SUPREME COURT OF NOVA SCOTIA
Citation: *Spring Water Ice Inc. v. 3862143 Canada Inc.*, 2022 NSSC 356

Date: 20221207
Docket: Hfx No. 486186
Registry: Halifax

Between:

Spring Water Ice Inc.,
formerly 3321244 Nova Scotia Limited, a body corporate

Applicant

and

3862143 Canada Inc.,
formerly Spring Water Inc., a body corporate,
and Gary MacKenzie

Respondents

DECISION

Judge:	The Honourable Justice Ann E. Smith
Heard:	March 1, 2, 3, 2022, in Halifax, Nova Scotia
Final Written Submissions:	Applicant: March 18 and April 8, 2022 Respondents: April 1, 2022
Counsel:	Christopher Madill, for the Applicant Tim Hill, K.C. and Meaghan Kells, for the Respondents

By the Court:

Introduction

[1] This case is about whether the Applicant was misled or defrauded by the Respondents in the context of the purchase of the assets of an ice plant, and if so, what damages, if any, the Applicant has suffered.

[2] The Applicant, Spring Water Ice Inc., (the "Applicant" or "NewCo"), formerly 3321244 Nova Scotia Limited, was incorporated under the laws of Nova Scotia. The current President of the Applicant is James Smith.

[3] The Respondent 3862143 Canada Inc., formerly Spring Water Inc. ("SWI") is a body corporate under the laws of Canada. SWI manufactured and sold the "Party Ice" brand of bagged ice available at many grocery stores, corner stores, gas stations and other retailers throughout the Maritime Provinces. SWI and a related business called Ready Refrigeration ("Ready"), which was involved in heating, ventilation, and air conditioning, carried on business out of offices located on Murdock MacKay Court in Lower Sackville, Nova Scotia. The sale of Ready is not part of the dispute between the parties.

[4] The Respondent Gary MacKenzie was at all times the President and primary beneficial shareholder of SWI.

[5] NewCo and the Respondents entered into an asset purchase agreement (the "APA") dated December 1, 2018. One of the terms of the APA was that the Respondents were required to disclose a "complete list of all contracts" related to SWI's business. Gary MacKenzie identified three contracts – an employment contract and two equipment leases.

[6] NewCo now says that Gary MacKenzie did not provide a complete list of all of SWI's contracts, and thereby, and in other respects, misrepresented, fraudulently or negligently, the true state of SWI's business. The Respondents deny all of these allegations and contend that NewCo was provided with full disclosure by Gary MacKenzie and his staff, and that any loss suffered by NewCo was caused by its own failure to conduct due diligence before the sale closed. Further, the Respondents say that NewCo has not proven that it suffered any loss.

NewCo's Position in Brief

[7] NewCo says that after the transaction closed, it discovered that Gary MacKenzie failed to disclose the existence of substantial volume rebate arrangements with some of the largest customers of SWI which it says totalled more

than $150,000.00 annually. NewCo says that nothing in the information provided by Gary MacKenzie to it prior to the closing could reasonably have led NewCo to conclude that amounts of that magnitude were payable on an annual basis. NewCo pleads that Gary MacKenzie was aware of these volume rebate arrangements, yet elected not to disclose them to NewCo.

[8] NewCo says that, relying on the representations and information provided by Gary MacKenzie, it tabled an offer to purchase the assets of SWI based on a 6.5 x multiple of estimated annual earnings before interest, taxes, depreciation, and amortization ("EBITDA") of $1,000,000.00. It is not in dispute that the parties understand EBITDA to mean "earnings before interest, taxes, depreciation and amortization."

[9] NewCo says that had it been aware that the business required payment of customer rebates in the range of $150,000.00 per year, it would have offered a multiple based on an EBITDA of $850,000.00, not $1,000,000.00. Consequently, NewCo says that it would have offered $5,525,000.00 to the Respondents instead of the $6,500,000 which it paid based on what it says was the misleading and inaccurate information and representations provided by Gary MacKenzie.

[10] NewCo says that the resulting loss to it is the difference between $6,500,000.00 and $5,525,000.00 which amounts to $975,000.00.

[11] NewCo also says that it discovered after the closing that the Respondents failed to pay volume rebates owed to the two largest customers of SWI for 2017 and 2018 (January to November) in the amount of $223,954.85. NewCo says that it was required to pay these amounts in order to maintain the commercial relationships with these two customers and claims in this proceeding for those amounts.

[12] Further, NewCo says that it discovered after the closing that the Respondents received $94,300.59 in customer deposits, post-closing ice sales and services provided by NewCo. The Respondents have not paid these amounts to NewCo, and it claims for those monies as well.

[13] NewCo's claims against the Respondents are framed in breach of contract (of the APA), negligent and/or fraudulent misrepresentation, unjust enrichment, conspiracy, and conversion.

The Respondents' Position in Brief

[14] The Respondents say that the purchase of SWI's business assets was purposefully structured as an asset purchase to avoid NewCo taking on SWI's

liabilities, which it says was specifically noted and acknowledged by SWI. The Respondents say that the agreements which it had with its customers were not intended to be assigned and were made specifically with SWI. As such, the Respondents say that those agreements were not intended to be included in the "contracts" Schedule of the APA.

[15] The Respondents say that there was no obligation on NewCo to take on the terms and obligations of any agreements SWI had with its customers and conversely, no obligation existed for the customers to force those terms on NewCo. The Respondents say that the contractual parties to those agreements were SWI and the customer and there was no requirement on the part of NewCo to follow through with these agreements if they chose not to.

[16] The Respondents also say that NewCo was aware not only of the practice of rebates generally in the packaged ice business, but of specific arrangements between SWI and larger customers relating to bulk purchase rebates.

[17] The Respondents say that these agreements or contracts were not "Contracts" that were contemplated to be included in the Schedule to the APA.

[18] The Respondents point out that the APA provided for a $300,000.00 holdback to be held from the purchase price payable by NewCo for purposes relating to

potential post-closing adjustments. The Respondents say that this holdback has not been released by NewCo. The Respondents say that when any payments came in post-closing for services/supplies provided by its pre-closing, it maintained a record and assigned any such payments in its records to NewCo. However, when it became clear that NewCo was refusing to release the holdback, as required by the APA and commenced the within litigation, the Respondents withheld these funds. The Respondents say that these funds are still being held and will be returned to NewCo upon payment of the holdback owed to it.

[19] The Respondents say that Gary MacKenzie provided all financial disclosure required in order to provide NewCo every opportunity to prepare their calculations and make their own determinations on the value of the business. The Respondents say that a sale price was fairly negotiated between the parties and NewCo was given every opportunity to conduct whatever due diligence it saw fit. The Respondents say that if NewCo has suffered any loss, such loss is a direct result of the lack of due diligence carried out by NewCo.

[20] The Respondents also say that NewCo has not proven that it has suffered any loss or damages, a necessary element to make out a claim in the various torts that it alleges.

The APA

[21] Section 3.1 of the APA sets out the parties' representations and warranties. Included in these provisions are representations and warranties as to the disclosure of financial information and contracts. These provisions provide as follows:

> **3. Representations and Warranties**
>
> 3.1 Vendor and MacKenzie Representations and Warranties – The Vendor and MacKenzie each represent, warrant and covenant with the Purchaser on a joint and several basis that:
>
> …
>
> (h) Financial Information – The financial information provided to the Purchaser has been prepared in accordance with GAAP, is correct and complete and presents fairly the assets, liabilities (whether accrued, absolute, contingent, or otherwise), sales, earnings and results of operations of the Vendor.
>
> …
>
> (n) Contracts – The Contracts as listed at Schedule 1.1(h) constitute a complete list of all contracts related to the Business, including Equipment Leases. The Vendor is in good standing under all such Contracts, including Equipment Leases. Each of the Contracts is valid and subsisting and in full force and effect, un-amended and has not received notice of any existing defaults thereunder. To the knowledge of the Vendor, no other parties under the Contracts are in default of their obligations thereunder. The Vendor is not in arrears with respect to payment obligations under any Contracts. Except as set out in Schedule 3.1(g), no consent or approval is required under any of the Contracts in connection with the Assignment of the Contracts to the Purchaser.
>
> [Emphasis added]

[22] Other key terms of the APA are as follows:

(a) The Purchase Price was $6,500,000 (exclusive of HST), subject to adjustments provided for in the agreement (Section 1.1 (hh));

(b) The Purchase Price was payable as follows (Section 2.4):

(i) a $100,000 deposit was to be paid to the Vendor's solicitor as a deposit, to be credited on account of the Purchase Price on closing;

(ii) a $300,000 holdback was to be held by the Purchaser's solicitors in trust as security for:

A. any post-closing adjustments or reimbursements to the Purchase Price in accordance with the terms of the agreement;

B. the indemnity by the Vendor for breach of representations, warranties and covenants; and

C. Any other amounts owing by the Vendor to the Purchaser.

(iii) the balance of the Purchase Price, less the Holdback, was payable on closing.

ISSUES

[23] The issues before the Court for determination are:

1. Did SWI and Gary MacKenzie breach the terms of the APA by not disclosing SWI's "contracts" with its vendors, or otherwise?;
2. Are SWI and Gary MacKenzie liable to NewCo for fraudulent or negligent misrepresentation?
3. Are the Respondents liable to NewCo for conspiracy?
4. Have the Respondents been unjustly enriched?
5. Are the Respondents liable to NewCo in conversion?
6. Are the Respondents entitled to the return of the holdback funds pursuant to the APA? and
7. Did NewCo suffer any loss as a result of fraudulent or tortious behaviour on the part of the Respondents, and if so, what is the quantum of damages?

The Evidence before the Court

[24] NewCo filed the Affidavits of Scott Carroll, Hugh Smith, K.C., James Smith, Kevin Fraser, Brett Fletcher, Heather Hill and Marlene Nicholson as well as Rebuttal

Affidavits of each of those affiants, with the exception of Hugh Smith and Kevin Fraser. Each of these witnesses was cross-examined.

[25] The Respondents filed the Affidavit of Gary MacKenzie, and he was cross-examined on it.

[26] The Court will now review key parts of the evidence of each witness.

John Scott Carroll

[27] John "Scott" Carroll's Affidavit evidence was that he has a background in the automotive industry and held ownership interests in a number of car dealerships which he sold in or around 2017. Following the sale of his interests in the car dealerships, he was on the lookout for new business opportunities.

[28] In August 2018 Scott Carroll learned about SWI's business which he understood sold ice throughout the Maritime Provinces. He contacted his father-in-law Hugh Smith, K.C. to seek his advice. Scott Carroll learned that Gary MacKenzie was the owner of SWI and that SWI might be up for sale.

[29] On September 4, 2018, Scott Carroll called Gary MacKenzie, introduced himself and told him that he was on the lookout for new business opportunities. Gary MacKenzie told him that he was looking to sell SWI and Ready and had in mind a

sale price for SWI in the range of $5M to $6M. Gary MacKenzie told Scott Carroll that he had come to that sale price as a result of calculations he had personally done with respect to EBITDA. Gary MacKenzie had been a practicing Chartered Accountant for most of his professional life but had given up that designation prior to the events at issue.

[30] Scott Carroll agreed in cross-examination that he was the initiator and eventually took the lead in negotiating the purchase of SWI on behalf of NewCo. A few months after the sale closed, in November 2018 Mr. Carroll ceased to be involved with NewCo. Scott Carroll said that James Smith ("Jamie" Smith), his business partner for the purchase, then became the principal of NewCo.

[31] Scott Carroll said that he was responsible for doing some due diligence for the purchase of SWI at the "very initial stages". His evidence was that he then engaged Kevin Fraser, a partner with Grant Thornton, to carry out the due diligence. He also had some advice from his father-in law, Hugh Smith, and from Jamie Smith. His evidence was that Jamie Smith first became involved with the potential purchase in October 2018, about a month before the closing.

