the debtor's fault, it is the duty of the presiding judge to evaluate the damage as best as he or she can based on admissible evidence. The comments of Hugessen A.C.J., then of the Superior Court, in Raymor[133] have been understood to be instructive in this regard:***
>
> > ***Even where the assessment of damages in a contractual matter is extremely difficult, it is the duty of the Court, once it is tolerably clear that there have been some damages suffered, to attempt to estimate them in much the same manner as a jury would be called upon to do.***
> >
> > ***As stated by the Court of Appeal, in Rothpan v. Drouin ([1959] B.R. 626):***
> >
> > > ***Lorsque le Tribunal constate qu'une partie a subi un préjudice dont l'autre doit réparation, il n'est pas nécessaire, pour qu'elle en détermine l'étendue, qu'une preuve positive ait été rapportée sur le***

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131 *Dunkin' Brands Canada Ltd.* v*. Bertico inc.*, 2015 QCCA 625.

132 Thus, it is appropriate to "distinguer entre l'incertitude du dommage en elle-même et celle découlant de la difficulté qu'il y a à le mesurer exactement en raison de la nature du litige, de la réalité du débat ou de la complexité des faits".

133 *Raymor Painting Contractors (Canada) Ltd*. v. *Purolator Courier Ltd.*, [1976] C.S. 468 at 472, cited with approval in, *inter alia*, *3030911 Canada inc.* v. *Softvoyage inc*., 2010 QCCA 1375 at para. 57.

> ***chiffre de cette perte. Il suffit qu'il se trouve au dossier des éléments lui permettant de l'apprécier.***
>
> ***[…]***
>
> ***I cannot overlook the fact that even this amount is theoretical and depends upon a number of contingencies as to which the proof is not entirely satisfactory. I would therefore reduce it by a further 25% to cover such contingencies and unforeseen or overlooked matters and, rounding out the figure thus obtained, would fix Plaintiffs damages in the amount of $5,000.***
>
> ***[Footnotes omitted]***
>
> ***…***
>
> ***… In Société du Parc des îles v. Renaud,[134] for example, my colleague Morissette, J.A. recognized that a trial judge is entitled to fix damages as best he or she can, even if evidence of quantum is seriously contested…***

Analysis

QUANTIFYING DAMAGES: SALES ESTIMATES AND COSTS ESTIMATES

[349] Quantification of damages is established by *CCQ* art. 1611 which states that: "The damages are due to a creditor to compensate for the amount of the loss he has sustained and the profit of which he has been deprived".

[350] Simms' claim is quantified by the expert's report of Mr. Andrew R. Michelin of the Richter and Associates firm in his report of March 5, 2013 (Exhibit P-71).

[351] Mr. Michelin is qualified by the Court as an expert in business evaluation, quantification of damages and accounting. He has testified as an expert witness on more than 30 occasions and has worked in the area for over 20 years. His work is divided 40% with business evaluation and 50% in litigation support, where he works for both plaintiffs and defendants (P-71 tab 3).

[352] He is a chartered public accountant and a chartered accountant and is the head of the business valuation and litigation and forensic accounting department of his firm.

[353] His expert opinion is contested for Costco by Mr. Alain Lajoie, who was qualified before this court as an expert in accounting and the quantification of damages. In addition to having an MBA, Mr. Lajoie is a Fellow of the Order of Quebec

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[134] 2004 CanLII 25747 (QC CA).

Chartered Accountants and the Order of Chartered Accountants (D-61 tab 2). He has practised in forensic accounting since the mid-1990s and acts for both plaintiffs and defendants. He has acted in many major litigation cases as an expert. The first report by Mr. Lajoie was done when he was with the Navigant firm. At trial, Mr. Lajoie was a partner with the Quotient firm.

[354] The Court acknowledges that both experts are senior highly experienced practitioners in the field of forensic accounting and quantification of damages, amongst others. For simplicity and as already noted, Mr. Michelin will be referred to as Simms' expert and Mr. Lajoie will be referred to as Costco's expert.

[355] These experts have a fundamental disagreement both on the quantification of projected sales as well as the quantification of future costs.

[356] By way of introduction, Simms' expert evaluates final damages as $4,593,038.00 after taking into account the settlement amount received by Simms in the US Bankruptcy proceedings as "rejection damages" resulting from the rejection of the EDA in the U.S. Bankruptcy proceedings . According to Costco's expert, the opposing approaches between he and Simms expert leaves a difference of $2,341,862.00 between them.

xxii) Sales Estimates

[357] Simms' expert based his calculations on the assumption that, absent the "Costco effect", Simms would have had a straight-line increase in sales for R & R products of 9.17% per year based upon the average projection of the increased sales for two specific years: 2006 and 2009[135].

[358] Simms' expert uses a damages period from November 2009 up to the end of the EDA, December 31, 2012.

[359] Based on these assumptions of the same percentage sales increase each year over for the full damages period claimed by Simms, Simms' expert estimates Simms' loss of profits in relation to the rejection of the EDA at $7,120,000[136]. From this figure, Simms' expert deducts the settlement amount of US$2,526,962 negotiated by Simms in the U.S. bankruptcy proceedings to assert a final claim of $4,593,038.00 for Simms against Costco.

[360] Firstly, and as has been indicated earlier, the Court does not agree with a straight-line increment. Based on the evidence, the Court determines that the sales for the relevant damages period over which the loss was incurred would be "flat" i.e. at the same level as in 2009 without increase for 2010 and up to March 30, 2011.

[135] Exhibit P-71, at page 9.
[136] Exhibit P-71, at page 18.

[361] Secondly, the Court has already determined that the proper damages period is up to and including March 30, 2011, the effective date when all outstanding executory contracts with R & R were rejected in the U.S. bankruptcy proceedings.

xxiii) Costs Estimates

[362] Simms' expert is a member of the Canadian Institute of Chartered Business Evaluators ("the Institute") since 1993. Filed into evidence were excerpts from course materials from Institute courses entitled Litigation I and II (exhibit P-79). Page 16 of the Litigation II course states:

> ***"Estimating costs is essential to any loss of profit quantification. However, costs are rarely known or ascertainable with precision. Even examination of the plaintiff's accounting books and records used to develop the financial statements may not provide an adequate picture of the cost pattern of the plaintiff's business. Accordingly, the Canadian business valuator must analyse the plaintiff's cost pattern, carefully considering the "variable" and "fixed" components. To quantify damages for lost profits, the business valuator will use the plaintiff's historical financial data as a base upon which to estimate the incremental costs. The business valuator may be required to estimate costs for a specific situation that may be different from cost data that is normally gathered in the plaintiff's accounting records".***
>
> (this Court's emphasis)

[363] The difficulty in the present case is that Simms' expert takes into account between 3.2% and 4.7% as operating expenses on lost sales while Costco's expert opines that operating expenses for the R & R line should be 13% of sales on average[137].

[364] Both experts agree that a representative gross margin for calculating damages is 30.6%[138].

[365] The critical question is what specific types of costs should be applied to the gross margin to arrive at the best approximation of what Simms' profits would have been, had it continued the sales volumes determined by the Court, up to March 30, 2011.

[366] At page 4-14, the Institute course states:

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[137] Summary of Defendant's Expert's Report at page 4.
[138] Exhibit P-71, at page 10; Exhibit D-61 at page 28.

> ***"Any litigation loss quantifications involve a partial loss or a time-limited loss, i.e., the business was impacted in a limited way or for a certain period of time, but the business returned to pre-incident profitability and was not completely destroyed. In such cases, the commonly accepted definition of profit for litigation loss quantification is contribution margin, not net profit. Contribution margin is defined as revenue less all variable expenses… In order to quantify contribution margin, litigation accountants must undertake a detailed analysis of each operating expense and its relationship to sales volume. This is commonly done by examining the business nature of the expense, as well as historical fluctuations in comparison to historical changes in sales. Certain expenses by their very nature are obviously variable (such as commission expenses that vary as a percentage of sales) while many others are semi-variable (or semi-fixed) and require considerable analysis to understand.***
>
> ***The use of contribution margin litigation loss quantification is because of the restorative concept of damages - to put the plaintiff back in the position it would have been in (using money damages) but for the actions of the defendant".***
>
> (this Court's emphasis)

[367] The Court will now analyze the experts' respective opinions using the Institute's doctrine as a reference.

What should Costco Take into Consideration?

[368] Simms' expert criticizes Costco expert's methodology for these reasons:

> ***Rock& Republic ("R & R") was Simms' most significant brand (Table 2, page 7)[139]. However, in order to appreciate the true relative importance of R & R to the Simms Group, one must look at the R & R sales relative to the total Group sales. For 2009, R & R represented 25.6% of Group sales (Table 10, page 13).***
>
> - ***Given that R & R represented 25.6% of Group sales and given that the Simms Group did not reduce its expenses in 2010 to 2012 as a result of the Group losing the R & R line, Richter believes that damages represent a loss of contribution margin - lost sales less the costs that would have been incurred in respect of the lost sales (cost of***

[139] Ms. Sigal testified at trial that at its best, R & R sales represented 60-70% of Simms' business.

goods sold and variable expenses) (Page 8).

- ***Navigant incorrectly assessed the relative importance of R & R by comparing R & R sales to Simms Company sales (rather than Group sales). Navigant incorrectly used the absorption costing method, allocating fixed costs to the lost R & R sales.*** [140]

[369] Simms' expert lists 25 different types of operating expenses (Exhibit P-71, page 12) and qualifies them as fixed, semi-variable and variable.

[370] Simms' expert considers - as "variable expenses" - 7 of the 25 different expenses: (1 and 2) shipping salaries and shipping supplies; (3, 4, and 5) selling commissions, distribution fees, advertising, and (6 and 7) travel and administrative salaries. He qualifies shipping salaries and administrative salaries as semi-variable and the rest as fixed. No fixed costs are accounted for by him in his calculation of damages.

[371] Simms' expert notes that "from 2007 to 2009, R & R sales represented 25.6% to 35.4% of the "Group's total sales". The Group consists of 4 different companies that all operate out of the Simms' premises at 155 Beaubien Street West in Montréal ("the premises"). The companies have overlapping ownership but who owns what has not been proven on the balance of probabilities. However, Ms. Sigal testifies Simms charges a portion of the common expenses to the other 3 companies that share the premises.

[372] Costco's expert assesses the relative importance of R & R by comparing R & R sales to Simms sales and not the Group sales. Simms expert disagrees with this approach. However, the Court determines that the approach of Costco's expert is appropriate in looking at Simms sales and not the Group sales since the party in this case is Simms, not the Group and Simms' expert has not proven on the balance of probabilities why his approach is the correct one. In addition, for one of the other companies, there was not a common split based on net sales but rather a fixed percentage of gross sales.

[373] Furthermore, Mr. Justice Jacque Dufresne (now of the Court of Appeal) – when he was on the Superior Court – expressed criticism in two cases where a plaintiff's damage claims failed to include any fixed costs, administrative charges or financing charges. He concluded that such an approach did not accurately reflect an appropriate distribution of costs because, if this Court applies his reasoning to this case:

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[140] Plaintiff's Argument, September 13, 2016.

a) such an omission means all of the other product lines of Simms would be supporting certain excluded costs necessary to sell the R & R products; and

b) such an approach underestimates the real costs to run a business[141].

[374] The Court agrees with Justice Dufresne's critique. Accordingly, the Court determines that the approach taken in Costco's expert's report – with certain modifications - is to be preferred because it is more consistent with both the approach required by the Institute and the concerns raised by Mr. Justice Dufresne.

[375] At page 21 of his report, Costco's expert states:

> ***"In light of the foregoing, a major difference can be noted between the costs that Richter took into account in calculating their lost contribution margin and the total costs that Simms experienced historically. While Richter took into account between 3.2% and 4.7% of lost sales, Simms experienced historically a cost base that ranged between 15.4% and 21.1% of its sales".***

[376] To validate his proposition that certain fixed costs must be attributed to R & R products, Costco's expert relies on certain of Simms' assumptions, but also considers the historic sales of R & R as well. Simms' other product lines from 2006 to 2012 demonstrate that ***"Simms' results that relate to the Other Product lines show negative results during the period when the company (i.e. Simms) sold R & R products. This situation could hardly happen as all the other years under study, i.e. 2002 to 2005 and 2011 to 2012, show positive results***" (Costco's expert report, at page 23). The conclusion that Costco's expert comes to is that: ***"This can only be explained by the fact that Richter underestimated the expense that should be absorbed by the R & R line, <u>resulting in the Other Product lines absorbing too large a share of the total expenses</u>."***

(this Court's emphasis)

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[141] *Excavation Fafard inc.* v. *Municipalité de Sainte-Guillaume et al*, J.E. 2004-928 (C.S.); 2751-9639 *Québec Inc.* v. *Jevco*, [2004] R.R.A. 954 (C.S.).

[377] The Court is convinced by the following opinion of Costco's expert as stated at page 2 of 6 of his summary[142] where he says that the "variable cost only" approach used by Simms' expert is appropriate "when the volume of sales/revenues lost is not significant or less significant when compared to the remaining sales revenues" (this Court's emphasis). The implication from the Costco expert is that this approach is not appropriate when the volume of lost sales is significant. In fact, R & R sales as a percentage of the total of Other Product lines and R & R were: 70.8% in 2006, 77.2% in 2007, and 67.1% in 2008; 57.6% in 2009, but only 30.6% in 2010. However, the last year of 2009 - 2010 has the "Costco effect" on sales.

[378] In view of these figures, the Court determines that the relevant R & R sales for 2009-2010 for purposes of damage calculations would be "somewhat significant" i.e. in the order of 60% of total sales. Therefore, the Court will apply a modest discount to Costco's expert's opinion to account for the overstatement of costs applied by Costco's expert.

[379] Costco's expert then went on to look historically at Simms' operating expenses for the Other Product Lines without the R & R line and found that the average was approximately 29% between 2002 and 2012.[143]

[380] Based on this analysis, the Defendant's expert sought to calculate "over the five-year period during which Simms generated R & R sales, what the R & R sales generated, as a whole, in terms of additional/marginal costs, assuming that the other product lines had to absorb a burden of 29% of their sales."[144]

[381] Doing this analysis, Costco's expert opines that over the five-year period of 2006 to 2010 the operating expenses which came from the R & R product line were 13% of those sales.

[382] As a check on the reasonableness of this opinion, Costco's expert had a linear regression analysis performed by Professor Jean Nollet, full professor at the HEC Montréal since 1991 and a holder of a Ph.D. in Operations Management from the Ivy School of Business at the University of Western Ontario.

[383] This statistical approach sought to determine the most accurate portion of expenses which should be attributed to R & R sales. The Court is satisfied that this is a valid approach to verify reasonableness and correlation of potential causal factors with ultimate results. The conclusions of Professor Nollet were that "operating expenses (i.e. everything not included in the cost of goods sold) should be assumed by the two product lines (i.e. Simms and Others) in the approximate proportions of 12.3% for the R & R sales and 27.3% of the other product lines sales".

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[142] Exhibit D-74.
[143] Exhibit D-61, page 24.
[144] Ibid, page 25.

[384] The Court arbitrates that 10% is the appropriate percentage to use for R & R sales for these reasons: (a) in view of this 12.3% figure; (b) the fact that Costco's expert comes to 13% with an assumption that R & R sales are a significant portion (instead of "somewhat significant"); and (c) since the Court determines the proportion to be "somewhat significant".

OVERALL CALCULATION FOR ESTIMATING THE DAMAGES FOR SIMMS LOST PROFITS.

[385] Since the Court-determined assumptions are different than those used by either of the parties' experts, the Court went back to those experts and asked for recalculations on the basis of the Court's own assumptions. The Court determines that the following assumptions should be used for the lost profits' calculations:

a. loss of profit should be calculated from January 1, 2010 to March 23, 2011. Richter confirms there were damages suffered in 2009.;

b. annual sales for 2010 and pro-rated sales for 2011 are the same amount as the annual sales for 2009. The issue arises as to whether an amount paid to Simms by its insurer as a result of R & R merchandise that had been stolen, should be included as part of the 2009 annual sales. The amount of the paid insurance claim was $246,486.00. Without this insurance claim, the actual sales for 2009 are $8,789,950.00. The total of the 2008 sales is: $10,336,431. That figure is a reduction of 8% less than the year before. Eight percent of $10,336,431 is $826,914. Absent the Costco effect in 2009, the Court determines that it is more probable than not Simms would have sold that $246,486.00 additional worth of goods and so the Court determines that the 2009 actual sales figure for Simms that should be used is : $9,036,436; and

c. for the attribution of contribution margin, 10% should be used.

[386] Based on the above reasoning, Option 4A as prepared in the attached Annex B, which formed part of various options proposed by the Court were calculated by the experts jointly and are confirmed by the parties in correspondence on Oct. 12, 2017. Based on these calculations, the lost contribution margin that represents Simms lost profits for the period determined by the Court is: $1,483,226.

[387] However, Simms has already received the settlement amount of $2,562, from the U.S. Bankruptcy proceedings (the "settlement"). The stipulation by the U.S. Bankruptcy Court approving the settlement noted that Simms's proof of claim of US$6,083,600 plus US$47,303.47 indemnity claim was "all in connection with

R & R's rejection of the Distribution Agreement and the cessation of Simms' role as exclusive distributor of R & R's Products in Canada" (P-2J).

[388] The Court determines that Costco's contractual interference has caused damages from January 1, 2010 to March 30, 2011 while the settlement covers Simms's losses from August 10, 2010 (the effective rejection date) to March 1, 2012 (the end of the EDA in normal circumstances).

[389] Simms cannot double-recover and therefore its damages from August 10, 2010 to March 30, 2011 have already been compensated through the settlement.

[390] Therefore, the Court must determine the damages for lost profits for the period January 1, 2010 to August 10, 2010: a total of 221 days. Annex B shows that total lost profits for the 465 days from January 1, 2010 to March 30, 2011 is $1,483,226.

[391] The Court determines that pro-rating the number of days provides the fairest determination of lost profits for the subject period, since that period also includes Spring, one of the two major sales seasons, within which is May 2010 when Costco sold the greatest volume of the Product.

[392] On this basis, the Court determines that lost profits to Simms are $722,010.89 (221/454 x 1,483,226).

[393] The Court explains below how this claim/damages is treated under Quebec law as an *in solidum* claim in which the wrongdoers are R & R and Costco. The final calculations of damages owed by Costco to Simms are calculated in that section.

MITIGATION

[394] Based on the following reasons, the Court determines there should be no deductions for failure to mitigate.

[395] Costco's expert argues that mitigation must be considered "in light of the capacity of Simms to assume a higher volume" (D-61 at p. 34). The burden of proving this assertion is on Costco. It argues "Mr. Lajoie's point of view is that assuming that it is indeed the case that no expenses were cut, it is nevertheless evident that at least a portion of these resources were affected to the sales of other product lines after the loss of the R & R line. As a matter of fact, Simms other product lines' sales increased from 2009 to 2012 (D-61, p. 31 – Graph 3).Therefore, Costco should not bear all the costs associated with the lost R & R line if the newly available resources were instrumental in allowing Simms to generate increased sales for its other product lines during the "loss" period (variance in sales for the other lines of products: 2010 VS 2009: + 34%; 2011 VS 2010: + 28%; 2012 VS 2011: + 5%).

[396] In his expert's report, Mr. Lajoie states: "One could question Simms capability to generate from 2010 to 2012:

- The increases aforementioned in the sales of the Other Product Lines; and
- The volume factored by Richter or Navigant with respect to lost sales."

[397] Costco has not proven this assertion for the following reasons:

a) The "questioning " by Mr. Lajoie does not rise to the level of proof required to prove Costco's assertion;

b) Mr. Lajoie bases his analysis on a full three years of sales: 2010-2012 inclusive. Instead, the Court is only allowing approximately 15.5 months of sales;

c) Under cross – examination, Ms. Sigal testified that Simms had sufficient excess capacity that they could have done the R & R work in 2010 if they had it. At worst, she said they could have hired one more warehouse person and one more sales person, but the evidence is not clear that this would have been required. Ms. Sigal testified that even after losing R & R, they never laid anyone off. The Court infers that this type of loyalty is reciprocal and that the same number of employees would have worked harder and costs would not have been increased for the 15.5 month period in issue. Accordingly, there should be no "mitigation deduction".

d) In all events, even into August 2010, at the Las Vegas Trade Show, R & R was seeking to make a deal with Ms. Sigal to allow Simms to continue to distribute for R & R (along with Costco), if it dropped the Costco suit. Accordingly, the possibility of re-gaining some R & R work makes it more reasonable for Simms not to lay off staff.

e) Ms. Sigal testifies that she did seek to mitigate the loss of R & R by working hard to acquire new brands (including from overseas), which she was able to do in part but never sufficiently to replace the lost R & R sales.

SHOULD LIABILITY BE DIVIDED BETWEEN R & R AND COSTCO?

xxiv) Introduction

[398] Simms' claims for damages against R & R in the U.S. bankruptcy proceedings are similar to those claimed against Costco.

[399] As a result of a settlement in these bankruptcy proceedings, Simms obtained the sum of $2,526,962.00[145] as "rejection damages" for which a full release was given

[145] This represents the converted amount in C$ of the settlement originally received in US$.

to the bankruptcy administrator for all outstanding claims by Simms against R & R.

xxv) Governing Law

[400] Costco has contracted with R & R in a way that violates the contractual rights that Simms has in its separate contract with R & R. The Court agrees with legal scholars Llluelles and Moore that qualifies Costco's liability as *in solidum* with R & R vis-à-vis Simms, since Costco's liability to Simms is extra-contractual while R & R liability is based in contract[146] i.e. the liabilities of the two wrongdoers originate from two different sources.

[401] The Court of Appeal judgment of *Tandalla Inc*. v*. Lippman Leebosh April* [147] stands for the proposition that "the release of an *in solidum* debtor who is primarily liable will cause the release of the co-debtor who is secondarily liable". In that case, the party to whom the release was given was found to be 100% liable (i.e. primary liability). Where a full release is granted to one *in solidum* co-debtor, the release attaches to their share of the debt[148]. Since the co-debtor who received the release was primarily (100%) liable in the *Tandalla* case, the release attached to 100% of the debt and so the secondary debtor benefited completely from the release (*CCQ* art. 1690).

[402] In this case, the full release granted to R & R will affect its share of the debt, which must be determined before the impact of the release on these proceedings - and on Costco's liability - can be ascertained.

[403] In its summary of argument, Costco asserts that: "if R & R had not breached the Distribution Agreement, it would have been impossible to argue that Costco had any liability and therefore, liability should be shared among the *in solidum* co-debtors as follows: 100% for R & R and 0% for Costco"[149].

[404] This conclusion is based on a false premise i.e. that R & R is 100% liable since only it could breach the EDA. On the contrary, the Court determines that there could be no damages without two participants: a buyer: Costco and a seller: R & R.

[405] Costco's argument raises two questions: firstly, whether for the *in solidum* analysis, R & R is the "primary debtor" and Costco, the "subsidiary debtor"; and secondly, how the settlement between Simms and R & R affects Costco's liability.

[406] As for the first question, the two leading cases are distinguishable on their facts from the present case. The *Tandalla* judgment is one where the appellant alleged that one Mr. Cohen had misrepresented "certain important financial information

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[146] LLUELLES and MOORE, *supra* note 24, at para. 2456.
[147] 2016 QCCA 1145 at para. 29.
[148] *Id*., at para. 20.
[149] Defendant's Argument, para. 50.

and thus defrauded appellant in the share purchase" while the respondent accounting firm "issued an audit opinion regarding Cohen's company's financial statements upon which the appellant relied to make the share purchase and suffered as a result".