[32] On September 5, 2018, Scott Carroll met with Gary MacKenzie at SWI's offices. At that time Gary MacKenzie provided Scott Carroll with financial and other information for SWI including the following:

> (a) audited year end financial statements prepared by Grant Thornton for the year ended February 28, 2018;
>
> (b) unaudited year end financial statements prepared by Grant Thornton for the year ended February 29, 2016;
>
> (c) a list of trucks and equipment;
>
> (d) a general overview of SWI and Ready prepared in narrative form by Gary MacKenzie; and
>
> (e) a chart prepared by Gary MacKenzie showing SWI's actual ice sales for each of 2015, 2016, 2017 and 2018 (year end of February 28) and to date for 2018/2019, with estimated sales for 2018/2019. The chart included an EBITDA calculation prepared by Gary MacKenzie and an "adjustment re rebates".

[33] As noted, this information included Gary MacKenzie's calculation of EBITDA. His calculation included actual ice sales for the periods 2015, 2016, 2017 and 2018 and estimated sales for 2019. The EBITDA calculation also included an "adjustment re rebates" for the year 2018 in the amount of $121,618.00. SWI had a year-end of the last day of February.

[34] Further, in Notes to the Non-consolidated Financial Statements (audited) for 2017/2018 (year ended February 28, 2018) which were provided to Scott Carroll on September 5, 1018, Grant Thornton states under "Unusual item", "The unusual item relates to an account relating to Loblaw rebates".

[35] Soon after Scott Carroll's September 5 meeting with Gary MacKenzie, he reached out to Hugh Smith who suggested that Grant Thornton be engaged to look at SWI's financials, generate questions to be asked, and prepare calculations on EBITDA. On September 7, 2018, Scott Carroll contacted Kevin Fraser, whom he had worked with in the past, and told him that he was interested in retaining him for the purposes of reviewing SWI's financial records and preparing EBITDA calculations.

[36] Also on September 7, 2018, Scott Carroll contacted Gary MacKenzie by email and asked if Gary could take Hugh Smith and him on a tour of the ice plant the following week, something he said that Gary MacKenzie had offered to do when they met on September 5, 2018. A tour of the plant was scheduled to take place on the evening of September 11, 2018. Scott Carroll said that Gary MacKenzie gave them a tour of the plant that evening, but both Gary MacKenzie and Brett Fletcher's evidence was that Brett Fletcher conducted the tour.

[37] Around mid-day on September 11, 2018, the morning of the plant tour, Kevin Fraser sent Scott Carroll an email which provided a list of questions for him to put to Gary MacKenzie regarding SWI's financial records and EBITDA. The email provided, in part, as follows (with respect to matters relevant to this action):

> Here are my high-level initial observations/questions for consideration during tonight's meeting. As discussed yesterday, please do not attribute these points to me at this stage until such time as we establish where this process is going after tonight's meeting.
>
> I would request copies of the distribution agreements with the distributors in each of Caraquet and Summerside;
>
> Significant increase in year over year sales in fiscal 2018 with an increase of 36% after the previous 3 years being generally flat. I would request an explanation for the increase. Is it maintainable? Or was there a large one-time contract/order in 2018 that will not recur?
>
> Major stated EBITDA spike in fiscal 2018 at $1.3 million compared to $500k - $700k range over the previous 3 years. Key question when discussing valuation will be whether he is looking for a multiple of the last year or a weighted average of the past 4 years. You will need to be very comfortable that fiscal 2018 wasn't an anomaly.
>
> What does the adjustment of $121,618 from 2017/2018 to 2018/2019 in his narrative document relate to? I note that it's already been booked in the internal year-to-date figures. Need to ensure this is not double counted for EBITDA normalization purposes.
>
> I would request an historical volume breakdown by major customers to understand the trend.
>
> [Emphasis added]

[38] Scott Carroll's Affidavit evidence is that on the evening of September 11, Gary MacKenzie provided him with an EBITDA schedule. This schedule is identical to the one that Gary MacKenzie gave him on September 5 when they first met at SWI's offices.

[39] In cross-examination, Scott Carroll was asked whether, when he saw that Gary MacKenzie's EBITDA calculation included an "adjustment re rebates" for the year 2018 in the amount of $121,618.00, he raised this with Gary MacKenzie. Scott Carroll responded, "not on the night of the 11th". He said that there were some "high-

level discussions" that night and "the commentary from Gary was that they had new pricing arrangements and they no longer pay rebates to their larger group of customers or any customers, for that matter".

[40] Scott Carroll's Affidavit evidence was that on the evening of September 11, Gary MacKenzie also told him that they had a new pricing arrangement with a large commercial vendor, Couche-Tard, which did not include rebates, and that SWI did not have any rebates in the prior year. Couche-Tard operated convenience stores at all Irving gas stations in the Maritimes under the "Circle K" brand at the material time.

[41] However, the Court notes that on September 5, Gary MacKenzie had given Scott Carroll SWI's audited financial statements for the year ended February 28, 2018, which noted that SWI had an account for Loblaw rebates in the amount of $25,392.00. Scott Carroll, who admitted that he was the person at NewCo who was doing the negotiating on behalf of that company, knew that SWI had been paying rebates to Loblaws as recently as the most current year end (February 28, 2018). His Affidavit is silent both as to his knowledge of the Loblaw rebate and with respect to whether he asked Gary MacKenzie about this rebate on September 11 during the plant tour, or indeed at any time before the closing.

[42] Further, Scott Carroll states in his Affidavit that "At no time during the plant tour did Gary mention the existence of any other rebate arrangements or contracts being in place with customers of SWI". His Affidavit evidence was also that Gary MacKenzie told him that evening that SWI had new pricing arrangements. As the potential purchaser of SWI, Scott Carroll also does not state in his Affidavit that he asked Gary MacKenzie about "new pricing arrangements" for the purchase of ice from vendors other than Couche-Tard. This is important in light of the fact that Scott Carroll had received information from Gary MacKenzie that showed that there was a rebate arrangement of some kind with Loblaws and that Gary MacKenzie had deducted approximately $121,000.00 from ice sales in 2018 as an "adjustment for rebates". Surely, new pricing arrangements would be of interest to a potential purchaser. There was no evidence that anyone associated with NewCo asked Gary MacKenzie anything about new pricing arrangements with "larger vendors".

[43] Throughout cross-examination, Scott Carroll's evidence was that he was unaware of any historical rebates with any large customers of SWI, except Couche-Tard. This is not accurate based on the evidence before the Court.

[44] I do not accept Scott Carroll's evidence that Gary MacKenzie told him on September 11 that "SWI did not have any rebates in the prior year". It makes no common sense that Gary MacKenzie would have lied about rebates when he had

previously given Scott Carroll financial information which showed that SWI was accounting for rebates to at least Loblaws and had accounted for an adjustment for rebates for year-to-date 2018 of some $121,000.00.

[45] In cross-examination, Scott Carroll was asked whether he had asked Gary MacKenzie about the "adjustment of $121,618" being "already booked in the internal year-to date figures", one of the questions that Kevin Fraser had prepared for him to ask the evening of the plant tour. His evidence was that he did not recall if he had asked.

[46] Early on the morning of September 12 (the morning after the plant tour) Hugh Smith sent Scott Carroll an email saying that he had looked at Kevin Fraser's notes (from September 11, but not in evidence) and suggested that Kevin Fraser should "work over the EBITDA analysis provided by Gary and identify any issues". Included in that email from Hugh Smith to Scott Carroll was the following statement, "See what is the new normal: $3,000,000 in sales which is 2018 minus hurricane and 2019 projected - $1,150,000 the new EBITDA". It seems that at that point someone knew a "hurricane" had positively affected SWI ice sales in 2018.

[47] Also on September 12, Gary MacKenzie sent Scott Carroll, via email, a letter (through Heather Hill, his clerk). Gary MacKenzie states:

> Enclosed is information re a calculation of EBITDA.
>
> When you have reviewed we will get together and start putting some figures together.
>
> It was a pleasure to meet your father-in-law. He obviously has a great deal of business knowledge, and no doubt will be of great assistance to you.
>
> Look forward to meeting you and Hugh again.
>
> [Emphasis added]

[48] Included in the package of material which Gary MacKenzie emailed Scott Carroll on September 12 was a document titled, "Notes Re EBITDA Calculation" which provided as follows:

> 1. EBITDA calculations from 2015 to 2018 are actual figures taken from the financials.
> 2. The estimated EBITDA for 2019 is based on the following.
>
> a. Internal statements for the period March 1st to August 31st show net income of $397,152. There a few more sales to come in for August from Caraquet. We will be adding in the sales when they are complete but for now the sales to be recorded are $880,235 showing an income of $1,277,152 for the seven months. See attached sales summary.
>
> b. Income for Sept 2017 was $34,000 – see attached financials statement. This was with sales of $266,600.
>
> Sales for the period September 1st to 11th are $155,216. Last year for the same period the sales were $92,205. See attached. Estimated sales will be at least $350,000 and net income should increase to around $100,000 showing a total income of $1,375,000 for the period and an EBITDA of $1,278,000.
>
> c. To estimate the income and EBITDA for the year – the figures for last year from October to February would not be representative so I have used the 2016-2017 figures for the period.
>
> This showed an EBITDA loss of $37,033. I have no doubt that we will greatly improve that figure the rest of this year but I have used this for estimating the EBITDA for the year.
>
> The estimated EBITDA for the year is $1,241,084.
>
> [Emphasis added]

[49] Also included in the attachments to Gary MacKenzie's September 12, 2018, email to Scott Carroll was SWI's internal income statement for the period March 2018 to August 2018. This document shows "rebates" as a line item, with rebates as follows:

REBATES	
Rebates Needs	-2,749.60
Rebates Couch Tard	-4,171.98
Rebates Ultramar	-1,566.82
Rebates Petro Canada	110.90
Rebates Arctic Glacier	0.00
Rebates Accrued	-25,875.00
TOTAL REBATES	-34,474.30
NET ICE SALES	-34,474.30

[50] The "net income" shown on this statement for the period March 1, 2018, to August 31, 2018, is $397,152.45. That figure is clearly net of "total rebates" and indeed in his email to Scott Carroll, Gary MacKenzie refers to $397,152.45 as "net income". Gary MacKenzie made handwritten notations under $397,152.45 which read, "800,000. $1,277,152.45".

[51] Gary MacKenzie's email to Scott Carroll on September 12, 2018, also attached SWI's internal income statements for the period September 1, 2017, to September 30, 2017, which also listed rebates for the month of September 2017 for each of Needs, Couche-Tard, Ultramar, Petro Canada and Arctic Ice. Total accrued rebates were recorded at $66,000.00.

[52] The information sent to Scott Carroll on September 12 also included SWI's income statement for the period October 1, 2016, to February 2, 2017, which showed rebates to Couche-Tard and Ultramar, and accrued rebates of $26,730.16.

[53] Clearly Scott Carroll knew on September 12, 2018, as of his receipt and review of SWI's most recent internal income statement for the period March 1, 2018, to August 31, 2018, as well as the September 2017 income statement that SWI had rebate arrangements including "historic" rebate arrangements with each of Needs, Couche-Tard, Ultramar, Petro Canada and Arctic Glacier.

[54] In cross-examination, and based upon the information with respect to the line items for rebates in the March 2018 to August 2018 income statements, Scott Carroll was asked, "So you were fully aware that there were rebates?" Scott Carroll's response was, "I was aware that, you've taken me through here, the rebates were there, but during our conversations with Gary, he made it very clear that they had

new pricing arrangements with companies such as Couche-Tard and they had no longer been paying rebates for a period of time, quite some period of time, and the bottom line was that they no longer paid rebates".