[407] Another leading case, *Bourque* v. *Poudrier*[150] also involved *in solidum* liability. In that case, the defendant vendor failed to disclose to the plaintiff purchaser a servitude which made the immovable unusable for the plaintiff's intended use. The instrumenting notary failed to bring this servitude to the purchaser's attention and as a result, the transaction was concluded to the purchaser's prejudice.

[408] In both of these Court of Appeal judgments, the Court of Appeal determined that the primary debtor was the co-contracting party while the professional, either accountant or notary, was only the subsidiary debtor. This Court understands the qualification of "primary" to be based on the fact that the "breach" originated with the co-contracting party and that the "breach" or "fault" by the professional would not have had an effect if it were not for this primary breach which is the "sine qua non".

[409] This is different from the present case where the fault was the sale from R & R to Costco, which required the joint fault – contractual by R & R and extra-contractual by Costco – to occur.

[410] Madam Justice Marie-France Bich in the *Bourque* judgment clearly explained the rationale for finding the professional to be a subsidiary debtor:

> *38 -* ***La faute du notaire a cependant un caractère subsidiaire à celle des vendeurs, premiers débiteurs du devoir de divulgation envers les acheteurs. Ce caractère de faute subsidiaire ne fait pas pour autant de la responsabilité du notaire une responsabilité subsidiaire, qui ne pourrait s'enclencher que si le débiteur primaire, ayant d'abord été poursuivi, est dans l'incapacité d'acquitter la condamnation prononcée contre lui ou que les voies d'exécution forcée se révèlent vaines.***
>
> …
>
> *41 -* ***Ce rejet ne change cependant rien au fait que, fréquemment, la faute du professionnel – et c'est ici le cas tout comme ce l'était dans l'arrêt Prévost-Masson – est subsidiaire. Cette différenciation des deux fautes a pour conséquence qu'entre les débiteurs in solidum de la condamnation, l'ultime responsabilité de celle-ci sera en principe assumée***

[150] 2013 QCCA 1663.

> ***totalement par le débiteur primaire. C'est exactement ce qu'a fait la Cour dans l'arrêt Chartré, où l'on reconnaît une telle subsidiarité et où l'on conclut en conséquence qu'entre les débiteurs, 100 % de la responsabilité sera imposée au débiteur primaire et 0 % aux notaires, débiteurs subsidiaires.***

[411] Therefore, in the present case there is no subsidiary fault since, as of the first cease-and-desist letter, Costco as purchaser now knows or should know that any further purchases by Costco from ABFI are contravening Simms' rights under the EDA.

[412] Accordingly, there is no primary or secondary debtor but rather two co-debtors, each 50% responsible.

[413] Secondly, the Court will now consider the issue of whether Simms waived its rights against Costco as a result of Simms' settlement with R & R.

[414] Following from the Court's earlier analysis and the fact Costco's original attorneys were informed by letter on September 3, 2010 of the R & R unilateral termination of the EDA and shortly thereafter, rejection[151] of the EDA, Costco was or should have been aware that Simms had a claim against R & R for breach of the EDA in the US Bankruptcy proceedings. The settlement between R & R was approved by the US Bankruptcy Court on October 12, 2012 (P-2J), while the original Chapter 11 Plan was approved by that Court on March 30, 2011 (D-33 and 34).

[415] Simms reserved its rights in its proof of claim in the US Bankruptcy proceedings (P-2G, page 4). A full release (including a release against Costco) could have been negotiated as part of the final settlement but it was not. Simms only released R & R and its related entities, not Costco.

[416] At paragraph 25 in *Tandalla*, the Court of Appeal found that since "Mr. Cohen was primarily liable, the release in his favour was for his "share" of the debt in the words of article 1690 CCQ and consequently the release endured to the benefit of the co-debtor Respondent" i.e. the notary. The Court of Appeal then goes on to discuss its judgment of *Boutilier* v. *Alexolopoulos*[152], wherein the Court found that "the manner in which the settlement was arrived at and documented suggested that the recourse against the building inspector was saved".

[417] The present case is similar, because of the context and the terms of the release Simms granted: there was clearly no intent to waive any liability for Costco.

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[151] See Costco Contestation dated September 22, 2010 at paragraphs 62 and 63. Copies of the September 3, 2010 letter are sent to Costco's original counsel as well as counsel for R & R in the US Bankruptcy proceedings (D-12 at p.84.

[152] 2010 QCCA 387.

[418] The first answer, as we have seen, is that unlike in *Tandalla* there is no primary and subsidiary debtor situation in the present case. For this reason alone, there can be no waiver as in *Tandalla.*

[419] However, for completeness, the Court adds that the chronology of legal proceedings in Quebec and in the U.S. confirms that Simms reserved all its rights against Costco.

[420] Unlike in *Tandalla,* at the time that the U.S. Bankruptcy Court agreed to the final settlement with R & R and Simms on October 10, 2012, Simms had already instituted its legal proceedings against Costco in Québec over 2 years earlier on August 6, 2010.

[421] By its own Contestation of September 22, 2010, Costco at paragraph 61, 62 and 63 noted it was aware of the US bankruptcy proceedings of R & R and that it had been informed of the rejection of the EDA on September 14, 2010 by that Court (D-1 as referred to in the Contestation).

[422] In its Amended Contestation of June 7, 2011, Costco refers to Simms' claim of October 21, 2010 (P-2G) in the R & R bankruptcy. In that Amended Contestation, Costco[153] refers to the proof of claim and thereby had constructive knowledge of that claim which was for "future lost profits and indemnity, including a related administrative priority claim" based on Simms "rejection damages claim and indemnity claim against R & R and its estate". The damages claim, as prepared by Mr. Michelin, was for US $6,080,360 in lost profits, as well as an indemnity claim of US $47,303.47. Critically, in the proof of claim, Simms reserved its rights as follows: "Nothing herein or otherwise, including, without limitation, any later appearance, pleading, claim or action, is intended or shall be deemed to be a waiver, release or modification by Simms of its… (d) "Other rights, remedies, claims, actions, defences, setoffs, or recoupment which Simms is or may be entitled, all of which are hereby expressly reserved".

[423] In the final stipulation (P-2-J) of the Order Approving the Settlement by the U.S. Bankruptcy Court dated October 10, 2012, that stipulation confirms at paragraph 3 that Simms is only waiving claims against the Debtors who are specified as "Rock and Republic Enterprises Inc. and TR Inc."

[424] At this same time, the present litigation is ongoing in Canada so it is clear that Simms, in settling with R & R, is not waiving any claims it may have against Costco.

[425] The *Tandella* case (at paragraphs 19 and 20) confirms that the release granted to R & R by Simms releases Costco from having to pay for the full amount of the damages (due to its *in solidum* liability) but does not affect the 50% liability of Costco i.e. the 50% of the compensatory damages proven in this case.

[153] At paragraphs 33 and 34.

Furthermore and contrary to Costco's arguments, what Simms agreed to with the R & R bankruptcy administrator and whether R & R "had sufficient assets to compensate Simms" in the present action against Costco, are not relevant considerations to determine Costco's share of liability in this litigation.

[426] In conclusion, R & R and Costco have primary responsibility, which the Court attributes between them at 50/50 for the period of damages from January 1, 2010 to August 10, 2010 for which the full amount of damages is $722,010.89

[427] However, since Simms has given a full release to R & R, the Court determines Costco is liable to Simms for the remaining 50% of this amount, being $361,005.44.

SIMMS' CLAIMS COSTCO'S COMMERCIAL PRACTISES ARE ABUSIVE AND HAVE DAMAGED SIMMS REPUTATION: ENTITLEMENT TO PUNITIVE DAMAGES

xxvi) Simms' Assertions

[428] Simms argues that "Costco's reprehensive and commercially unacceptable behaviour entitles Simms to punitive damages in the amount of $500,000.00 as well as payment of its solicitor-client fees".

[429] Simms' main assertions in its Re-Amended Motion to Institute are:

> ***"134. Quite apart from causing its customers to cancel orders on a wide-ranging basis, Costco's reputation (sic: this Court's note: should read "actions") has damaged Simms' reputation in the marketplace generally as a reliable supplier of high-end garments";***
>
> ***"139. Moreover, Costco's dishonest, wilful, reprehensive and commercially repugnant behaviour towards Simms, including acts of willful blindness, entitles Simms to punitive damages in the amount of $500,000 as well as payment of its solicitor-client fees and extra-judicial costs."***

xxvii) Governing Law: Quebec Charter Breach or Abuse of Procedure: Sole Sources of Punitive Damages

[430] The determining legal principle is *CCQ* art. 1621:

> 1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

> Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the reparatory damages is wholly or partly assumed by a third person.
>
> (This Court's emphasis)

[431] There are two potential legal sources for Simms' punitive damages claim: (a) unlawful and intentional interference with its reputation per *Quebec Charter* art. 4 and 49 and (b) abuse of procedure under *CCP* art. 54:

> ***4. Every person has a right to the safeguard of his dignity, honour and reputation.***
>
> ***…***
>
> ***49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.***
>
> ***In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.***
>
> [this Court's emphasis]

[432] Where the Court determines there has been abuse of procedure under CCP art. 54, it may award "punitive damages if warranted by the circumstances" as well as, amongst others, "professional fees and disbursements".

[433] The Court will analyze both purported claims one after the other.

xxviii) Whether there has been Unlawful and Intentional Interference by Costco with Simms' Reputation

Governing Law

[434] The operative definition of reputation in the 9th edition of the Concise Oxford Dictionary is: "the state of being well-thought of; distinction; respectability".

[435] Commonplace expressions such as "A reputation takes years to earn, and seconds to lose" note the importance placed on "reputation". This is confirmed by "reputation" being included in *Charter* art. 4. The *Charter* preamble underscores that it is important to declare certain rights and freedoms in the *Charter* "so that they may be guaranteed by the collective will and better protected against any violation". *Quebec Charter* rights are afforded quasi-constitutional status. The

courts must be sensitive to the Legislator's expressed will to ensure that such a right as reputation is "guaranteed" and "protected against any violation".

[436] In a leading 2016 Court of Appeal judgment, *FTQ-Construction c. Lepage*[154], the Court of Appeal awarded punitive damages for intentional interference with reputation. That case involved an initial finding of defamation (an "unlawful act") where the defendants, a construction union and certain of its leaders, falsely attacked the reputation of the plaintiff project manager as a result of which he was effectively shut out of further employment in the construction industry.

[437] The Supreme Court of Canada determines that the court must use an objective test to determine whether the "unlawful conduct" would have harmed the reputation of the alleged victim [155] in the mind of an "ordinary citizen". The Supreme Court of Canada confirms that this test does not create a legal presumption but an inference that the judge can draw from the facts which is "***un repère rationnel et objectif***"[156].

[438] A corporation has a right to protect its reputation under art. 4, *Quebec Charter*[157].

[439] In sum, Simms must demonstrate:

(1) interference with a right guaranteed by the *Charter*; and that
(2) the interference was (a) unlawful (e.g. an extra contractual fault) ***and*** (b) intentional because the defendant either (i) intended or desired the consequences of their wrongful conduct ***or*** (ii) acted with full knowledge of the "immediate and natural" or "extremely probable" consequences of his wrongful conduct.[158]

[440] The Supreme Court of Canada instructs that "a relatively permissive approach should be encouraged in Quebec civil law when giving effect to the expression unlawful and intentional interference" regarding punitive damages under the *Quebec Charter*[159].

[441] In addition, the Court must be satisfied that an award of punitive damages will achieve the preventive purpose of such damages because (a) punitive damages are necessary to prevent the repetition of the conduct (specific deterrence) or (b) the conduct must be denounced (general deterrence)[160] or both.

Analysis

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[154] 2016 QCCA 1375.
[155] *Bou Malhab* v*. Diffusion Métromédia CMR inc*., 2011 SCC 9 ; applied in *FTQ-Construction* c*. Lepage*, 2016 QCCA 1375.
[156] Ibid., at paragraph 32.
[157] *Voltec ltée* c*. CJMF FM ltée*, SOQUIJ AZ-50145796, [2002] R.R.A. 1078 (C.A.).
[158] *FTQ-Construction, supra* note 155 at paragraph 121.
[159] *Syndicat national des employés de l'Hôpital St-Ferdinand c. Québec (Curateur public),* [1996] 3 SCR 211 at para.120.
[160] Ibid at paragraphs 121 and 129 and *Richard* v. *Time inc.,* 2012 1 SCR 265 at paragraph 155.

Unlawful Act Interfering with Simms' Reputation

[442] For this first issue, the Court determines that Costco's unlawful contractual inference did diminish Simms' *Quebec Charter* ("*Charter*") right to safeguard its reputation with its own retailers.

[443] Punitive damages under *Charter* art. 49 are not awarded for *de minimis* interferences with reputation under *Charter* art. 4. However, the Supreme Court of Canada has confirmed that "an award of exemplary damages under the second paragraph of section 49 of the *Charter* depends not on the extent of the prejudice resulting from the unlawful interference but on the intentional nature of that interference" (this Court's emphasis).

[444] The interference with Simms' commercial reputation is serious. This interference is inextricably linked to the loss of sales caused by Costco's contractual interference and the direct effect that this had on Simms' retailer clients.

[445] The uncontradicted evidence from Ms. Sigal and Ms. Torossian is that Simms' reputation was seriously diminished in the eyes of Simms' retailers, particularly following Simms' perceived and real inability to ensure the exclusivity of the Product because of the second wave of major sales by Costco starting in May 2010.

[446] The uncontradicted evidence from Ms. Sigal is that her retail clients are being called "thieves" by certain customers. This is hardly surprising in view of the $200.00 price differential between Costco's retail price and Simms' retailers' retail price. The extremely probable consequences are that these retailer clients reduced the esteem with which they held Simms. As Costco was a major retailer itself, such immediate and extremely probable consequences must have been in the mind of Costco. For example, Ms. Ells and Ms. Janek both knew that Holt Renfrew was selling the Product in Canada. As a result of receiving the first cease and desist letter, Costco also knew or should have known that Holt Renfrew was purchasing its R & R stock from Simms.

[447] Despite this effective knowledge of the negative impact on Simms' reputation for the November sales at Costco (but for which up to the first cease and desist letter Costco cannot be held responsible), and without telling Simms, Costco orders and purchases about 5 times more the number of units of the Product it sold in November 2009. Costco undertakes this second wave of sales of the Product in May 2010[161]. This Spring season is one of two main sales periods in the year. Hence, Costco made these increased purchases of the Product knowingly seeking to take advantage of the increased Spring demand.

[161] On January 28, 2010, Costco ordered 46,084 units of ladies jeans and 19,200 units of ladies tee shirts.

[448] Prior to the Costco sales beginning in November 2009, Simms had an enviable reputation amongst high-end Canadian fashion retailers. This was uncontradicted by Costco. This reputation was built on years of hard work by Ms. Sigal, Mr. Simms and their Simms staff. The tangible proof that Simms had a reputation for reliability and quality is confirmed by its client list which included such high-end Canadian retailers as Holt Renfrew, Harry Rosen and Aritzia. As noted, Ms. Sigal's testimony of this enviable reputation is not contested.

[449] A further uncontradicted element of this reputation is Simms' ability to have the exclusive distribution of the high-end Product for which consumers are prepared to pay a premium price. Both Ms. Sigal and Ms. Torossian described at length the constant marketing that Simms did to cultivate this "edgy image" for the Product which made it so desirable. The evidence is clear that "exclusivity" is the sine qua non for such high-end clothing products.

[450] At the same time, Simms' retailer customers received scathing complaints from their own consumers.

[451] The Court recognizes this is not a typical case of intentional damage to reputation where a party's *Charter* right to reputation has been directly attacked by specific words or a picture, as in the FTQ case or as in *Rosenberg* v. *Lacerte* [162].

[452] Nonetheless, the Court determines that an ordinary citizen would find that Simms' commercial reputation had been diminished as a result of the illegal contractual interference committed by Costco and the following chain of events. In November 2009, Simms' retailers had informed Simms of the Costco sales at about $100.00 per pair while Simms' retailers were required by Simms to sell the product at $300.00 per pair. The evidence shows that Simms sought to demonstrate to its retailers that it was interceding with the manufacturer and had the situation in hand to resolve the matter. The fact that Simms got no further complaints after November 2009 up to May 2010 creates an important inference that Simms' retailer clients were satisfied that the problem was resolved. Those same clients could reasonably infer that this situation would not occur again.

[453] However, whatever confidence Simms' retailers might have re-established was lost by the second wave of Costco sales beginning in May 2010. Not only were these sales in 65 of Costco's stores across Canada and thus competition to Simms' retailers in major Canadian centres, but the quantity of the Product, approximately five times greater than the initial quantities sold in November 2009, would demonstrate: (a) Simms had no control anymore over the exclusivity of this Product and (b) Simms obliged its retailers to sell the product at $300.00 per pair (after Simms sold a pair of jeans for $200.00 to the retailer) without in any way protecting the exclusivity or the price which it was requiring from its own retailers. For any ordinary citizen, an exclusive distributor who could not control the

[162] 2013 QCCS 6286.

exclusivity of the product would have its credibility and commercial reputation seriously diminished.

[454] This direct negative interference on Simms' commercial reputation was the immediate result of the illegal contractual interference practised by Costco.

Intention to Diminish Simms' Reputation

[455] The second part of the test required by *Charter* art. 49 paragraph 2 is that Simms must prove that Costco intended the interference with Simms' commercial reputation. As seen earlier, what is being punished is the wrongdoer's intention to infringe a *Charter* right and what punitive damages seek to prevent is similar conduct in the future "which could have been avoided"[163].

[456] At paragraph 121 of the St-Ferdinand case, the Supreme Court of Canada instructs that intentional interference occurs when there is "a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause… Thus, an individual's recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test"[164].

[457] A review of the information known to Costco, and after the two cease and desist letters (P-4 and 6: November 12 and 16th, 2009 respectively), confirms on the balance of probabilities that Costco must have known that the immediate and natural consequences of its May 2010 sales would negatively impact Simms' reputation with Simms' retail clients. The direct knowledge by Costco comes from the first cease and desist letter which asserts: "Inasmuch as the damages that it (Simms) suffers cannot be ***quantified, given the impact that the sale of the Product at Costco has on its business and its reputation in the marketplace, Simms Sigal estimates that it has sustained and will continue to sustain a financial loss measuring in the millions of dollars by reason of Costco's violation of its rights"*** (P-13).

[458] In the first cease and desist letter, Simm's lawyers propose that if Costco undertakes to not use Simms' CA number and to remove the impugned goods from sale, it will discuss with Simms waiving any damages.

[459] In the second letter, Simms' then counsel advises Costco's then counsel that "Every day that is passing exacerbates the harm being done by your client" and asks that Simms be advised of the identity of the company from whom Costco purchased the Product. This is a reasonable request for cooperation based upon

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[163] *St-Ferdinand*, supra note 159 at para. 122 and Jean-Louis BAUDOUIN et al, *supra* note 102, at para 1-380.

[164] As applied in *Hinse* v. *Canada (Atty. Gen.)* 2015 SCC 35 at paragraph 164

Simms' assertions that it benefits from the EDA and the concomitant right to stop interference with its rights under the EDA [165].

[460] What is Costco's response through its attorneys? The last paragraph of Exhibit P-8, Costco's then attorneys' response letter of November 18, 2009 establishes a pattern of uncooperative behaviour that has led to this protracted litigation: "Finally, you have indicated your client (Simms) insists on being advised as to the source of Costco Canada's goods in question. You have not indicated however what you would provide to Costco Canada in return. In any event, our client is not prepared to provide this information as it clearly constitutes confidential information in the nature of trade secrets to our client "(this Court's emphasis).

[461] The Court underscores that at this time Costco knows that it is selling goods with Simms' CA number (which is contrary to federal labelling law since Simms was not the source of these goods), that R & R is dealing with a "very mad" Simms and yet Costco's supplier is telling it not to provide Simms with R & R's letter that would confirm that Costco's supplier purportedly had the right to sell the goods in Canada and potentially resolve the whole issue.

[462] Furthermore, both Ms. Ells and Ms. Janek have seen the Products sold at Holt Renfrew so Costco knows at least about one specific high-end retailer customer of Simms.

[463] As noted earlier, the Supreme Court of Canada confirms that intent is sufficiently proven under *Charter* article 49 where "that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause".[166]

[464] Costco is a major retailer with 65 stores across Canada. Both Ms. Janek and Ms. Ells were experienced buyers and Ms. Ells was now part of management. Ms. Ells was in contact with Costco's internal legal department (D-5) following the first two cease and desist letters. Accordingly, Costco knew or wilfully ignored that its future purchases of the Rock & Republic product were contractual interferences with Simms' rights as exclusive distributor. As sophisticated retailers, Ms. Ells and Ms. Janek knowing that Simms' customers were the likes of Holt Renfrew must have known the immediate and natural consequences would be the devastating effect on Simms' reputation of losing this exclusivity through the Costco sales due, amongst other things, to Costco's "treasure hunt effect".

[465] Costco's interference with Simms' reputation is particularly egregious. In its own Code of Ethics, Costco requires that its employees "on a business matter that is

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[165] See *Google Inc.* v. *Equustek Solutions Inc.*, 2017 SCC 34 regarding the obligation on a third party to not aid a wrongdoer in unlawfully selling the plaintiff's intellectual property. In the present case, contractual rights and not intellectual property were at stake but the situation is analogous.

[166] *Saint-Ferdinand*, supra note 159 at paragraphs 120,121.

open to varying ethical interpretations" to "Take the High Road AND DO WHAT IS RIGHT" (D-63) (same emphasis as in original).

[466] Following the receipt of the cease and desist letters, the path to that "high road" was clear from a legal perspective. In flagrant violation of Simms' cease and desist letters, Costco not only did not remove the Product from its shelves but did nothing to ascertain Simms' allegations nor did Costco engage with Simms to resolve the issue. On the contrary, in circumstances that called for restraint and transparency, Costco "went silent" all the while preparing to purchase five times more of the Product and put it on their shelves again. By undertaking these actions, Costco knew or should have known the devastating effect this would have on Simms' reputation.

[467] The fact that Costco's employees would act in this way despite the Code of Ethics is an aggravating factor. Ms. Ells, a loyal Costco employee, spoke eloquently of the Costco goal of focussing on the interests of their members first. That laudable objective however, must be balanced by the rights of other companies who hold valid exclusive distributorship agreements and who are entitled to have their rights take precedence, as should have occurred in this case, over the "treasure hunt" effect.

[468] Punitive damages are required by way of general deterrence since if a major retailer such as Costco may be permitted to contravene with impunity the judicial fact that is the EDA after Costco has been informed of the exclusive distributorship, then the reputation of an exclusive distributor such as Simms has no guaranteed protection.

Assessment of Quantum

[469] The Supreme Court of Canada confirms that the quantum of punitive damages must be determined so as to achieve the objectives of punitive damages: prevention, deterrence (both specific and general) and denunciation.[167]

[470] *CCQ* art. 1621 provides a non-exhaustive list of criteria to consider in evaluating punitive damages, including: "the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the repertory damages is wholly or partly assumed by a third person". These factors, and others, will be given different weight depending on a case's individual facts.

[471] Hence when the words "restraint" and "moderation" are used in relation to the awarding of punitive damages under the *Quebec Charter*, which means that the importance of the award must, in the words of CCQ art. 1621 "not exceed what is sufficient to fulfill the preventive purpose", it does not mean that the amount may not be substantial if that is what required to fulfill that purpose.