[55] When asked about the obvious references to rebates in SWI's internal financial statements for periods during 2016, 2017 and 2018, including to Couche-Tard, Scott Carroll's evidence was "that made it very confusing" and that was why he "continued to ask what the arrangement was with pricing and rebates". Scott Carroll stated that he asked Kevin Fraser if he would have a discussion directly with Gary MacKenzie - "accountant to accountant". His evidence was that Kevin Fraser and Gary MacKenzie had a direct phone conversation on October 22, 2018, to "further clarify this" and he testified that the same communication was given back from Gary MacKenzie to Kevin Fraser that they had new pricing arrangements and they no longer paid rebates. Counsel for the Respondents put to Mr. Carroll that that evidence was "a recent invention and not true". Mr. Carroll responded, "I disagree".

[56] That answer given by Scott Carroll is inconsistent with the notes that Kevin Fraser made during the conversation which he had with Gary MacKenzie on October 22, 2018. Those notes clearly refer to yearly rebates in the approximate amount of $12,000.00 being paid by SWI to each of Loblaws and Needs. Mr. Fraser's notes do not record that these rebates had ended.

[57] In his Affidavit, Scott Carroll states that on the morning of September 13, Heather Hill, from Gary MacKenzie's office, sent him an email attaching unaudited financial statements for SWI's FY2016, a "general overview of the companies with possible opportunities and a high-level EBITDA calculation, an updated EBITDA calculation, and a list of trucks and equipment".

[58] What Scott Carroll does not say in his Affidavit is that the information sent to him by Gary MacKenzie on September 13 was identical to the information which Gary had given Scott on September 5 when they first met at SWI's offices. This September 13 documentation included the very same EBITDA calculation that Gary MacKenzie had given to Scott Carroll the previous day, September 12, which showed "adjustment re rebates" of $121,618.00. The EBITDA was not "updated", as Scott Carroll states in his Affidavit.

[59] In cross-examination, Scott Carroll was asked whether, in terms of due diligence, he had anyone look at the Grant Thornton statements which Gary MacKenzie sent him on September 13. Mr. Carroll said that he provided all of this information to Kevin Fraser.

[60] In cross-examination, Scott Carroll was asked whether he understood that the sales figures in the Grant Thornton statements were after any rebates had been

subtracted. Scott Carroll said that he was so aware. It was put to Scott Carroll that the question of whether or not there was a rebate would not affect the EBITDA number. Mr. Carroll agreed that it would not affect the EBITDA number but testified that it would affect their (NewCo's) outlook on how they purchased the business, if they would purchase it at all.

[61] Scott Carroll's evidence was that had they known rebates were on-going versus what he says they were told, i.e., "that they were no longer on-going, that SWI did not pay rebates anymore and that a new pricing arrangement is in place, we would have made a decision to either walk away from the purchase or come up with a different number, not the number we made. We were told there were not any rebates going forward".

[62] When asked if he went directly to Gary MacKenzie to ask about what he was seeing in the income statements about rebates and what he says Gary MacKenzie was telling him about there being no more rebates, Scott Carroll said that he had multiple conversations with Gary MacKenzie about the rebates, and that he was only going to ask so many times. He stated that if Gary MacKenzie, who was a Chartered Accountant by trade and did the books and the monthly statements for the company, told him multiple times that there were new pricing arrangements and that they did

not pay rebates anymore going forward, that he had to take the man at his word, at face value.

[63] Scott Carroll was asked in cross-examination when it was that Gary MacKenzie sent him details of the new pricing arrangement. Scott Carroll said that Gary MacKenzie never did so, and he did not ask for it. It is hard to understand why NewCo would not want to know what these new pricing arrangements were prior to purchasing SWI. Yet, NewCo never asked. Further, according to Scott Carroll's own evidence Gary MacKenzie told him that there were new pricing arrangements.

[64] In his Affidavit, Scott Carroll states that on the morning of September 18 he received an email from Kevin Fraser "attaching a list of eight (8) questions for him for Gary based on Kevin's analysis of the information that had been disclosed by Gary".

[65] Scott Carroll sent these questions to Gary MacKenzie by email, asking him to respond in preparation for a meeting he and Gary MacKenzie had scheduled for the following day, September 19. Gary MacKenzie responded to Scott Carroll with answers to all questions about three hours after receiving them.

[66] Included in the questions prepared by Kevin Fraser and answered by Gary MacKenzie were the following:

- Please explain why the actual Oct/16 – Feb/17 period is being used in determining the forecast fiscal 2019 results. Would the Oct/17 – Feb/18 internal results not be the more logical to use?

  I did not use the Oct/17 – Feb/18 figures because we had a large one-time sale in that period and it was not as a result representative of that period in a year. If I had used 2017/2018 it would have shown a significantly larger EBITA. It did not seem fair to use 2017/2018 in any estimated calculation.

- Please provide details on the rebate adjustment of $121,618 for fiscal 2019 and the historical fiscal year to which the rebate relates.

  Our rebate agreement and price agreement with CT had run out sometime ago and we stopped paying the rebate but we kept accruing the rebate in our records. In June we went forward with a change in price plus a standard rebate of $80,000 a year starting in June of this year and also a price increase. The accrual in our books was reversed but we did not add it to this years income but treated as an adjustment of prior years or more specifically 2017/2018.

  [Emphasis added]

[67] Gary MacKenzie ends his responses to the questions by stating, "This may be a little confusing, but I can explain further if you have any questions".

[68] The Court notes that in his answer about the rebate adjustment of $121,618.00, Gary MacKenzie's answer solely focuses on Couche-Tard. He makes references to going "forward with a change in pricing plus a standard rebate of $80,000 a year starting in June of this year and also a price increase". Gary MacKenzie does not state that a rebate was no longer payable to Couche-Tard but says that it was a "standard rebate of $80,000 a year" and "starting in June of this year", together with a price increase.

[69] As of September 18, Scott Carroll knew directly from Gary MacKenzie that since June, SWI was going forward with a standard rebate of $80,000 per year to Couche-Tard. If that information was inconsistent with what Scott Carroll says he was told by Gary MacKenzie a week earlier during the plant tour when Mr. Carroll said they had "high level discussions", i.e., "no more rebates".

[70] Scott Carroll was asked in cross-examination whether he followed up with a question with respect to Gary MacKenzie's answer about the rebate of $121,618.00 and historical rebates. His answer was that the follow-up was the trigger for his conversation with Kevin Fraser to speak with Gary MacKenzie about rebates because "it was yet another number produced which didn't line up at all with the income statements which they had previously reviewed".

[71] In his Reply Affidavit, sworn on November 30, 2020, Scott Carroll states that although Gary MacKenzie provided a response to his question (Kevin Fraser's question) regarding the rebate adjustment of $121,618.00 on September 18, "he did not advise me at any time of the existence of the longstanding agreements that were in place with SWI's largest customers requiring that they be paid rebates of approximately $150,000 per year".

[72] This is simply not accurate. Gary MacKenzie disclosed ample financial information which showed that SWI was paying rebates to large customers for years and in his EBITDA calculations. These were noted at close to $122,000.

[73] Scott Carroll states in his Affidavit that later that same evening (September 18) he received an email from Kevin Fraser attaching a "preliminary normalized EBITDA for SWI". Scott Carroll's Affidavit continues, "Based on the information provided to him, Kevin calculated a normalized EBITDA for 2018 and 2019 of $960,000.00 and $1,020,000.00, respectively".

[74] Kevin Fraser's cover letter to Scott states:

> Preliminary normalized EBITDA for SWI attached. Give me a shout in the morning to discuss once you've had a moment to review.
>
> Key adjustment to EBITDA that I ratcheted down fiscal 2018 normalized EBITDA to adjust for the one-time non-recurring nature of the Puerto Rico order. This leaves 35% as representative of recurring based on continued growth of the Company in fiscal 2019 year-to-date but not at 100%. I set the range of $840,000 on the low side and $1,000,000 on the high side with a mid-point of $920,000.
>
> At a 6 x multiple, this equates to an enterprise value (prior to adjustment for debt both third party and related party as well as net redundant assets) of just over $5,500,000. This also assumes that there is not excess working capital in the Company on closing. This will need to be determined during diligence.
>
> [Emphasis added]

[75] According to Kevin Fraser, "diligence" had not yet started, as of September 18, given his statement, "This will need to be determined during diligence". Kevin

Fraser's evidence at trial was that he was never engaged by NewCo to carry out due diligence on the sale.

[76] In the calculations which Kevin Fraser provided for normalized EBITDA, he used "reported total revenue" for SWI for the years 2015 through 2019. His calculations note Gary MacKenzie's "reported EBITDA" (calculations) for 2018 and 2019, which were net of rebates.

[77] Kevin Fraser's normalized EBITDA calculations also refer to "Loblaw rebates removal" for the year 2018 in the amount of $25,392.00. The calculations also refer to Gary MacKenzie's "rebate adjustment" of $121,618.00.

[78] The planned meeting between Gary MacKenzie and Scott Carroll went ahead on September 19. In his Affidavit, Scott Carroll says that at the meeting he provided Gary with Kevin Fraser's normalized EBITDA calculations. Scott Carroll does not say that he asked Gary MacKenzie anything about the Loblaw rebate of $25,392.00 which was used by Kevin Fraser in his normalized EBITDA calculation. He does not say that the Loblaw rebate came as a surprise to him. He is silent on this point.

[79] Scott Carroll also says nothing in his Affidavit about Gary MacKenzie's answer to the questions posed by Kevin Fraser concerning the "standard rebate" to Couche-Tard of $80,000 "starting in June" (2018).

[80] In terms of the financial information given by Gary MacKenzie to Scott Carroll, Scott Carroll states in his Reply Affidavit that he did not receive SWI's internal income statement for March 1, 2016, to February 28, 2017 and SWI's internal income statement for March 1, 2017 to February 28, 2018, both of which are attached to Gary MacKenzie's Affidavit and referred to as documents which he provided to Scott Carroll, Jamie Smith or Kevin Fraser.

[81] With respect to the financials for the year March 1, 2016, to February 28, 2017, these show that in SWI's business year 2016/2017, it had rebate arrangements with Needs, Couche-Tard, Ultramar, Petro Canada, Arctic Glacier with total rebates noted as $143,217.03. These financials do not appear in Scott Carroll's Affidavit as information received from Gary MacKenzie. However, the Court notes that on September 12, 2018, Gary MacKenzie sent Scott Carroll SWI's income statement for the period October 1, 2016, to February 2, 2017, which showed rebates to Couche-Tard and Ultramar, and total rebates of $26,730.16.

[82] With respect to the financials for the year March 1, 2017, to February 28, 2018, these statements list rebates payable to Needs, Couche-Tard, Ultramar, Petro Canada, Loblaws and Arctic Glacier with total rebates of $183,970.08. The rebate to Loblaws is noted at $13,599.60.

[83] The Court also notes that the information sent by Gary MacKenzie to Scott Carroll on September 12, 2018, included SWI's internal income statements for the month of September 2017 which showed rebates to Couche-Tard of $41,737.12 and total accrued rebates (Needs, Couche-Tard, Ultramar and Petro Canada) of $66,000.00.

[84] If Scott Carroll did not receive the internal statements described above, the Court finds that nothing turns on this. If all the references to accrued rebates and adjustments for rebates in other financial statements had not caused Scott Carroll to re-think his understanding that there were "no more rebates", one wonders what difference the receipt of these additional financial statements would have made.

[85] Scott Carroll states in his Affidavit that Gary MacKenzie told him when they met on September 19 that he was not interested in selling SWI for a 5 x multiple on EBITDA.