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[167] *Cinar Corporation v. Robinson*, 2013 SCC 73.

[472] Costco's actions had the effect of not only debasing Simms' reputation but of compounding that interference. The gravity of Costco's fault is particularly serious because it continued, and in fact increased its illegal sales of the Product after having received the two cease-and-desist letters, despite the implication of both internal and external counsel at the time (not trial counsel). This conscious and callous disregard for Simms' reputation is compounded by the lack of any remorse.

[473] With more than 65 retail outlets across Canada, Costco is a major Canadian retailer. At the same time, because of its size and reputation, this type of action must be both reproved and sanctioned, lest it set an example in the marketplace. The amount of the award must take into consideration the stature and size of this major company so that the amount of the award will be a true disincentive to stop this type of activity in the future. One of the clear purposes of punitive damages is to avoid recidivism and to be of sufficient magnitude that it is not simply considered "a cost of doing business" to be passed on to consumers.

[474] As other parts of this judgment indicate, the bulk of the lost profits component of damages has been paid for by R & R through the U.S. Bankruptcy proceedings. As such, the award for compensatory damages against Costco is, in and of itself not a particular disincentive. This is why the punitive damages award must be an appropriately important amount. Also, Costco may seek to exercise its contractual claim for indemnification from ABFI pursuant to the Vendor agreement. If it does so successfully, then Costco would be able to pass on to ABFI the compensatory damages awarded herein. Accordingly, *CCQ* art. 1621 also requires this must be considered by the Court.

[475] Next, the evidence is clear that Costco's employees were acting on behalf of their employer. Both management and the legal department were aware of the Costco purchases. Irrespective of the fact that the markup by Costco was only $15 per pair of jeans, there is evidence on behalf of Costco that the profit to Costco on this product was not the direct purpose: the Product was used as Ms. Ells explicitly testified, to create the desired "treasure hunt effect" which was part of Costco's precise business strategy (Exhibit P-81).

[476] This whole "treasure hunt effect" is premised on the fact that Simms, its retailers, and the manufacturer, devote a great deal of money and effort to "pumping up the brand" so that the regular market price creates this "treasure hunt effect" when Costco's customers come upon the unexpected "bargain" in the course of their shopping at Costco.

[477] The Court now turns to the patrimonial situation of Costco.

[478] Simms filed the 2010 Annual Report for Costco Wholesale Corporation (the Company"). The Defendant is a subsidiary of the Company. The Annual Report states:

a) 2010 was a record year for the Company in sales and earnings (p. 2);

b) Total assets are: US$ 23,815 million.

c) “As of December 2010, the Company … operates in 9 Canadian provinces with 80 locations…” In 2010 (p. 2), the Company had $76.3 billion in sales with net earnings in 2010 of $1.3 billion U.S.;

d) To the year-end August 30, 2009, total revenue from Canadian operations was: $12.051 billion U.S.

e) The Company is the third largest retailer in the U.S. and the eighth largest retailer in the world (p. 3);

f) “All of our senior executives average over 25 years’ experience with Costco and that helps us remain true to our core objectives” (p. 3);

g) “We continue to present great theatre and outstanding values packaged in a treasure hunt atmosphere, which we are convinced makes Costco a fun place to shop” (p. 3).

[479] To come to a final determination on quantum, the Court analyzes certain figures concerning the R & R transaction for Costco. The main documents are filed by Costco and clearly not filed for the purposes of the calculations that the Court might find most useful. The Court makes certain adjustments.

[480] The first important figure is to determine total purchases by Costco of the Product.

[481] For the relevant period, the total amount of R & R Product that Costco purchased was $8,722,091.00, (Exhibit D-55). However, deducted from that amount should be the original purchase in July 29, 2009 when Costco was unaware of the EDA; this purchase was for $771,456.00 (Exhibit D-64), therefore leaving a rough total of $8 million in unauthorized purchases. The average markup on the Products purchased (ladies' and men’s jeans and ladies' T-shirts) was 12.8% (D-55).

[482] The Annual Report says that in 2010 “Selling, General and Administrative Expenses” represented 10.28 % of net sales. According to D-55, the “receiving @ sell” figure was $9,997,267.00 and the “receiving @ cost” figure was $8,722,091.00, leaving a difference of $1,275,176.00. Accordingly, it is probable that Costco expected to make a rough profit in the order of 2.5% of total sales (12.8% - 10.28 %) in approximate percentages.

[483] 2.5 % of 9,997,267.00 is $249,931.67.

[484] The great irony is, that when all is said and done, because of deductions Costco was required to take because of damages to some of the Product, buyer markdowns, and warehouse markdowns, on final total sales of the R & R product, Costco suffered an overall loss of $735,125.00 (Exhibit D-55).

[485] However, deterrence and punishment in this case must take into consideration that Costco undertook this contractual interference convinced that it would benefit

Costco's members (and hence increase Costco's goodwill) rather than the monetary loss that actually happened. However, these calculations do not include profits made by Costco from its memberships nor indicate the level of satisfaction of Costco members at benefitting from the treasure hunt effect created by the Product.

[486] To conclude, the gravity of the interference is serious and the modest extent of the compensatory damages and the existence of an indemnification agreement, provide minimal deterrence. The critical factor is Costco's "patrimonial situation" which the Court now considers in fuller detail.

[487] In the 2015 *Cinar* case, the Supreme Court of Canada noted that "the typical range for punitive damages in Quebec is between $5,000 and $250,000…" with the most egregious cases attracting $1,000,000 awards[168]. The 2006 Superior Court judgment of *Markarian v. Marchés mondiaux CIBC inc*.[169] involving stockbrokers' liability and the appropriation of clients' property, actually awarded $1.5 million in punitive damages.

[488] The *Cinar* case involved egregious conduct by the defendants in infringing the plaintiff's copyright in contravention of article 6 of the *Quebec Charter*: "Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law." Punitive damages, where there were four defendants, was assessed at a total of $500,000.00 by the Supreme Court of Canada.

[489] The Court has considered the following extracts from the Court of Appeal judgment in *Cinar* which provide context for the most egregious cases where punitive damages have been awarded:

> ***[250] La tradition jurisprudentielle canadienne applique donc rigoureusement la règle de proportionnalité. L'octroi de sommes très substantielles est exceptionnel et il accompagne des cas de conduites répréhensibles extrêmes[170].***
>
> ***[251] Le présent dossier ne constitue pas l'un de ces cas exceptionnels comme ce l'était dans les affaires Whiten précitée et Markarian* c. *Marché mondiaux CIBC inc.[171] citées par les intimés dans leur mémoire. Dans l'un et l'autre de ces cas, une banque et une société d'assurance ont tenté de flouer leur client en toute connaissance de cause. Dans ces situations, le besoin de dénonciation est**

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[168] Ibid., at para. 138.
[169] 2006 QCCS 3314.
[170] For example: *Whiten* v. *Pilot Insurance Co*., 2002 SCC 18; *Markarian* c. *Marché mondiaux CIBC inc.*, [2006] R.J.Q. 2851 (C.S.); *Hill* v. *Église de Scientologie de Toronto*, [1995] 2 SCR. 1130.
[171] Ibid. [Markarian].

particulièrement pressant, ne serait-ce que pour faire savoir aux personnes impliquées que pareille conduite est intolérable et qu'elle sera vivement dénoncée.

[252] Dans Whiten, l'assureur a refusé d'indemniser son assuré en invoquant qu'il avait participé à un incendie. Or, l'enquêteur et l'expert avec lesquels il avait fait affaire ont tous deux affirmé qu'il n'existait pas la moindre preuve d'incendie criminel. La famille dont la maison avait été incendiée était dans une situation financière très précaire. Elle a dû risquer son dernier élément d'actif pour s'engager dans un procès long et totalement inutile vu l'absence de vraisemblance de l'allégation d'incendie criminel. Le jury a conclu que l'assureur avait eu une conduite exceptionnellement répréhensible et il a octroyé des dommages punitifs de un million de dollars pour lancer un message vigoureux de châtiment, de dissuasion et de dénonciation. La Cour suprême a reconnu que le montant était élevé, mais elle a refusé d'intervenir en raison des faits très particuliers de l'affaire.

[253] Dans Markarian, la Banque CIBC savait que ses clients, des personnes âgées et non averties en matière boursière, avaient été victimes d'une fraude de la part de l'un de ses conseillers en placement. La Banque CIBC a refusé de reconnaître sa responsabilité, elle a maintenu une position insoutenable et elle a forcé les demandeurs à subir un procès de quatre mois. Plus encore, cette conduite n'était pas isolée, mais elle s'était répétée à l'égard de plusieurs autres victimes. Ces faits ont entraîné l'attribution de dommages punitifs de un million de dollars.

[254] Dans Hill* c. *Église de Scientologie de Toronto*[172]*, la Cour suprême a confirmé une condamnation à des dommages punitifs de 800 000 $ et à des dommages-intérêts compensatoires de 500 000 $ pour les dommages moraux subis en raison d'une atteinte à la réputation de l'avocat Hill. Il faut rappeler que le comportement de l'Église de Scientologie de Toronto dans la publication fausse et injurieuse concernant M. Hill était empreint de malveillance. Elle avait pris les mesures nécessaires pour que sa publication, soigneusement planifiée, soit largement diffusée de manière à ce qu'elle soit très préjudiciable. L'allégation contre l'avocat Hill était dévastatrice. On l'accusait d'abus de confiance et on lui reprochait une conduite criminelle. De plus, les agissements de l'Église de Scientologie à compter de la publication, pendant le procès et après le jugement,

[172] *Supra,* note 170.

constituaient une tentative persistante de nuire à Hill en propageant une déclaration qu'elle savait fausse. [173]

[490] The last case the Court will consider is the 2015 Court of Appeal judgment in *Eddy Savoie v*. *Thériault-Martel* [174].

[491] That case involved a SLAPP suit (i.e. a procedure abusively instituted to shut up the opposing party) with a subsequent claim by the victim for punitive damages under *CCP* article 54.4. The Court of Appeal confirmed the damages awarded at trial of $87,095 in legal fees; $10,000 in moral damages, and importantly for the purposes of this case, $200,000 in punitive damages.

[492] Two approaches taken by the Court of Appeal are instructive. Firstly, the Court of Appeal noted that the $200,000 punitive damage award was .000013% of the $1.5 billion patrimony of the wrongdoer, a proportion which the Court of Appeal found not to be excessive in the circumstances. The Court of Appeal also noted that the wrongdoer had himself filed a punitive damages claim against the victim of the SLAPP suit in the amount of $200,000, for which the Court of Appeal noted that the patrimonial situations between the parties were "light years apart".[175]

[493] In the above-noted jurisprudence, the interference was overt, even nasty; the victims were clients and were in a major power imbalance; the victims were forced through lengthy legal proceedings to seek justice and the wrongdoers refused to recognize their responsibility.

[494] In the present case, Costco's actions after the cease and desist letters were covert but the effect of those actions on Simms' reputation was very serious. Although Simms had no contractual relationship with Costco, Costco used its market dominance to acquire a very large quantity of the goods which it knew would cause direct harm to Simms' reputation. Furthermore, Simms also had a lengthy Court battle. However, the critical factor in this case is that the punitive damages must "not exceed what is sufficient" [176] to deter Costco from future similar behavior. This preventive aspect has particular importance since part of Costco's business strategy is the "treasure hunt" effect which was a motivating factor for Costco's unlawful sales here.

[495] In the present case, a punitive damages award of $500,000.00 would represent .00170 % of the total assets of Costco's parent company (US$ 23,815 million in 2010) [177] noted earlier in this judgment. Moreover, three months before trial,

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[173] *Cinar, supra* note 167 at paras. 250-254.
[174] 2015 QCCA 591.
[175] Ibid at paras. 70,72.
[176] In the words of *CCQ*. art. 1621.
[177] This amount was not challenged by Costco nor did Costco seek to introduce more contemporary evidence of its financial status, nor did it choose to provide evidence of the patrimonial status of Costco alone, as the Canadian subsidiary. As of September 25, 2017 with a conversion rate of .8103

Costco asserted a counterclaim against Simms for punitive damages for harm to its reputation in the amount of $100,000.00. The patrimonial situation of Simms, as shown in the financial statements of Simms filed by Costco (Exhibit D-61 en liasse) to the end of 2012 is: $6.974 million in assets, a figure “light years apart” from that of Costco and its parent. In fact, it represents 1.43% of Simms total assets.

[496] *Charter* art. 49 does not create a hierarchy of *Charter* rights in which distinctions must be made based upon which *Charter* right suffers intentional unlawful interference. Simms’ right to reputation is equally worthy of protection as its other rights.

[497] Punitive damages are not intended as compensation even though Simms’ professional legal fees costs for these proceedings are substantial.[178] Simms most recent procedure (see paragraph 429 of this judgment) leaves ambiguous the grounds under which Simms claims “solicitor-client costs”. Since the Court has found no abuse of procedure by Costco and since there was no substantial breach in the conduct of proceedings (art. 342 CCP), they cannot be claimed on either of those bases. There are two other possible bases for such a claim: (a) as damages resulting from intentional contractual interference or (b) under art. 49, *Quebec Charter*. The Court of Appeal in *Viel* ([2002) RJQ 1262 (CA)) prevents such costs from being awarded under (a). The law provides the same result for a claim under (b) [179] , although the doctrine cited proposes a legislative amendment to permit recovery of attorney’s fees incurred to protect a quasi-constitutional right, such as reputation. Such a proposal is consistent with the objective of the *Charter’s* preamble to guarantee *Charter* rights. However, based on the present state of the law, this claim for “solicitor-client costs” is dismissed.

[498] In conclusion and in the circumstances of the present case where Simms claims $500,000 in punitive damages and weighing the amounts awarded in the above cases and the statutory factors, the Court determines that an award of $500,000 is sufficient and appropriate “to fulfill the preventive purpose” of *CCQ* art. 1621.

CAD/USD, CDN $500,000 is equal to US $405,150. Under cross-examination, Ms. Ells testifies that in 2015, Costco had approximate sales of $15 Billion.

[178] These amount to $789,996 for the two Montreal law firms representing Simms in the course of the present litigation (Exhibit P-83). The American law firm representing Simms in the US Bankruptcy proceedings charged Simms $ 1,036,983.00.

[179] See Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile,* 8è éd., Vol. 1 « Principes généraux », Cowansville, Éditions Yvon Blais, 2014, par. 1-351; see also *Hrtschan* c. *Montréal (Ville de)*, [2004] R.J.Q. 1073 (C.A.) at paras 58*ff*.

xxix) Legal Costs Incurred by Simms in R & R's U.S. Bankruptcy Proceedings

[499] For Simms to obtain its extra-judicial legal costs in the U.S. Chapter 11 proceedings, it must establish that the fault(s) committed by Costco were the direct cause of those damages. That means that Simms must prove that Costco's contractual interference was a direct cause for it to incur these legal fees.

[500] It has not done so.

Analysis

[501] Simms' then counsel, Davies Ward Phillips Vineberg engaged the American law firm of Alston and Bird following the institution of Chapter 11 proceedings by R & R in New York. Costco accepted for the purposes of quantum only that the legal fees for Alston were $1,036,983 and for Davies Ward, $65,000 for a total of $1,101,983 in relation to the U.S. Bankruptcy proceedings.

[502] However, the Chapter 11 filings and the rest of the bankruptcy proceedings - except for the Motion to Reject - were all related to the independent actions of R & R. There is no direct causal link to Costco and so legal fees for the bulk of the U.S. Bankruptcy proceedings cannot be claimed as damages.

[503] Since the Court determined that Costco knew or should have known that its orders for the Product would lead R & R to take the rejection proceedings, the Court is prepared to consider the claim for damages regarding the specific legal fees related to those proceeding: first on the issue of liability and then quantum.

[504] The Court determines that Costco has no liability for these legal fees. The relevant period for legal services is from August 12, 2010 when R & R filed its Motion to Reject (P-2D) until September 13, 2010 when Simms withdrew its Opposition to that Motion (P-2F). However, Simms effectively renounced to this claim for legal fees for the Davies firm and the Alston firm, when it withdrew its Opposition on September 13, 2010. By this withdrawal, Simms admits in effect that its Opposition was not necessary. Whatever strategic or tactical reasons Simms had for this withdrawal were not brought to the Court's attention.

[505] Nonetheless and for completeness, the Court will determine quantum. Davies' legal fees to Simms up to August 12, 2010 were $48,273.19 and up to October 19, 2010 were $67,758. No hourly rates were provided. The difference between these 2 amounts is: $19,484.81, the approximate amount of fees incurred during the period in issue.

[506] The specific work done by the Alston firm included drafting the Opposition by Simms on September 2, 2009; attendance at the hearing September 8, 2009 and attendance on September 13th, 2009 to withdraw the Simms' Opposition and receive the Order Rejecting the EDA. The hourly rates are not filed for the Alston firm. The Court would arbitrate the fees for the Alston firm to be the same as

those for Davies since the Alston work was over a much shorter period and the Court can take judicial notice that the hourly rates of attorneys in New York City are generally greater than those in Montréal.

ABUSE OF PROCEDURE CLAIM BY COSTCO

[507] Normally, Costco's allegations for abuse of procedure are properly dealt with as part of the main action while Costco's claim based on defamation is part of the Counterclaim. However, Costco's allegations for abuse of procedure and defamation are so closely intertwined that both aspects will be dealt with in the Counterclaim.

Ultimate Determination of Damages Owed in the Main Action

[508] For the reasons given, Simms is entitled to compensatory damages of $361,005.44 and is entitled to $500,000 in punitive damages.

COUNTERCLAIM

Nature of Relief Being Requested

[509] In its counterclaim, Costco claims $1,425,571.40 for professional fees (including fees for the three experts and fees for Costco's first attorneys in the amount of $833,148.49 and for trial counsel of $335,000). In addition, Costco claims $100,000 in punitive damages per *Quebec Charter* art. 49, alleging that the harm to its reputation is caused by Simms' intentional abuse of process.

Are Any Aspects of the Counterclaim Prescribed?

[510] The Court determines that the Counterclaim, in as far as it relates to damage to Costco's reputation and defamation, is prescribed pursuant to *CCQ art.* 2929 The one-year prescription began on November 30, 2010, when the amended motion to institute proceedings was notified to Costco. Costco cannot invoke *CCQ* art. 2896 to interrupt prescription because its action in defamation does not arise from the same source ***("même cause d'action ou de même fait générateur de droit")*** as Simms' action for contractual interference. [180]

[511] With respect to the claim for abuse, the Court concludes :

a) prescription for a claim for abuse of procedure begins from the date of the judgment in the proceedings in which the procedure is taken; and

b) a claim alleging abuse of procedure is an "incident" within the main action and need not be brought by counterclaim, which is a separate proceeding. In the present case, the Court will deal with Costco's claim

[180] See *2862-1225 Québec inc.* c. *Placements Synvesco inc*., [1998] R.J.Q. 1135 (C.S.); *Pilon* c. *Cyr*, J.E. 2004-1388 (C.S.) at paras 71-72.

for abuse as part of the Counterclaim.

Defamation: Alleged Damages of $100,000 and moral damages of $50,000

Analysis

[512] Even if Costco's counterclaim for defamation were not prescribed but with a view to concluding all aspects of this topic, this Court would have refused Costco's claim for the reasons that follow.

[513] Costco alleges that harm to its reputation "stems from an abuse of process" which is "clearly intentional", and therefore claims $50,000 in moral damages and $100,000.00 as punitive damages under sec. 49, *Quebec Charter*.

[514] Ms. Ells testifies that the allegations in the Simms' proceedings are "insulting and incorrect" and damaging to the Costco brand and Costco's employees, including herself.

[515] Simms' Amended Motion, - with which Costco takes exception - is dated November 30, 2010 and was responded to by Costco on June 7, 2011, but without Costco alleging defamation and abuse of procedure at that time.

[516] It was over five years later, on July 29, 2016, that Costco made these assertions concerning defamation and abuse in its Re-Amended and Modified Contestation and Counterclaim dated July 29, 2016. Costco alleges that the use of certain expressions and / or words in Simms' Amended Motion has adversely affected its reputation and integrity.

[517] The list of Costco's allegations of defamation[181] arising from Simms' Amended Motion (with paragraph references to the Simms procedure) are:

- in furtherance of this **scheme — which was dubbed "Project X" –**" (paragraph 22, see also paragraphs 23, 43, 90, 92, 97, 99, 101, 102 and 103);
- "Costco, R & R, Quetico and Kontakt **conspired** to engineer the flow of Products into Costco's Canadian stores" (paragraph 90);
- "[R & R, Costco, Quetico and Kontakt] decided that it was necessary to camouflage the means by which Costco was to come into possession of the Products" (paragraph 91);
- "To give effect to their scheme, and to avoid the appearance that there were any direct contacts between R & R and Costco, the parties put into effect an elaborate ruse […]." (paragraph 92);

[181] *Re-Amended and Modified Contestation and Counterclaim*, para. 152. The paragraph references are to the Simms' Amended Motion.

- “It is clear that […] Costco had obtained same pursuant to the scheme designated as "Project X" using Quetico and Kontakt to hide the true nature of its involvement in the transaction.” (paragraph 97);
- “Costco […] knew that [the] supply of such goods to it had to be camouflaged because of the existence of the Exclusive Distribution Agreement.” (paragraph 98);
- “It is therefore clear from the foregoing that the parties colluded and that Costco knowingly participated in the "Project X" scheme for the express purpose of selling Rock & Republic merchandise in Canada in violation of Simms' rights.” (paragraph 102);
- “Costco induced R & R to breach its contract obligations towards Simms and to apply in the U.S. bankruptcy proceedings for the rejection of the Exclusive Distribution Agreement. All of this was in furtherance of the scheme to illegally provide Products for sale in Canada by Costco” (paragraph 103);
- “The extent to which Costco's wilful and egregious conduct” (paragraph 107);
- “Costco's actions are high-handed and flagrant and in violation of […] its own obligation to act in good faith.” (paragraph 120);
- “Costco's high-handed actions constitute : i) an egregious, wilful and deliberate infringement of Simms' exclusive rights; and […] iii) a violation of its obligation to exercise its civil rights in good faith.” (paragraph 122);
- “Had it not been for Costco's bad faith and illegal conduct, aided and abetted by R & R, Quetico and Kontakt,” (paragraph 125);
- “It is clear that Costco is acting in a manner contrary to the requirements of good faith.” (paragraph 126); and
- “Costco's dishonest, wilful, reprehensive and commercially repugnant behaviour towards Simms” (paragraph 139).

Governing Law

[518] For defamation proceedings to succeed, there must be a fault committed by the defendant[182]. There are essentially two types of fault: either the defendant is acting in bad faith with intent to harm the plaintiff’s reputation or the defendant does not intend to harm the Plaintiff’s reputation but does so either by negligence

[182] BAUDOUIN, *supra* note 102, 1-297.

or by recklessness.[183] Thereafter, there are two stages in the assessment of fault: firstly, the applicable test is what would the "reasonable person" have taken from the impugned comments; and secondly for the determination of damages, what would be the level of negative impact on the victim's reputation in the mind of an "ordinary citizen in the face of the defamatory statements or conduct".[184]

[519] Finally, if intent to defame can be shown, then the *Quebec Charter of Human Rights and Freedoms* s. 49 establishes that punitive damages may be awarded.

[520] Normally, the role of intent is not an important one in defamation proceedings[185], but it must be considered here in view of the second part of Costco's claim based in defamation.