[86] Scott Carroll and others at NewCo decided that a 6.5 multiple on EBITDA of $1,000,000.00 was reasonable in the circumstances and made a total offer of $6,800,000.00, which included $300,000.00 for the purchase of Ready and an offer to purchase SWI for $6,500,000.00. They made that offer to Gary MacKenzie on

September 26, at which time Scott Carroll delivered to Gary MacKenzie a Letter of Intent and a $100,000.00 deposit.

[87] In his Affidavit, Scott Carroll states, “I decided to offer an asset sale to avoid assuming legal responsibility for liabilities, but with the intention of acquiring everything to seamlessly carry on the business of SWI and Ready Refrigeration as they had operated in the past, with the existing customer base”. None of this is stated in the Letter of Intent which NewCo provided to SWI at the time, except that the transaction would be an asset purchase.

[88] A draft copy of the APA was delivered to Gary MacKenzie and his lawyer on October 4. On October 19, Scott Carroll asked Gary MacKenzie if he would send him SWI’s September financials for SWI. Gary MacKenzie replied that they were finished, and he would forward them. Scott Carroll responded, “Thanks. These financials will be helpful”. On October 22, Gary sent Scott SWI’s balance sheet as of September 30, 2018, as well as SWI’s income statement for the month of September 2018 and SWI’s income statement from March 1, 2018, to September 30, 2018. Under the heading, “Rebates”, the September balance sheet lists “Rebates for Arctic Glacier – zero”.

[89] However, the income statement for the period March 1, 2018, to September 30, 2018, shows rebates paid to Needs, Couche-Tard, Ultramar and Petro Canada, with total accrued rebates of $25,875.00 and total rebates of $34,474.30. One wonders what "help" these financials provided to Scott Carroll because there is no evidence that he asked anything about the rebates clearly listed on them. If the balance sheet for the one month of September, which showed zero rebates (with reference to Arctic Glacier) supported his view that there were no longer any rebates payable to any vendor, as his evidence suggests, was misplaced and unsupported by all of the information given to him by Gary MacKenzie.

[90] On October 22, 2018, Scott Carroll asked Gary MacKenzie if he could meet with NewCo's accountant, Marlene Nicholson, on October 24. Scott Carroll added that he and Jamie Smith also wanted to speak with Brett Fletcher, the VP of Sales and Operations of SWI. The evidence showed that Brett Fletcher became an employee of NewCo after the closing of the sale, as did Heather Hill. There is no suggestion that Brett Fletcher's employment contract or that of Heather Hill was assigned to NewCo.

[91] Also on October 22, 2018, Gary MacKenzie and Kevin Fraser had a telephone conversation which lasted for about an hour. As stated previously in this decision, Kevin Fraser took notes during this conversation and attached them as an exhibit to

his Affidavit. The notes made by Mr. Fraser concerning SWI are in point form and fill more than one-half a typed page. These notes include reference to "Expected EBITDA loss of about $100K from Oct/18 through Feb/19" and "They put a price increase in effect at the end of June/18 – not across the board but specific to certain customers". Under the heading "Rebates", the following is recorded by Kevin Fraser:

- Rebates
    - Couche Tard

        contract ran out 3-4 years ago

        charged full price, then added $0.20 per bag that was then rebated to Head Office

        stopped during the current year

    - Loblaws

        About $12,000 per year

    - Needs

        About $12,000 per year

[92] The reference in Kevin Fraser's notes to "…they put a price increase in effect at the end of June/18 – not across the board but specific to certain customers" appears to be related to Couche-Tard, because the only evidence before the Court regarding a change in pricing in June 2018 was with respect to that vendor.

[93] The Court notes that Scott Carroll could not have been surprised by the information about the Loblaws rebate, because Kevin Fraser had accounted for a rebate for Loblaws in the amount of $25,392.00 for 2018 back on September 18 when he prepared his normalized EBITDA calculations and gave these to Scott Carroll on September 18.

[94] Despite this, Scott Carroll's evidence at trial was that he received the same communication from Kevin Fraser after his phone call with Gary MacKenzie on October 22, "that they had new pricing arrangements and they no longer paid rebates".

[95] Of course, Kevin Fraser and Scott Carroll were also aware that one of Gary MacKenzie's answers to questions posed by Kevin Fraser with respect to Couche-Tard was:

> *Our rebate agreement and price agreement with CT had run out sometime ago and we stopped paying the rebate but we kept accruing the rebate in our records. In June we went forward with a change in price plus a standard rebate of $80,000 a year starting in June of this year and also a price increase. The accrual in our books was reversed but we did not add it to this years income but treated as an adjustment of prior years or more specifically 2017/2018.*
>
> [Emphasis added]

[96] Kevin Fraser's notes do not reflect that he and Gary MacKenzie discussed the standard $80,000.00 rebate that Gary MacKenzie had said he went forward with for Couche-Tard starting in June 2018. Kevin Fraser only records, with respect to

Couche-Tard, “charged full price then added $0.20 per bag that was then rebated to Head Office” and “stopped during the current year”.

[97] Kevin Fraser’s notes also do not record “no more rebates” across the board, or words to that effect. Further, Kevin Fraser’s notes apparently record answers, but not questions.

[98] Counsel for the Respondents put it to Scott Carroll that while he asked about rebates from Couche-Tard, he did not ask about rebates from any other customers. Scott Carroll testified that that was correct, that Couche-Tard was the largest customer, at least 25% of the revenue of SWI, and was one that they would have “zoned-in on”. He testified that he did not ask about other rebates because at that point he had asked Gary MacKenzie several times about the rebates and Gary’s answer was “we have a new pricing arrangement, and we don’t pay rebates anymore”.

[99] In his Affidavit, Scott Carroll states that, “I discovered after the APA closed that SWI had longstanding agreements in place with its largest commercial vendors – Couche-Tard, Sobeys/Needs, CST, Petro Canada and Loblaws – which required that SWI pay substantial volume rebates to those vendors in exchange for volume purchases of packaged ice”.

[100] Scott Carroll also states in his Affidavit that:

> I further discovered after the Applicant took control of the business that the annual value of the volume rebates paid to SWI's customers was in the range of $150,000.00 per year in the years leading up to the APA, and that the vendors expected and required that the volume rebates continue as they had in the past if we wanted to continue to do business with them.
>
> [Emphasis added]

Hugh Kelly Smith, K.C.

[101] Hugh Smith is a lawyer and businessperson. Mr. Smith states in his Affidavit that, over the years, he has owned and operated a number of successful and profitable businesses in Nova Scotia and advised other businesspeople and entrepreneurs with respect to their businesses.

[102] Mr. Smith states in his Affidavit that in late August 2018, he was contacted by his son-in-law, Scott Carroll, with respect to a potential business opportunity involving a company that manufactured and sold prepackaged ice to grocery stores, corner stores and gas stations throughout the Maritimes under the name "Party Ice". He states that Scott Carroll asked him if he would assist him in looking at this possible opportunity. Mr. Smith goes on to state in his Affidavit that he came to know that Gary MacKenzie owned SWI.

[103] In his Affidavit, Mr. Smith states that he and Scott Carroll decided, based on the assurances given to them by Gary MacKenzie, Gary MacKenzie's EBITDA

analysis and an EBITDA calculation provided by Kevin Fraser that it would be reasonable to table an offer to purchase SWI for a 6.5 multiple on an EBITDA of $1,000,000.00, for a total offer of $6,500,000.00.

[104] In his Affidavit, Mr. Smith states that at no time during the negotiations with Gary MacKenzie, or in the period leading up to the execution of the APA in early September, was he aware that SWI had contracts in place with some of SWI's larger customers including significant "volume rebates" which had been paid by SWI to those customers for years. Mr. Smith states that he has since been told by his son, Jamie Smith, that the magnitude of the volume rebates paid to SWI's customers was in excess of $150,000.00 in the years leading up to the execution of the APA.

[105] Mr. Smith concludes his Affidavit by stating that:

> Had I known that SWI had agreements in place requiring that it pay out a sum in excess of six figures to its customers as sales rebates, I would not have been comfortable with an EBITDA of $1,000,000 and would have advised Scott to reduce the EBITDA by at least the value of the rebates, or approximately $150,000.

[106] Mr. Smith was cross-examined on his Affidavit.

[107] Mr. Smith stated that his initial involvement in this matter was not to assist with due diligence. Rather, he said that he went with his son-in-law, Scott Carroll, to two meetings with Gary MacKenzie. He said that numbers or figures that they had received from Mr. MacKenzie were referred to Grant Thornton. Mr. Smith said that

he was not involved in the due diligence of those numbers. He said that the due diligence was carried on by Grant Thornton and Scott Carroll.

[108] SWI's counsel asked Mr. Smith whether EBITDA would change if the number shown for sales was a net number after subtraction of rebates. Mr. Smith's response was that he was not sure about that. He stated that on the numbers and schedule which Gary MacKenzie provided, he just focussed on the EBITDA.

[109] SWI's counsel put to Mr. Smith that if you are selling ice for $1,000.00 and giving back a $100.00 discount, the actual price is net $900.00. SWI counsel asked, "if the EBITDA calculation is based upon a starting price of $900.00, the fact that there was a $100.00 rebate would make no difference to EBITDA, would it?". Mr. Smith said that he thought that that was correct in that example.

[110] SWI's counsel asked Mr. Smith if he was aware that there were rebates. Mr. Smith responded that "yes", in the EBITDA schedule which Gary MacKenzie provided there was a line "less rebates".

[111] Respondents' counsel asked Mr. Smith, "So you were clear that rebates were part of this particular business?". Mr. Smith stated, "Yes, but there was no discussion of rebates between Mr. MacKenzie, Mr. Carroll and myself, but in the

schedule that Mr. MacKenzie provided for calculation of EBITDA it said "adjustment re rebates", that was the only thing".

[112] Hugh Smith, K.C.'s evidence was that he did not look at the Grant Thornton statements or the internal statements of SWI. He testified that he focussed on the EBITDA only.

Brett Fletcher

[113] Brett Fletcher is currently Vice President of Sales and Operations of NewCo. His Affidavit provides that he was the Vice President and Sales and Operations of SWI until December 2018.

[114] Mr. Fletcher states that he has been involved in the packaged ice and bottled water business in Nova Scotia since 1994 when he started an ice business in the Annapolis Valley. He says that he owned and operated Fletcher's Ice which did residential and retail bottled water delivery and ice sales. In June 2001 he and his business partner formed a new company called Eastern Ice and Water Limited. Mr. Fletcher's Affidavit sets out the circumstances whereby in September 2001 his shareholding interest in Eastern Ice and Water Limited was rolled over into a new company known as Spring Water Inc. ("SWI") owned by him, Gary MacKenzie and three or four other shareholders.

[115] Brett Fletcher was cross-examined on his Affidavit.

[116] He testified that in May 2018 he sold his shares in SWI to Gary MacKenzie in exchange for a different share set-up in a different company.

[117] Brett Fletcher testified that he was intimately familiar with the operations of SWI. In his Affidavit he says that when they started operating SWI in 2001, Gary MacKenzie had a daily, hands-on role with the business, but Gary's role in the operations side of the business diminished significantly over time. He stated that as the business grew, he became primarily responsible for the day-to-day operations, with Gary MacKenzie responsible for the financial operations of SWI.

[118] Gary Fletcher testified that SWI was the biggest player in the Maritimes for packaged ice.

[119] Mr. Fletcher's evidence was that in September 2018, the first time that he met Jamie Smith and Scott Carroll, he took them for a walk around the SWI plant. He said that he showed Scott and Jamie a few ice machines and they then went back into Gary's office.

[120] Brett Fletcher was asked questions in cross-examination about the following paragraph of his Affidavit:

> 27. Some of SWI's largest commercial vendors for bagged ice were BG Fuels, Petro-Canada, CST/Parkland Fuels, Needs, Loblaws, and Couche-Tard. From the moment that SWI started working with these vendors, the contractual arrangements with each included a volume rebate payable by SWI to the vendor, either on a per bag basis or as a percentage of total sales during a given period. The agreements to provide volume rebates were in place with each vendor when the assets of SWI were sold to the Applicant in early December 2018.

[121] Brett Fletcher was asked whether it was his evidence that there were signed agreements in place for each of the commercial vendors referred to in paragraph 27 of his Affidavit. His answer was "Yes, signed, or in agreement that we were continuing our Programs ...".

[122] Attached as an Exhibit to Mr. Fletcher's Affidavit is an agreement between SWI and Couche-Tard executed by the parties on January 12, 2012. This agreement includes terms whereby SWI agreed to supply Couche-Tard with party and block ice for an agreed price, with SWI agreeing to give Couche-Tard an agreed upon rebate. The term of this agreement is noted to be from April 1, 2012, to April 1, 2013, subject to termination on notice to SWI.

[123] Brett Fletcher's evidence with respect to this "expired" agreement with Couche-Tard, was they would have "had an email" and continued to provide ice to Couche-Tard and pay rebates "from that point on, until now, actually". Mr. Fletcher stated that this was the only signed agreement with Couche-Tard that he had.

[124] SWI's counsel pointed Brett Fletcher to section 5.2 of this Couche-Tard agreement which states that if there is a change to the agreement, it must be in writing and signed by the parties. Mr. Fletcher's evidence was "No, not with Couche-Tard". He added that SWI continued to pay Couche-Tard its rebates as was the case with a lot of other customers. He said, "this just continued and the way the pricing structure is set up, we have a set price that we want to get our net amount from which is dictated by the original agreements; therefore we would accrue the rebates and this sort of thing, so that it was just business as usual always with these customers".

[125] Brett Fletcher was referred to that part of his Affidavit where he stated that in January 2018, he had an email exchange with Dominic Quenneville, Supplier Income Rebate Technician at Couche-Tard and Benoit Rioux, Category Manager with Couche-Tard. Mr. Quenneville had asked that SWI send him a cheque for 2017 rebates in accordance with its agreement with SWI. Brett Fletcher replied by email to Benoit Rioux at Couche-Tard stating that he thought that Mr. Rioux was coming to Nova Scotia in late 2017 to speak about the matter. Mr. Rioux responded and advised that he would arrange a call in February (2018) to discuss a new arrangement with SWI, but that the "actual contract is still running on a monthly basis with the same terms and conditions".

[126] Brett Fletcher was asked by the Respondents' counsel whether Gary MacKenzie was unhappy with Couche-Tard and was trying to get them to come up with a different arrangement. Mr. Fletcher said that they had had discussions with Couche-Tard about paying their rebates in a different manner. Mr. Fletcher's evidence in terms of pricing was that SWI went from $1.46 to $1.51, in that range, and from an 11% rebate to about a $14% rebate.

[127] Brett Fletcher said that on May 29, 2018, he sent an email to Benoit Rioux, after discussions with Gary MacKenzie, in which SWI proposed changes to their existing pricing arrangements to provide for a flat rate rebate system ($80,000.00 per year) which they would like to do in the form of a two-year agreement effective June 15, 2018. This included a per bag increase from $1.51 to $1.70. Brett Fletcher stated that Couche-Tard eventually agreed to the price per bag increase to $1.70, but not to their proposed change to the rebates.

[128] Also attached to Brett Fletcher's Affidavit was an unsigned copy of an Agreement between SWI and Sobeys Convenience Store Division ("Needs") for the period April 1, 2018, to April 1, 2020. This Agreement provided, *inter alia*, for SWI to provide party ice to Needs stores in the Maritimes, with a provision for pricing per bag of party ice as well as a provision for a $0.20 per bag rebate to be paid to

Needs. Brett Fletcher's evidence was that this written agreement did not exist in December 2018 when the assets of SWI were sold "but the facts inside it did".

[129] A further unsigned Agreement attached to Brett Fletcher's Affidavit was between SWI and Ultramar for the period July 15, 2013, to July 15, 2015, for the sale of packaged ice and the provision of rebates to Ultramar. Mr. Fletcher's evidence was that there was a signed copy of this agreement, but it was not attached to his Affidavit.

[130] Mr. Fletcher's evidence was that even if these agreements were not in writing, the terms of the agreements were honoured by the parties in terms of pricing and rebates.

[131] Brett Fletcher testified that it was extremely common in the business (packaged ice) that rebates be paid.

[132] After the sale to NewCo, Brett Fletcher was hired by NewCo with essentially the same duties that he had when he worked with SWI. His evidence was that after the sale he sent an email to Couche-Tard saying that NewCo would look after any rebates which had not been paid by SWI (2017 and 2018). Mr. Fletcher calculated the number owing based on quarterly sales and arranged for these amounts to be paid to Couche-Tard by NewCo.

[133] On January 17, 2020, Brett Fletcher sent an email to Benoit Rioux (Couche-Tard) stating, “Yes, that amount reflects what the old company records show for 2017 – 2018 sales, which as you know were Gary MacKenzie’s (Spring Water Inc.) responsibility prior to the sale of the assets in December of 2018. These rebates were owed and based off the money he collected for the ice sales before the sale of the business; however, that being said, the new company is looking after this in good faith to maintain our relationship and we will hopefully be recouping these amounts from Gary soon”.

[134] Brett Fletcher says that the amount owed to Couche-Tard by SWI for outstanding rebates for 2017 and 2018 was $199,672.97. Brett Fletcher states that that amount was paid by NewCo “in order to maintain the important business relationship with Couche-Tard”.

Mary Marlene Nicholson

[135] Ms. Nicholson is the controller/accountant for NewCo. In her Affidavit she states that she has worked as a bookkeeper for 30 years and has been working with Jamie Smith, the owner of NewCo, and his businesses for the last 15 years as a controller and accountant, though she does not hold a formal accounting designation.

[136] Ms. Nicholson's evidence was that in December 2018 she started working for NewCo. She stated that following the transaction between NewCo and SWI, the accounting system used by SWI remained available and accessible to her, NewCo having purchased the servers that hosted SWI's accounting system.

[137] Ms. Nicholson's Affidavit evidence was that after the closing, NewCo discovered that SWI had a number of rebate arrangements in place with some of its larger customers "which were not disclosed by the Respondents in the course of asset purchase transaction". In cross-examination Ms. Nicholson agreed that she did not know what went on in discussions between the individuals negotiating the agreement concerning rebates.

[138] Ms. Nicholson stated in her Affidavit that the accounting records show that for the 2016, 2017 and 2018 calendar years, SWI owed substantial annual rebate payments to certain of those larger customers – Couche-Tard, Loblaws, Ultramar and Needs, with those rebate payments being based on the packaged ice sales to those customers.

[139] In her Affidavit, Ms. Nicholson states that based on her review of the records, the rebates owed for 2016 to Couche-Tard, Loblaws, Ultramar and Needs amounted to $161,497.00.

[140] Ms. Nicholson states in her Affidavit that the rebates owing for 2017 to Couche-Tard, Loblaws, Ultramar and Needs totalled $144,091.00. Ms. Nicholson does not state in her Affidavit how she calculated the amount of rebates paid to each of those vendors. Her evidence was that SWI did not pay the 2017 rebate of $83,367.00 to Couche-Tard; the $9,830.00 rebate owed to Ultramar and $2,749.00 of the 2017 rebate of $37,563.00 owed to Needs.

[141] Ms. Nicholson states in her Affidavit that the rebates owing for 2018 to Couche-Tard, Loblaws, Ultramar and Needs totalled $168,433.00. Ms. Nicholson does not state how she calculated those amounts. Her evidence was that SWI did not pay the $2,601.00 rebate owed to Ultramar; the $111,379.00 rebate owed to Couche-Tard; the $15,878.00 rebate owed to Loblaws or the $38,575.00 rebate owed to Needs.

[142] Ms. Nicholson's evidence was that between 2016 and 2018 the average annual rebate owed by SWI to customers was a little more than $158,000.00.

[143] Ms. Nicholson's Affidavit evidence was that the amounts owed for 2019 by NewCo pursuant to the rebate arrangements in place with some of the largest vendors totalled "$160,969.00".

[144] In her Affidavit, Ms. Nicholson states that the sum of $94,300.59 was erroneously paid to SWI for invoiced post-closing packaged ice sales during the period March 1, 2019, and September 25, 2019.

[145] Ms. Nicholson states that NewCo has paid a total of $223,954.85 for pre-closing rebates owed by SWI to Couche-Tard and Loblaws for 2017 and 2018.

[146] Ms. Nicholson states that after the closing, she found a cheque in a file folder from SWI in the amount of $49,000.00 payable to Couche-Tard for pre-closing rebates owed to Couche-Tard. She states that she does not know why the cheque was not sent to Couche-Tard. In her Affidavit she states that she brought the cheque to the attention of Gary MacKenzie who told her that he had forgotten about the cheque. She states that Mr. MacKenzie took the cheque back and told her that he would issue a new cheque to Couche-Tard for the correct amount owing to it for pre-closing rebates. Ms. Nicholson states that to her knowledge, Mr. MacKenzie never issued a cheque to Couche-Tard for the pre-closing rebates owed by SWI.

[147] In cross-examination Ms. Nicholson was asked whether she agreed that Gary MacKenzie, unsolicited, wrote a cheque for $49,000.00 payable to Couche-Tard and sent it to NewCo. Ms. Nicholson stated that she found the cheque in a file folder. She said that because it was a couple months after the closing, she felt it was only

fair to make sure there was still money in the account before passing the cheque along to Couche-Tard. Ms. Nicholson's evidence was that she asked Heather Hill to come with her to meet with Gary MacKenzie and to ask him if it was still alright to send the cheque on to Couche-Tard, saying that the amount was less than what was owed for that period. Her evidence was that Mr. MacKenzie said that he thought the account was closed or the cheque was stale-dated and that he would take it.

Heather Hill

[148] Heather Hill is currently the accounts receivable clerk of NewCo, and before the sale held that same position with SWI.

[149] In her Affidavit, Ms. Hill says that SWI had a "number of contracts in place with larger customers such as Needs, Couche-Tard, Loblaws, CST/Parkland and BG fuels". She says that she had no role in negotiating those contracts. Heather Hill also says that in the years "leading up to 2018" that she was involved in meetings with Gary MacKenzie and Brett Fletcher "regarding price increases for packaged ice to help offset the costs of the volume rebates SWI paid to the larger customers (such as Petro-Canada, CST (now Ultramar), Needs, Loblaws, Couche-Tard, and BG Fuels). Ms. Hill goes on to state that in 2018 Gary MacKenzie told her and Brett Fletcher

that he wanted price increases for the larger customers that were entitled to rebates "in order to offset the rebate payments they would have otherwise received from us".

[150] Ms. Hill states, with respect to Couche-Tard:

> … In or about May 2018, Gary said that he wanted a price increase from our larger customers. He indicated that he and Brett had not been able to get clarification on SWI's contract with Couche-Tard, the largest customer in terms of both sales and rebates. He and Brett suggested (*sic*) proposal to Couche-Tard via email, indicating that SWUI wanted a price increase per bag and a specific rebate amount for each quarter instead of a per bag rebate that was currently in place.

[151] Ms. Hill says that "Couche-Tard did not agree to this proposal".

[152] Ms. Hill then says that "because Couche-Tard did not respond, Gary told me in mid-2018 that he was not going to pay them a rebate on the ice sales". Ms. Hill says that "to my knowledge, Couche-Tard had been paid a rebate and listing fee since SWI and Couche-Tard started their business relationship".