[521] Defamation in legal proceedings has its own particularities. In Terreault v. Bigras, the Court of Appeal confirms the four criteria for analyzing whether legal proceedings are defamatory:

> ***"La diffamation dans un acte de procédure donne lieu à un recours en dommages-intérêts, mais seulement à la condition d'établir que les allégations diffamatoires non seulement sont fausses, mais encore qu'elles n'étaient pas pertinentes au litige, qu'elles ont été faites malicieusement ou du moins, avec une témérité telle qu'elles équivalaient à malice et qu'il n'y avait aucune cause raisonnable ni probable de les faire."***[186]
>
> (this Court's emphasis)

[522] Hence, it is necessary to analyze whether Simms was malicious or reckless in its allegations[187] since the burden is higher for a plaintiff alleging defamation in court proceedings than defamation in other documents.

[523] Therefore, the law requires Costco to prove that the impugned allegations (1) were not based on reasonable or probable grounds; (2) were not relevant; (3) were made maliciously or recklessly; and (4) were false.[188]

Analysis

[524] Reduced to its essence, Simms is alleging Costco knew about the EDA and conspired with R & R and the intermediaries to purchase the Product in knowing violation of Simms' rights under the EDA. Simms' allegations are based on

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[183] Ibid., para. 1-297.
[184] *Bou Malhab* v. *Diffusion Métromédia CMR inc.*, 2011 SCC 9, para. 93.
[185] BAUDOUIN, *supra* note 102.
[186] *Tétrault* v. *Bigras*, 2005 QCCA 1243, para. 94; *Berthiaume* v. *Carignan*, 2014 QCCA 2092, para. 46.
[187] *C.J. Borenstein* v. *Eymard*, 1992 CanLII 3157 (QC CA), p.6.
[188] *Tetrault, supra* note 186.

presumptions for the period prior to the first cease-and-desist letter and afterwards, on Costco's direct knowledge as a result of that letter.

[525] Costco asserts (Re-Amended Contestation, paragraph 150) that Simms' allegations - that Costco "was involved in a conspiracy of any kind - are complete fabrications and highly offensive". Costco qualifies the allegations as "gratuitous and un-sustained".

[526] Analysis of the Costco claims for defamation must be considered in relation to three time periods:

1. Period 1: before Costco received the first cease-and-desist letter on November 12, 2009;
2. Period 2: the period between that letter and R & R's Motion to Reject in the U.S. Bankruptcy proceedings dated August 12, 2010; and
3. Period 3: the period after August 12, 2010.

[527] Within these time periods, the allegedly defamatory allegations have two distinct but related alleged conspiracies: (a) Costco participating in the sale originating with R & R in pre-meditated violation of the EDA; and (b) Costco's encouragement for R & R to undertake the Motion to Reject the EDA in the U.S. bankruptcy proceedings. This latter conspiracy is applicable only for the second and third time periods.

BEFORE COSTCO'S RECEIPT OF THE FIRST CEASE-AND-DESIST LETTER, NOVEMBER 12, 2009

xxx) The Absence of Reasonable or Probable Cause to Make the Allegations and the Lack of Relevance of the Allegations to the Relief Being Sought

[528] In this first period, there is no direct evidence that Costco knew Simms benefited from the EDA. The presumptive evidence – needed by Simms to prove such Costco knowledge – must be serious, precise and concordant. The Court determines that Simms committed no fault since the allegations were made on reasonable grounds although, on the merits, Simms' evidence did not meet its burden of proof.

[529] Simms' allegations of knowledge by Costco are relevant since without Costco's knowledge of the EDA, Simms cannot claim contractual interference by Costco.

[530] For the reasons that follow, the Court determines that Simms had both reasonable cause, and it was relevant per *Tetrault*, to allege Costco was working closely with R & R to obtain the Product and hence, it was reasonable and relevant for Simms to allege Costco knew or must have known an arrangement

was put in place for Costco to acquire and sell the goods in Canada despite the prohibition against this in the EDA:

a) a series of emails between two R & R employees on January 12, 2009 referencing a "meeting with Costco" in one email on Tuesday, in a second on Wednesday and in another on Thursday (P-16 a);

b) a July 17, 2009 email from a law firm to the R & R president (Exhibit P-16 B) which makes reference to: "The Costco people continue to be quite interested in a possible relation with R & R. Knowing your concerns about the rest of your Canada sales, I suggested that perhaps the product should be something other than jeans to start with…. Meredith and a Costco chick would like to come to LA (and I would be there) to chat a bit further" (this Court's emphasis);

c) a November 11, 2009 email from Ms. Sussman to Ms. Bernholtz (R & R president) and other R & R employees including the R & R employee who was mentioned in the January 2012 emails in paragraph (a) that make reference to "all three styles in Costco Canada are "Project X" styles … Linda Sigal wants to speak with me urgently. Can we please schedule a call to discuss?" This email allows for the reasonable conclusion that Project X refers to the ultimate Costco purchases and so when Ms. Janek makes reference to Project X (see next pargraph), a reasonable conclusion could be drawn that Costco and R & R were working together.

[531] Costco's Ms. Janek had made reference to "Project X" in an email that she sent to Mr. Rolnick. From the documents related to the U.S. bankruptcy proceedings, this Court is aware that "Project X", in the minimum, refers to R & R manufacturing jeans in Guatemala instead of the United States. The Court determines that Costco must have known and ultimately accepted that certain goods it sold in November 2009 were made in Guatemala, since there is no evidence Costco complained about this Guatemalan manufacture, even though Mr. Rolnick had originally represented to Ms. Janek that the R & R goods were made in United States.

[532] It is reasonable for Simms to draw an inference, given the nature of the sophistication of R & R and Costco that since R & R was aware of the existence of the EDA and since Costco was aware that the R & R Product was sold in high-end Canadian fashion stores that Costco would have been made aware of this EDA issue.

[533] In conclusion, Simms had reasons to make the allegations even if, on the Court's determination, the evidence fell short. It was reasonable for Simms to test the credibility of these inferences in the "crucible of truth" provided by a trial.

THAT THE ALLEGATIONS WERE MADE WITH MALICIOUS, OR AT LEAST, RECKLESS INTENT

[534] Ms. Sigal testified at trial - under cross-examination - of her thought process back in 2009-10: “How is it that the Costco gets this opportunity to purchase these goods? Why did Costco not ask themselves if they had the right to buy the goods?”

[535] She said that if Costco had told her that they were authorized by R & R, she would have stopped the lawsuit but “people were not telling me the truth”. She said she had nothing against Costco but that she was “trying to survive”. She said that she had never once sent a cease-and-desist letter before in her lengthy career and she simply “wanted Costco to take her seriously”, “she wanted to fix the problem, she had no intention to litigate” and “she wanted Costco to take the Product off the shelves”.

[536] Furthermore, she would have sent the EDA to Costco if they had asked but Costco never questioned Simms' assertion that Simms was the exclusive distributor. She recognized that paragraph 8.3 of the EDA made it confidential but she would have gone to get R & R’s permission to show Costco the document.

[537] Whether she would have obtained that permission (or had to seek a Court order) is moot. Her testimony was credibly given and without hesitation. Her good faith in this regard is proven on the balance of probabilities.

[538] The Court does not agree with Costco’s characterization of:

a) Ms. Sigal’s testimony – both in the proceedings before this Court and in the U.S. bankruptcy proceedings – and

b) conspiracy allegations,

as “pure speculations”.

[539] What takes these inferences beyond “pure speculations” is the use of the term “Project X” in Ms. Janek’s correspondence and the R & R email references to Costco as early as January and July, 2009. The Court also concludes that Costco actions after it received the cease-and-desist letters – in lieu of frank and open discussions with Simms to try to understand and resolve Simms’ allegations – was responsible for creating this climate of mistrust from which a reasonable inference could objectively be drawn, along a spectrum of possible reasonable inferences, that Costco knew about Simms’ exclusive rights but chose to ignore them.

[540] Accordingly, Costco has not proven the criteria of malicious or reckless intent.

[541] The burden of proof is on Costco to prove that the four legal criteria are met. Since they have not been able to do so for the above three criteria, Costco has

not proven Simms' proceedings were defamatory in relation to this first time period.

[542] Nonetheless for completeness, and as regards this fourth criteria, the Court rules that Costco has proven on the balance of probabilities that for this first period, they were unaware of Simms' rights under the EDA and so, Simms' conspiracy allegations in relation to this first time period, are not proven.

[543] The operative allegation by Simms is:

> ***(20) In or about July of 2009, the parties came to an understanding whereby R & R would sell Products to Costco in such a way that it would appear as if Costco was purchasing R & R merchandise on the grey market. A representative of Costco, Ms. Pamela Janek, later admitted under discovery that the R & R products sold by Costco were not grey market goods.***

[544] Firstly, there is no direct evidence that the alleged meeting with Costco ever took place in January 2009. It is more probable that that meeting was in fact with Mr. Rolnick, acting on behalf of Kontakt.[189]

[545] Secondly, there is no direct evidence that the meeting with the "Costco chick" referred to in the July 17, 2009 email (P-16 B) ever took place. The Court accepts the evidence of both Ms. Janek[190] and Ms. Ells that they never met with anyone from R & R in 2009, and that neither of these Costco employees was the so called "Costco chick" referred to in that email. While the Court accepts that the reference to the R & R president's (Ms. Bernholtz) "concerns about the rest of your Canada sales" clearly refers to the problem R & R has with the EDA in terms of accessing a broader distribution network in Canada, this, in and of itself, does not mean that Costco was aware of the EDA.

[546] Accordingly, the Court determines that on the balance of probabilities, Simms has not proven that Costco was aware of the EDA prior to the first cease-and-desist letter, November 12, 2009. Reference is made as well to this Court's earlier reasons.

xxxi) Between the First Cease-and-desist Letter and the R & R Motion to Reject (P-2d), August 12, 2010

[547] In view of the Court's earlier findings of contractual interference for this period, including Costco's real or implied knowledge of Simms' exclusivity rights, Simms allegations are proven. On this ground alone, the allegations for this period cannot be defamatory.

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[189] Exhibit D-59, Examination of Mr. Rolnick on April 4, 2011, at page 103.
[190] Exhibit P-73, Examination on Discovery of March 10, 2011, at page 149.

[548] The remaining question is whether Costco encouraged R & R to undertake the Motion to Reject.

[549] Again, based on the earlier findings by the Court, Simms' allegations of Costco's implicit collaboration with R & R to have the EDA rejected have not been proven to be false and hence, there is no defamation.

xxxii) After August 12, 2010

[550] The proven fact is that on November 3, 2010, there is an internal R & R memo which discusses "offering Linda Sigal a piece of the action if she drops the Costco lawsuit". [191] The most probable reason for R & R to want to assist Costco was because of Costco's existing or prospective orders for more Product. For this reason, the Court cannot agree with the Costco argument that their involvement with R & R ended when they cancelled the June 2010 orders.

[551] Moreover, the order confirmation of June 11, 2010 for 18,032 units of men's jeans was not actually cancelled by Costco until sometime between February 10 and February 23, 2011. [192]

[552] These two facts alone, in the mind of a reasonable person, could reasonably give rise to the allegation that Costco was supporting R & R's Motion to Reject.

[553] Accordingly, Costco has not proven that Simms' allegations were made without some reasonable basis for this time period either.

Abuse of Procedure

[554] A judicial proceeding may be found to be abusive without being defamatory. The applicable criteria are not the same as for defamation: for one thing, malice is not required to prove abuse.

xxxiii) Costco's allegations

[555] Costco alleges that Simms has committed an abuse of procedure though the filing of its Amended Motion because:

a. It made "false and unfounded allegations";

b. It used "gratuitous and inflammatory language";

c. "on the face of the evidence obtained by Simms in the U.S. Bankruptcy proceedings, Simms should have withdrawn the present proceedings";

d. "Simms claim for punitive damages… for half a million dollars is completely unfounded given the absence of any basis in the Amended Motion" and is an abusive pressure tactic.

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[191] Chronology of Key Events agreed to by the parties.
[192] Exhibits P-33, P-72 (1) -U-3b, U-55 and D-64.