[153] Heather Hill goes on to state in her Affidavit that after the asset purchase agreement closed, Gary MacKenzie's bookkeeper, Rosemary MacGillvray, sent a cheque to NewCo from SWI in the amount of $49,000.00 for "pre-closing rebates owed to Couche-Tard". Ms. Hill says that that cheque was not sent to Couche-Tard.

[154] Ms. Hill also states in her Affidavit that after the closing of the sale, at some point in mid-20189, she spoke with Gary MacKenzie about the "pre-closing rebates

owed to Loblaws". She states that Gary MacKenzie told her that if he owed the amounts to Loblaws, he would pay them.

Kevin Fraser

[155] Mr. Fraser is an advisory partner at Grant Thornton LLP in Halifax and has spent the majority of his career working in the areas of corporate finance and commercial banking. He states in his Affidavit that he advises a wide range of clients with a primary focus on the privately held family business sector.

[156] Mr. Fraser says that in early September 2018 he was contacted by Scott Carroll, a client that he had worked with in the past in an advisory capacity. Scott Carroll told him that he was exploring an opportunity to purchase a company that manufactured and sold packaged ice throughout the Maritimes under the brand name "Party Ice".

[157] Mr. Fraser says that Scott Carroll told him that he had a package of financial information from the owner of Party Ice and asked him if he could do a review of the material and a workup on the company's EBITDA. Mr. Fraser states in his Affidavit that EBITDA assesses the relative profitability of a company and is frequently used as the basis for determining a company's enterprise value.

[158] In cross-examination Mr. Fraser's evidence was that he was asked by the purchasers to assist them with financing the transaction if it went ahead. His evidence was that he was also asked to review the preliminary information package which Gary MacKenzie had given Scott Carroll and to provide an overview of same or to advise of any questions which he might have. Kevin Fraser denied that he was asked to perform due diligence. Rather, he said, he was asked to review information and to simply provide preliminary questions. Mr. Fraser said that he could not say who was carrying out due diligence. He testified, "It was not me". Kevin Fraser said that he was working with Scott Carroll so he would have received instructions from him. Mr. Fraser said that he would have had some interaction with Hugh Smith in relation to the questions which he submitted to Scott Carroll. Mr. Fraser said that he had very few interactions with Jamie Smith and those had to do with financing.

[159] In his Affidavit, Kevin Fraser states that on September 11, 2018, he sent an email to Scott Carroll setting out his high-level initial observations and questions for consideration. Kevin Fraser says that on September 12, 2018, Scott Carroll forwarded him an email from his father-in-law, Hugh Smith, indicating that Grant Thornton should "work over" the EBITDA analysis provided by Gary MacKenzie. On September 14, 2018, Scott Carroll forwarded to him certain financial information provided to him by Gary MacKenzie. On September 18, 2018, Kevin Fraser sent an

email to Scott Carroll providing a list of questions that he had prepared, based on his review of the information provided by Gary MacKenzie. One of those questions was as follows:

> 7. Please provide details on the rebate adjustment of $121,618 for fiscal 2019 and the historical fiscal year to which the rebate relates.

[160] On the same day, Scott Carroll sent Mr. Fraser an email providing Gary MacKenzie's responses to the eight questions he had proposed that Scott Carroll put to him in advance of a meeting between Scott and Gary scheduled for September 19.

[161] The answer to question 7 provided by Gary MacKenzie was as follows:

> 7. Our rebate agreement and price agreement with CT had run out sometime ago and we stopped paying the rebate but we kept accruing the rebate in our records. In June we went forward with a change in price plus a standard rebate of $80,000 a year starting in June of this year and also a price increase. The accrual portion in our books was reversed but we did not add it to this years income but treated as an adjustment of prior years or more specifically 2017/2018.

[162] In cross-examination Kevin Fraser was asked what he understood from Gary MacKenzie's answer. His evidence was that "based on the analysis that Mr. MacKenzie had provided to Mr. Carroll there was a rebate amount that he had reversed in the current year, and he had added it back to income in a previous year on the basis that it was the building up of an accrual, or rebate, and that it was reversed on the basis that that rebate had not been paid to Couche-Tard".

[163] On September 18, 2018, Kevin Fraser sent an email to Scott Carroll providing a preliminary normalized EBITDA calculation for SWI based on his review of the information provided to him by Scott Carroll.

[164] Mr. Fraser states in his Affidavit that he spoke with Gary MacKenzie on October 22, 2018, for about an hour in order for him to obtain a better understanding of the businesses. He took notes during that conversation and attached a copy of these notes to his Affidavit. During the October 22, 2018, call, he stays that he and Mr. MacKenzie spoke regarding the business and operations of SWI. With respect to the issue of rebates, Mr. Fraser states that Mr. MacKenzie told him that:

(a) SWI's contract with Couche-Tard ran out 3 to 4 years earlier;
(b) SWI had charged full price for a bag of ice, and then added $0.20 per bag which was then rebated back to Couche-Tard's head office;
(c) SWI's rebate arrangement with Couche-Tard stopped during the current year;
(d) SWI's rebates to Loblaws were about $12,000 per year; and
(e) SWI's rebates to Needs were about $12,000 per year.

[165] Kevin Fraser's notes with respect to this phone call record, under "Couche-Tard", "stopped during the current year".

[166] Kevin Fraser states in his Affidavit that during their phone call, Gary MacKenzie did not mention to him the existence of any rebate arrangements with Couche-Tard or other vendors beyond those specifically referred to in his notes.

[167] Of course, it is noted that Kevin Fraser's notes do not record questions that were asked either by him or by Gary MacKenzie.

[168] Kevin Fraser says that based on the financial information provided to Scott Carroll by Gary MacKenzie, Grant Thornton was able to arrange financing for the transaction through the Bank of Montreal.

[169] In cross-examination, Kevin Fraser's evidence was that he reviewed whatever internal year-to-date statements for SWI that were included in the package of material provided to Scott Carroll by Gary MacKenzie. He agreed that these statements showed rebates.

[170] With respect to the Grant Thornton statements, Kevin Fraser said that these showed ice sales, but he said there was no note on the statements that showed that these sales were net of rebates, except for the Loblaws' rebate noted in the 2017/2018 audited statements. When asked by the Respondents' counsel if he compared SWI's internal year to date statements with the Grant Thornton statements, Kevin Fraser's evidence was that Gary MacKenzie had not provided full-year statements for the preceding years. The Court took that as a "no" in terms of Kevin Fraser's review of any of SWI's internal statements provided by Gary MacKenzie.

[171] In cross-examination Kevin Fraser was asked if the Grant Thornton statements showed sales net of rebates. Kevin Fraser's answer was, "You are asking me to speculate about the Grant Thornton statements". His evidence was that there was no "note" to those statements advising that they were net of rebates. He testified that there was a note indicating a Loblaws' rebate for 2017/2018. "If the sales number was net of rebates, then on the basis of determining EBITDA from those financial statements, then 'yes', it would be inclusive of rebates and it would be included in the EBITDA number".

Gary MacKenzie

[172] Gary MacKenzie was the President of SWI at all material times in this proceeding. He basically ran the company. He obtained a Chartered Accountant designation in 1967 and thereafter worked for H.R. Doane, which is now known as Grant Thornton for approximately seven or eight years. In approximately 2015 Mr. MacKenzie made the decision to stop doing the required continued learning obligations to maintain his Chartered Accountant designation. Since then, he has no longer practiced accounting.

[173] After working as an accountant, Mr. MacKenzie started his own businesses. He became the president and sole director of SWI upon the incorporation of that company in 2002.

[174] In cross-examination Gary MacKenzie stated that because of his background he was mostly involved with the financial side of the business, but he was also involved in the operational side and familiar with all aspects of the business, including its sales side. Mr. MacKenzie's evidence was that at month-end and year-end, he would go through the general ledger and carry out adjustments, with the year-end being a much more thorough review of the financials than month-end. He was responsible for the financials the entire time that he ran SWI, which included invoicing and dealing with payables, although he had staff who helped with the invoicing and payables.

[175] Mr. MacKenzie signed the APA on his own behalf and also on behalf of SWI. He was represented by legal counsel at the time.

[176] In cross-examination counsel for NewCo put to Mr. MacKenzie that Scott Carroll's evidence was that he was told by Mr. MacKenzie that there were no rebate arrangements with the larger customers. Mr. MacKenzie denied that he had said so. Mr. MacKenzie admitted in cross-examination that the figures listed for rebates to

various vendors were not “accurate”, but he said they were the best numbers he had at the time. He said that rebates were hard to keep track of on a monthly basis because they were only paid periodically. His evidence was that that was why he listed “rebates accrued” to at least show that SWI had rebates.

[177] With respect to the APA, Gary MacKenzie’s evidence was that since the transaction was an asset-purchase agreement, he only listed contracts which he believed were assignable.

[178] Gary MacKenzie said that when you sell assets, SWI’s vendor agreements would become null and void. His evidence was that he explained to Scott Carroll that they (NewCo) would have to work out all agreements with all their customers with regard to any rebates and price, because SWI could not pass that on. His evidence was that he did not want to include the rebate arrangements in the documentation because that would give the implication that those rebates “were enforceable”, which “they were not”.

[179] Mr. MacKenzie stated in cross-examination that he was aware who the key customers were in the ice business – Sobeys, Needs, Loblaws, Couche-Tard and Ultramar and that Brett Fletcher was the main point of contact with those customers. In terms of the contracts with those vendors, Mr. MacKenzie’s evidence was that he

and Mr. Fletcher would discuss the issues for contract negotiations, and then Brett Fletcher would take these to the vendors for review. The paper copies of these contracts were kept in Brett Fletcher's office.

[180] His evidence in cross-examination was that the deals SWI had with its larger customers included a per bag of ice price and a rebate.

[181] Mr. MacKenzie's evidence was that in the fall of 2018 Scott Carroll telephoned him and asked if he would be interested in selling the business. They agreed to meet and did so about one week later at SWI's office. Mr. MacKenzie stated that he did not now remember the questions which Mr. Carroll asked him. His evidence was that the only thing Mr. Carroll was interested in was the price. Mr. MacKenzie's evidence was that he told Scott Carroll the price and Mr. Carroll asked him how he arrived at that figure Gary MacKenzie told him that he based it on EBITDA figures. His evidence was that he told Scott Carroll that if he wanted a copy of those figures, he would provide them.

[182] Gary MacKenzie's evidence was that he did not accompany Hugh Smith and Scott Carroll on the plant tour given by Brett Fletcher on September 11. He said that he knows now that they met in Brett's office after the tour but he did not know that at the time.

[183] Gary MacKenzie stated that he recalled meeting with Hugh Smith at another point and that Mr. Smith asked good questions. He could not recall what questions Mr. Smith asked. They met for about an hour and he answered Mr. Smith's questions.

[184] In his Affidavit Gary MacKenzie states that:

> …all rebates were fully disclosed to SWI through more than one discussion with Jamie Smith, Scott Carroll and/or Kevin Fraser. Additionally, the monthly and yearly financial statements that were provided clearly listed all rebates that had been paid or payable.

[185] In his Affidavit, Mr. MacKenzie also states:

> Additionally, Brett Fletcher, who continues to work with SWI, was mainly responsible for dealing with the rebates and would give the required information to Canada Inc.'s [SWI] accountant for payment. Scott Carroll spent many hours with Brett going over operations which would have included the details about rebates. Any information regarding the rebates would also be in Brett Fletcher's files at the time of negotiations and the sale closing.
>
> [Emphasis added]

[186] Gary MacKenzie admitted in cross-examination that he did not know, one way or the other, whether Brett Fletcher and Scott Carroll talked about rebates.

[187] Gary MacKenzie stated in cross-examination that he had a telephone conversation with Kevin Fraser at the request of Scott Carroll on October 22, 2018. Mr. MacKenzie said that Kevin Fraser told him that he was assisting NewCo to apply

for a business loan to Bank of Montreal, but the questions which Mr. Fraser asked were far broader than he expected would be needed for that purpose.

[188] Gary MacKenzie's evidence was that SWI paid a 14% rebate to Couche-Tard for a number of years after 2013 when its initial contract with SWI expired. SWI did not pay the 14% rebate to Couche-Tard for its fiscal year March 1, 2017, to February 28, 2018. However, Mr. MacKenzie stated that he accrued the rebates in the financial records but did not pay them because SWI was attempting to secure a price increase.

[189] In an email message to Brett Fletcher dated February 20, 2018, Gary MacKenzie stated, in part, as follows:

> CT (Couche-Tard) – this is our fault we should have approached them whenever our agreement run out and that includes Need's. Now we have not had a price increase for over 5 years as a result. The best we can hope is to get some concession on the rebates owing and a substantial price increase.

[190] Gary MacKenzie said that the way it worked was that you would negotiate a price with Couche-Tard, for example, $1.50 a bag. Couche-Tard would say they wanted a $0.20 rebate, so you charged them $1.70. "So really, it was an in and out." Gary MacKenzie's evidence was that they were trying to set up meetings with Couche-Tard to discuss the rebate, but Couche-Tard kept delaying these meetings.

[191] Gary MacKenzie's evidence was that he gave a cheque dated March 11, 2019, to Scott Carroll in the amount of $49,832.95, payable by SWI to Couche-Tard and told Scott Carroll should be put with another cheque for December 2018, also to go to Couche-Tard for rebates for 2018. Mr. MacKenzie's evidence was that Marlene Nicholson told him around this time that Couche-Tard would not accept the $49,832,95 cheque. Gary MacKenzie said that later Ms. Nicholson "changed her story" to the cheque being put in a desk and was therefore lost and only discovered by Scott Carroll at a later date.

[192] With respect to Loblaws, Gary MacKenzie agreed in cross-examination that sometimes Loblaws would not make a payment for ice sales to SWI, or a payment in full, and call that payment its rebate. His evidence was that they never knew when Loblaws would take the rebate off their cheque. Gary MacKenzie testified that there was a Loblaws rebate payment every year. Gary MacKenzie described Loblaws as a big customer in terms of the amount of business SWI was doing with it and considered that the amount of their rebate was fair. As a result, SWI did not challenge paying that amount of rebate.

[193] Gary MacKenzie's evidence was that Ultramar was not one of the big customers but was a "relatively small" customer of SWI. Rebates were paid to

Ultramar as part of their deal with SWI. His evidence was that Ultramar never advised SWI that it no longer needed to be paid rebates.

[194] In cross-examination Gary MacKenzie's evidence was that Couche-Tard always wanted to be paid rebates. NewCo's counsel suggested to Gary MacKenzie that he did not tell the purchaser that no rebate had been paid to Couche-Tard in 2017 or in 2018. Mr. MacKenzie's response was that he did not, but Brett Fletcher talked to Scott Carroll. He did not know if Brett Fletcher told Scott Carroll that or not.

[195] NewCo's counsel also put to Gary MacKenzie that he did not tell NewCo that no rebates had been paid to Loblaws for 2017 or 2018. Mr. MacKenzie said that that was not correct because the rebates for Loblaws came out automatically. Gary MacKenzie's evidence was that Sobeys/Needs also always wanted to be paid their rebates.

[196] Gary MacKenzie testified in cross-examination that paying rebates was part of doing business with the larger accounts. He said that only five or six accounts received rebates. He referred to Couche-Tard, Ultramar, Sobeys/Needs and Loblaws. Gary MacKenzie's testimony was that he always thought that NewCo would have to pay rebates to these customers on a go-forward basis. He added that he did not say that NewCo would <u>have</u> to pay the rebates. He said that it was up to

him (Scott Carroll) to meet with the customer to work out the amount of the rebate and also the price for their product. Gary MacKenzie also said that he thought any agreements, oral or written, that SWI had with these customers were null and void.

[197] Gary MacKenzie agreed that NewCo paid Couche-Tard an amount close to $200,000.00 for rebates SWI owed to Couche-Tard for 2017 and 2018. Gary MacKenzie said that NewCo should not have done so, that it was up to SWI to negotiate with Couche-Tard the payments of those amounts.

[198] When he was examined on discovery, Mr. MacKenzie's evidence was that he told Scott Carroll which companies SWI paid rebates to. Scott Carroll disputes this. Mr. MacKenzie's discovery evidence was also that agreements with the big vendors which had expired continued on, until such time as new agreements were made.

[199] Mr. MacKenzie's evidence was that his attempted payment of $49,000.00 (inclusive of tax) was part payment of the proposed $80,000.00 per year rebate with Couche-Tard.

Analysis and Findings

Issue 1: Did SWI and Gary MacKenzie breach the terms of the APA by not disclosing SWI's "contracts" with its vendors, or otherwise?

[200] The answer to this question is "no".

[201] Gary MacKenzie did not list the contracts which SWI had had with its commercial vendors in the "contracts" Schedule. The APA required that contracts "related to the business" be listed. However, the phrase "related to the business" must be interpreted, as it was by Gary MacKenzie, in the context of an asset purchase. NewCo was purchasing SWI's assets – its physical plant and equipment. NewCo was not purchasing SWI's contracts or SWI itself.

[202] The definition of "contracts" in the "Representations and Warranties" section of the APA is as follows:

> 3.1(n) Contracts – The Contracts as listed in Schedule 1.1(h) constitute a complete list of all contracts related to the Business, including Equipment Leases. The Vendor is in good standing under all such Contracts, including Equipment Leases. Each of the Contracts is valid and subsisting and in full force and effect, un-amended, and has not received notice of any existing defaults thereunder. To the knowledge of the Vendor, no other parties under the Contracts are in default of their obligations thereunder. The Vendor is not in arrears with respect to payment obligations under any Contracts. Except as set out in Schedule 3.1(g), no consent or approval is required under any of the Contracts in connection with the assignment of the Contracts to the Purchaser.
>
> [Emphasis added]

[203] Reference is made to that portion of the definition of "contracts" which refers to those contracts as not requiring any consents or approval for assignment to the purchaser, NewCo. There was no evidence that any of the contracts or arrangements which SWI had with its commercial vendors such as Couche-Tard, Needs and Loblaws were assignable to NewCo.

[204] NewCo specifically did not want those commercial vendors to know about its purchase of the assets of SWI. The principals of NewCo knew or should have known that they could not simply "step in the shoes" of SWI, as though the purchase had been a share purchase of SWI. It was up to NewCo to arrange for its own employees to operate the ice plant it bought. It hired Brett Fletcher and Heather Hill. There was no evidence that either Brett Fletcher or Heather Hill was required to become an employee of NewCo. Rather, these were former employees of SWI hired by NewCo under whatever terms of employment they and NewCo agreed to. The same thing follows with whatever arrangements were in place between SWI and its commercial vendors. It is noted that on October 22, 2018, Scott Campbell asked Gary MacKenzie in an email to him of that date if he could get "a copy of the employee benefits contract and also a complete employee list to include hire date and pay plans".

[205] SWI and Gary MacKenzie were required under the terms of the APA to provide a list of its customers, and it did so (Schedule 1.1(l) – Customer List). The Customer List includes Couche-Tard, Irving, Loblaws, Needs, Petro Canada, Sobeys and Ultramar, with addresses and phone numbers, including contact phone numbers for each.

[206] This Court finds that Gary MacKenzie and SWI did not breach the terms of the APA by not listing the non-assignable contracts it had with its larger commercial

customers. The APA did not require the Respondents to do so. I find that implicit in the definition of "contracts" is that such contracts are assignable, or consents provided if they are not. None of these vendor contracts was assignable on their terms.

[207] This Court finds that SWI and Gary MacKenzie did not forward to NewCo "…any payments received from customers of the Business for services rendered and supplies delivered to customers by the Purchaser (NewCo) after the Closing Date", as per s.2.13 of the APA.

[208] The evidence disclosed, and was not disputed, that SWI received $94,300.59 in payments after the closing, but did not forward those monies to NewCo. SWI took the position that those monies would be provided from the monies held in trust as the holdback ($300,000). The Court finds that the sum of $94,300.59 is owed by SWI to NewCo.

[209] As discussed further in this decision, SWI is also required to indemnify NewCo for its outstanding liabilities to Couche-Tard and Loblaws for pre-closing rebates it owed to those companies.

[210] In all of the circumstances, including the initiation of litigation against it, I find that the Respondents did not breach the relevant provisions of the APA by not

to date reconciling the amounts it owed NewCo with the holdback sum of $300,000.00.

[211] If this Court is incorrect, and the Respondents breached terms of the APA the Court will review the measure of damages in contract after it reviews the measure of damages for fraudulent or negligent misrepresentations.

Issue 2: **Are SWI and Gary MacKenzie liable to NewCo for fraudulent or negligent misrepresentation?**

Fraudulent Misrepresentation

[212] In *Gallagher Holdings Limited v. Unison Resources Incorporated*, 2018 NSSC 251 Justice G. Moir set out the test for fraudulent misrepresentation, with reference to the decision of Saunders J (as he then was) in *Grant v. March*, [1995] 138 N.S.R. (2d) 385 (NSSC) where Justice Saunders quotes (para. 20) from *Cheshire & Fifoot* (6th ed.) at p. 241, "…a fraudulent statement is a false statement which, when made, the representor did not honestly believe to be true". As noted by Justice Moir in *Gallagher Holdings*, Saunders J also provided at para. 21, *DiCastri's* (3rd ed.) list of elements applicable in a case of repudiation for fraud, as follows:

> (1) the defendant made a false representation to the plaintiff;
> (2) the defendant
> (a) knew the representation was false;
> (b) had no belief in the truth of the representation; or

(c) was reckless as to the truth of the representation;

(3) the defendant intended that the plaintiff should act in reliance on the representation;

(4) the defendant did act on the representation; and

(5) the plaintiff suffered loss by doing so.

[213] Justice Saunders also noted in *Grant* at para. 22 that, "Fraud is a serious complaint to make, and the evidence must be clear and convincing in order to sustain such an allegation".

[214] The Court finds that Gary MacKenzie made no false representation in relation to the existence of "contracts" with respect to SWI's vendors in the APA. His evidence was that the deal was an asset purchase, and that the contracts SWI had with its vendors were not assignable to NewCo. There is nothing fraudulent which arises from that interpretation of the APA.

[215] Nor did Gary MacKenzie fraudulently inflate SWI's EBITDA. If he had wanted to do so, he could have attempted to hide from NewCo the fact that SWI had a bumper sales year in 2017 due to a hurricane in Puerto Rico which resulted in an increase in ice sales in SWI's fiscal 2018. As Gary MacKenzie stated in an email to Scott Carroll (answering questions posed by Kevin Fraser about Gary MacKenzie's EBITDA calculation), "I did not use the Oct/17 – Feb/18 figures because we had a large one-time sale in that period, and it was not as a result representative of that period in a year. If I had used 2017/2018 it would have shown a significantly larger

EBITDA. It did not seem fair to use 2017/2018 in any estimated calculation". This is hardly the approach a man bent on deception would employ.

Negligent Misrepresentation

[216] The elements required to make out a claim in negligent misrepresentation are not in dispute. These elements were set forth by the Supreme Court of Canada in *Queen v. Cogno*, [1993] 1 SCR 87:

> (a) A duty of care must exist between the parties;
>
> (b) The representation must be untrue, inaccurate, or misleading;
>
> (c) The representor must have acted negligently in making the misrepresentations;
>
> (d) The representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (e) The reliance must have been detrimental, in the sense that the representee has suffered a loss.