[556] Based on these allegations, Costco claims $887,140.45 for professional and expert fees.

[557] Simms Amended Motion complained of by Costco was dated November 30, 2010 and was originally responded to by Costco on June 7, 2011.

[558] It was over five years later on July 29, 2016 that Costco made these assertions concerning abuse of procedure (and defamation) in its Re-Amended and Modified Contestation dated July 29, 2016. Unlike Costco's delayed claims for defamation, the Court is less concerned with the same delay as it relates to abuse, since abuse must be evaluated over the entire context of the proceedings, including the evidence adduced at trial.

Governing law

[559] First, abuse of procedure is defined in *CCP* art. 51 (2):

> ***Regardless of intent, the abuse of procedure may consist in a judicial application or pleading that is clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome. It may also consist in a use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, particularly if it operates to restrict another person's freedom of expression in public debate.***
>
> ***2014, c. 1, a. 51.***

[560] *CCP* art. 54.1. provides for penalties for abuse of procedure:

> ***On ruling on whether a judicial application or pleading, including one presented under this division, is abusive, the court may order a provision for costs to be reimbursed, order a party to pay, in addition to legal costs, damages for any injury suffered by another party, including to cover the professional fees and disbursements incurred by that other party, or award punitive damages if warranted by the circumstances.***
> ***If the amount of the damages is not admitted or cannot be easily calculated at the time the application or pleading is declared abusive, the court may summarily determine the amount within the time and subject to the conditions it specifies or, in the case of the Court of Appeal, refer the matter back to the court of first instance for a decision.***
>
> ***2014, c. 1, a. 54.***

[561] Accordingly, the Court may, if it deems the procedure abusive, award compensation for the extrajudicial legal costs incurred by the party to defend against such abusive procedures.

[562] The Court of Appeal in its judgment of *Acadia Subaru* v. *Michaud* stated that in order to declare a procedure abusive, there must be blameworthy conduct:

> [42] ***Parmi d'autres différences, il y a l'élément de blâme associé à la conclusion qu'une demande en justice ou un acte de procédure constitue un abus qui n'est pas nécessaire selon l'article 165(4) C.p.c. Si le mot français « abus» le démontre plus nettement que le terme anglais « impropriety », les textes anglais et français de l'article 54.1, aliéna 2 C.p.c. expriment clairement ce que constitue l'utilisation blâmable d'une procédure dans la description de ce qui constitue un abus de procédure. Le motif pour conclure qu'une demande en justice ou qu'un acte de procédure est « manifestement mal fondé » est présenté parallèlement avec d'autres motifs comme « frivole ou dilatoire »[193].***

[563] Moreover, it was determined in *Duni* v. *Robinson Sheppard Shapiro, s.e.n.c.r.l.*, that:

> [14] ***Puisqu'une déclaration d'abus comporte une part de blâme envers le comportement de la personne concernée, on s'attend généralement à ce que le tribunal justifie sa qualification en donnant les motifs qui la sous-tendent. Toutes les requêtes mal fondées ne sont pas, bien entendu, abusives[194].***
>
> (this Court's emphasis)

[564] The Court must therefore determine whether there is blameworthy conduct in order to declare the procedure "abusive" for conduct that is:

(a) clearly unfounded; or

(b) frivolous; or

(c) dilatory; or

(d) vexatious or quarrelsome.

[565] As noted, bad faith is not required.

[566] The blameworthy behavior may be inferred by the Court where there is an evident lack of evidence. As stated in *Laliberté* v. *Guinta*, if the evidence concerning the

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193 2011 QCCA 1037.

194 *Duni* v. *Robinson Sheppard Shapiro*, *S.E.N.C.R.L.,* 2011 QCCA 677, par. 14.

alleged allegations is non-existent, there is abuse. It is not necessary to have an intention to harm.[195]

[567] However, the Court of Appeal has emphasised that the analysis of what constitutes abusive conduct i.e. that which is beyond generally acceptable societal norms, must be balanced against a litigant's right to use the courts to resolve disputes.[196] At the same time, freedom of expression, another *Quebec Charter* right, must be taken into consideration when evaluating the words used in a Court procedure.

xxxiv) Analysis: Whether Simms' Procedures are Abusive?

[568] Costco has not met its burden to prove abuse of process. Simms had factual justifications to assert its claims. A reasonably informed person reading Simms' pleading would not find the language in the pleading disproportionate to the evidence asserted on reasonable grounds. In the final analysis, Simms has prevailed for part of its assertions.

[569] Another overarching reason is that there is no blameworthy conduct to sanction. Where Simms' allegations have not found to be proven, there was an arguable case for those allegations to be made when all the circumstances are considered.[197]

[570] The evidence arising in the US Bankruptcy proceedings is not res judicata in Quebec. In view of the lack of credibility and duplicitous behaviour of R & R (asserted by both parties in this case), it was not unreasonable for Simms to question certain testimony of R & R employees in those U.S. Bankruptcy proceedings. At the same time, Simms was not required to accept the testimony of Costco employees taken out of Court in view of a certain lack of transparency with which Costco dealt with the cease-and-desist letters, as explained earlier.

[571] Costco has not proven blameworthy conduct in Simms' assertion of punitive damages – which were successfully advanced – and accordingly Costco's claim for abuse of procedure fails.

SIMMS MOTION TO DECLARE COSTCO'S PROCEEDINGS ABUSIVE.

[572] On July 29, 2016, Costco filed its Re-Amended and Modified Contestation in which it initiated a Counterclaim against Simms in the amount of $1,337,140.45. Shortly thereafter, Simms served its Opposition to this amendment, and on August 17, 2016, Simms filed an Application for Declaration of Abuse and Dismissal of Defendant's Cross-application. It was agreed that that Application would be determined at trial.

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[195] J.E. 2000-516 (C.S.).
[196] *Royal Lepage commercial inc*. v. *109650 Canada Ltd*., 2007 QCCA 915, para. 39 and 42.
[197] Ibid., at paragraph 46.

[573] Simms cited the following reasons for that Application:

- Costco's amendments were made almost 3 ½ years after the filing of Simms Re-amended Motion which Costco complained of so vigorously and;
- Not only were the grounds upon which Costco based its Counterclaim known to them years before that Counterclaim was asserted, but the claims were prescribed and furthermore, were made only weeks before trial.

[574] The Court has already determined that while the defamation claim was prescribed, the claim regarding abuse was not prescribed. Furthermore and particularly regarding the abuse claim, the delay in bringing it was not an impediment, even if the claim was not upheld by the Court.

[575] The Court is satisfied that the Counterclaim raised arguable issues and was not frivolous.

[576] As the Court had noted previously, the timing of this Counterclaim (and the amount claimed) raises certain questions. However, on balance, Simms' Application does not meet the tests for finding a proceeding abusive.

[577] That said, the timing of the Counterclaim and the amount involved were contributing factors to Simms making this Application for abuse. The Court determines that it is in the interest of justice that each side bear their own costs on this Simms' Application.

CONCLUSIONS

FOR THESE REASONS, THE COURT:

[578] **DECLARES** that the damages suffered by the Plaintiff as a result, inter alia, of the Defendant's fault, is in the amount of $1,483,226; **DECLARES** that the Plaintiff received $2,534,667.00 from the settlement in the US Bankruptcy proceedings (P-83); and **DECLARES t**hat the Defendant, as between it and the other *in solidum* debtor, is liable for 50% of the compensatory damages, which 50% is awarded in the next paragraph;

[579] **GRANTS** the Plaintiff's action in part and **ORDERS** the Defendant to immediately pay to the Plaintiff the following amounts:

(a) compensatory damages of $361,005.44. with interest and indemnity from the date of service of the action; and

(b) punitive damages for interference with reputation: $500,000.00, with interest and indemnity from the date of this judgment to the date of payment [198];

[580] **WITH <u>LEGAL COSTS INCLUDING EXPERT FEES</u>** awarded to the Plaintiff in the Main action;

[581] **DISMISSES** the Defendant's Motion for abuse of procedure; with **EACH PARTY PAYING THEIR OWN COSTS;**

COUNTERCLAIM

[582] **DISMISSES** the Plaintiff's Application for a declaration of abuse of procedure; **WITH EACH PARTY PAYING THEIR OWN COSTS.**

[583] **DISMISSES** the Counterclaim, **WITH COSTS.**

MARK G. PEACOCK, J.S.C.

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Dates of hearing: September 12 through 23, 2016

[198] *Boyer v. Lotto-Quebec*, 2017 QCCA 951.

TABLE DES MATIERES

RECTIFIED ANNEX A

EXECUTIVE SUMMARY OF JUDGMENT IN SIMMS V. COSTCO

1. The Court determines that Costco committed the fault of contractual interference against Simms, a Montreal distributor of high end women clothing, when it sold products from an American manufacturer with whom Simms had a contract to be the exclusive distributor in Canada. The Court finds that Costco, despite being put on notice of the exclusivity, sold the manufacturer's goods through 65 of its stores in Canada and is therefore responsible for the loss of sales suffered by Simms.

2. As for the amount of damages, Simms already received a monetary settlement for the loss for a particular period subsequent to its exclusive a distributorship agreement being terminated in Chapter 11 proceedings instituted in the United States by the manufacturer. The settlement covers part of the period of time for which compensatory damages were caused by Costco to Simms. To avoid double recovery, Simms is entitled to damages for a balance of the loss pro-rated over the number of days not covered by the settlement, which damages owing by Costco are $361,005.44.

3. Furthermore, the Court determines that actions by Costco constituted an intentional interference with his Simms reputation. In keeping with the legal principles for such awards which are based, in part upon the asset value of the defendant and the need to be of sufficient deterrence for the future, $500,000 in punitive damages are also awarded.

4. Both parties made opposing claims for abuse of procedure which were dismissed as was the counterclaim by Costco for defamation.

SIMMS SIGAL & CO LTD. V. COSTCO WHOLESALE CANADA LTD.
S.C.M. No 500-17-060159-103

CALCULATIONS REQUESTED PURSUANT TO JUSTICE PEACOCK'S LETTER DATED SEPTEMBER 15, 2017

		OPTION 4A Based on Richter Sales Estimates			OPTION 4B Based on Navigant Sales Estimates		
		Period ending			Period ending		
		31-déc-10	30-mars-11	Total	31-déc-10	30-mars-11	Total
		(365 days)	(89 days)	(454 days)	(365 days)	(89 days)	(454 days)
Projected sales	Note 1	$ 9 036 436	$ 2 203 405	$ 11 239 841	$ 8 789 950	$ 2 143 303	$ 10 933 253
Actual sales	Note 2	(3 958 730)	(91 453)	(4 050 183)	(3 958 730)	(91 453)	(4 050 183)
Lost sales		5 077 706	2 111 952	7 189 658	4 831 220	2 051 850	6 883 070
Gross margin %	Note 3	30,63%	30,63%	30,63%	30,63%	30,63%	30,63%
Lost gross margin		1 555 301	646 891	2 202 192	1 479 803	628 482	2 108 284
Operating expense burden, 10% of lost sales	Note 4	(507 771)	(211 195)	(718 966)	(483 122)	(205 185)	(688 307)
Lost contribution margin		**$ 1 047 530**	**$ 435 696**	**$ 1 483 226**	**$ 996 681**	**$ 423 297**	**$ 1 419 977**

(1) The figures of $9,036,436 and $8,789,950 are as per Justice Peacock's letter dated September 15, 2017.

(2) Actual sales as per Schedule 1 of the Richter Report or Appendix 5 of the Navigant Report.

(3) Gross margin % is 1 minus the cost of goods sold of 69.37% as per Schedule 1 of the Richter Report. Appendix 5 of the Navigant Report rounded the gross margin % to 30.6%. The impact of rounding is immaterial (approximately $2,000)

(4) Operating expense burden of 10% is as per Justice Peacock's letter dated September 15, 2017.