[217] This Court has reviewed the evidence of Scott Carroll, Kevin Fraser and Gary MacKenzie and the other Affiants in significant detail in this decision.

[218] The only response that Gary MacKenzie gave to Scott Carroll, at least initially, which was less than complete was with respect to the Couche-Tard rebate that he had proposed of $80,000, as set forth in his September 18 email to Scott Carroll. I say "initially" because Scott Carroll had plenty of time to follow up with Gary MacKenzie's in this regard. Indeed, Gary MacKenzie's email to Scott Carroll

with respect to the "standard rebate" of $80,000.00 concluded by stating that "this may be a little confusing, but I can explain further if you have any questions".

[219] However, there was no evidence that anyone from NewCo followed up with Gary MacKenzie with respect to the "standard" rebate of $80,000.00. Clearly Kevin Fraser discussed something about Couche-Tard with Gary MacKenzie, but Mr. Fraser's notes do not record anything about the $80,000 standard rebate that Scott Carroll said was a trigger for Kevin Fraser's conversation with Gary MacKenzie. I cannot infer from Kevin Fraser's notes (answers without questions) that Gary MacKenzie told Kevin Fraser that Couche-Tard no longer required a rebate on a go-forward basis. In his Affidavit, Mr. Fraser states that Gary MacKenzie told him that SWI's rebate arrangement with Couche-Tard (14% of sales) stopped during the current year. I accept that Gary MacKenzie did so.

[220] However, I find that it makes no sense that Gary MacKenzie then lied and told Kevin Fraser that the standard rebate ($80,000) he had told Scott Carroll about with Couche-Tard starting in June 2018 was now at an end, and that Couche-Tard no longer expected to be paid a rebate.

[221] Further, it is important to note that NewCo's allegations focus not on confusion on their part as to whether Couche-Tard would agree to the standard

$80,000.00 rebate or instead insist on the *status quo* of approximately 14% of total ice sales. Rather, NewCo insists that Gary MacKenzie told Scott Carroll that there were no rebates on a go-forward basis, either with Couche-Tard or any other "larger vendor".

[222] Kevin Fraser's notes do not record, and his Affidavit does not provide, whether he and Gary MacKenzie discussed Gary MacKenzie's written explanation of the arrangement with Couche-Tard, as provided to Scott Carroll on September 18, 2018, i.e., that starting in June they were going forward with a standard rebate of $80,000.00. It is to be remembered that Gary MacKenzie gave this answer in response to a question framed by Kevin Fraser (at that point, behind the scenes). It seems surprising that this was not discussed, because in cross-examination Scott Carroll referred to the $80,000 as "yet another new number" and was what triggered his suggestion that Kevin Fraser and Gary MacKenzie speak directly "accountant to accountant".

[223] I find that Gary MacKenzie did not tell Kevin Fraser or Scott Carroll, or anyone else at NewCo, that there were no rebates on a go-forward basis with Couche-Tard or any other commercial vendors. I accept Gary MacKenzie's evidence in this regard. It makes no common sense that Gary MacKenzie would provide Scott Carroll with SWI's internal income statements for periods throughout 2016, 2017

and 2018 which were replete with references to rebates to Needs, Loblaws, PetroCanada and Couche-Tard, including in September 2018, and at the same time represent to Scott Carroll that there were no more rebates and no historic rebates with larger vendors. Further, Gary MacKenzie specifically told Scott Fraser in his answer to the question posed by Kevin Fraser, that SWI had "gone with a standard rebate of $80,000" starting in June 2018 with Couche-Tard. There was no evidence that Scott Carroll asked further about this proposed "standard rebate" going forward – all information at odds with his supposed understanding that there were "no more rebates".

[224] Further, I come back to the fact that the arrangement that SWI had with Couche-Tard was not assignable to NewCo. Couche-Tard was free to enter into whatever arrangements it chose to with NewCo and *vice versa*. I accept Gary MacKenzie's evidence that he told Scott Carroll just that. I believe Gary MacKenzie's evidence when it conflicts with the evidence of Scott Carroll. I so find because there many instances, as reviewed in this decision, where Scott Carroll's Affidavit evidence made little or no common sense based upon the information given to him by Gary MacKenzie and, further, conflicts with his trial evidence.

[225] For example, Scott Carroll insisted that Gary MacKenzie told him that there were no rebates payable on a go-forward basis. However, Kevin Fraser's notes based

on his conversation with Gary MacKenzie on October 22, 2018, record that Loblaws and Needs rebates were "about $12,000.00 per year".

[226] In his oral evidence, Scott Carroll maintained that Gary MacKenzie's conversation with Kevin Fraser confirmed that there were no more rebates, when I find that that is clearly not the case.

[227] There was ample opportunity for Scott Carroll any others with NewCo to ask Gary MacKenzie to clarify what he meant about the Couche-Tard "standard rebate". There was no evidence before this Court that anyone did so.

[228] If I am wrong, and Gary MacKenzie's representations to the principals of NewCo with respect to Couche-Tard were negligent, the Court must also find that NewCo reasonably relied on those representations in order for negligent misrepresentation to be made out.

[229] The Court finds that NewCo did not reasonably rely on Gary MacKenzie's statements about the Couche-Tard rebate. Whatever due diligence NewCo conducted seems to have been woefully inadequate. For example, there was no evidence that anyone asked Gary MacKenzie to provide details of the new pricing arrangement with Couche-Tard. No one, at least on the evidence before the Court, inquired further into the annual rebates which Gary MacKenzie told Kevin Fraser

SWI had been paying, totalling collectively approximately $25,000.00 per year to each of Loblaws and Needs. Scott Carroll's own evidence was that he was only focussed on Couche-Tard, not other commercial vendors.

[230] The Court finds that Gary MacKenzie provided NewCo's representatives with everything he was asked to provide concerning SWI's business. He answered all questions put to him. The documents he provided included external financial statements prepared by Grant Thornton, as well as internal financial statements which he prepared. The internal financial documents included sales figures for packaged ice, as well as rebates paid to vendors including Couche-Tard, Needs, Loblaws and Petro-Canada.

[231] I do not find that there is anything nefarious in Gary MacKenzie apparently not providing Scott Carroll with SWI's 2017/2018 internal income statements. If Gary MacKenzie did not provide these statements to Scott Carroll, which he said he did, I find that nothing turns on that.

[232] Scott Carroll ignored all of the other references to rebates, including rebates listed in SWI's internal income statement for September 2018. If these references to rebates being currently paid or accounted for to Needs, Loblaws and other vendors

did not spur him on to ask more questions, one wonders what difference the "missing financials" would have made, had they been received.

[233] Due diligence in this transaction was an issue. Jamie Smith, the current President of NewCo was not involved in carrying out due diligence – he only became involved in the purchase of SWI close to closing. Scott Carroll was chiefly involved in reviewing materials provided by Gary MacKenzie, and asking questions about those materials, particularly the financials. However, his evidence was that it was Kevin Fraser who was doing due diligence. Hugh Smith, K.C. also thought that Grant Thornton was doing due diligence. Kevin Fraser was very clear that he was not engaged to carry out due diligence on the sale. It is therefore a question mark as to who was carrying out due diligence.

[234] NewCo claimed in its pleadings that SWI artificially inflated its EBITDA in an effort to get a higher purchase price. There was absolutely no evidence before the Court in support of that claim. Scott Carroll and Kevin Fraser both agreed that if rebates were deducted from ice sales, then EBITDA was based on net sales. Gary MacKenzie's EBITDA calculation was based on net sales. He could not have been clearer that that was the case. NewCo had Gary MacKenzie's EBITDA calculation on September 5 – the very first time that Scott Carroll met with Gary MacKenzie.

[235] Gary MacKenzie never altered his EBITDA calculations throughout the negotiation of the sale. NewCo did not amend its pleadings to delete reference to the claim that Gary MacKenzie had artificially inflated EBITDA, even after discoveries when it became clear that he had not done so. That is a matter for costs at the end of the day.

[236] Before the deal closed in December 2018, Scott Carroll and Jamie Smith were aware that Gary MacKenzie did not list any of the arrangements or contracts SWI had with Sobeys/Needs or Loblaws, or any other vendor in the Schedule to the APA which required contracts related to the business be listed. It is inconceivable to this Court that that alone, would not have prompted an inquiry by Scott Carroll or Jamie Smith. If they had to pay $24,000 in rebates to Sobeys/Needs post closing (assuming those customers were prepared to carry on ice sale arrangements with them under the same terms as had SWI), then surely, they would have asked why those contracts were not listed in the schedule to the APA, given their now argument that all such contracts should have been listed. Of course, by his own evidence, Scott Carroll was only "zoned in" on Couche-Tard.

[237] As stated previously no one from NewCo asked Gary MacKenzie to provide them with the contracts it had with its commercial vendors. Apparently, no one from NewCo was curious as to the terms of such contracts which possibly dealt with

matters apart from rebates. The Court notes that on September 11, 2018, Kevin Fraser suggested that Scott Carroll ask Gary MacKenzie during the plant tour that evening, to ask Gary to provide copies of certain distribution agreements.

[238] There was no evidence about this request. However, the Court notes that no distribution agreements were listed by Gary MacKenzie in the "contracts" Schedule to the APA.

[239] There was no evidence at trial suggesting that Gary MacKenzie deceived or misrepresented the rebates payable to Loblaws, Petro Canada or Needs. The rebates for Needs and Loblaws were specifically disclosed and discussed by Gary MacKenzie during his October 22, 2018, telephone conversation with Kevin Fraser. Ms. Nicholson's Affidavit evidence states that these amounts were higher – in the range of $50,000.00 payable to each of Loblaws and Sobeys annually, but there is no evidence as to how Ms. Nicholson came up with those figures, other than she reviewed "records". There was no other supporting evidence.

[240] This Court finds that NewCo has not proven that the Respondents negligently misrepresented the status of SWI's rebate payments to SWI's vendors or in any of manner negligently misrepresented the financial status of SWI. Nor did NewCo reasonably rely on any supposed misrepresentations.

[241] If this Court is incorrect in this regard, the Court will go on to consider the legal framework for the assessment of damages if the Respondents did make fraudulent or negligent misrepresentations to NewCo.

Damages – Fraudulent and Negligent Misrepresentation

Fraudulent Misrepresentation

[242] The Nova Scotia Court of Appeal set out the analysis for assessing damages for fraudulent misrepresentation in *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2012 NSCA 33, [2012] N.S.J. No. 165, leave to appeal denied, [2012] S.C.C.A. No. 245, where Beveridge J.A. said, for the court:

> 125 The correct approach to assessment of damages for fraud is quite uncontroversial. The award of damages is to put the respondent in the same position as if the deceit or fraud had not been committed (see *Huff v. Price* (1990), 76 D.L.R. (4th) 138). Fridman, G.H.L., in *The Law of Contract in Canada* (5th ed.) (Toronto: Carswell, 2006) sets out the following (pp. 293-4):
>
> > Fraud has effects both at common law and in equity and gives rise to remedies under the law of tort and the law of contract. A fraudulent misrepresentation amounts to the tort of deceit, for which the injured party will receive damages from the misrepresentor. A contract induced by fraud is voidable at the election of the defrauded party. It is not void *ab initio*; it is liable to be upset. Rescission may be granted. But the equitable remedy of rescission is discretionary.
> >
> > Damages may be awarded as well as rescission. Such damages will be calculated on the basis of the loss suffered through the deceit, so as to put the injured party into the position he would have been in had the fraud not occurred.
>
> [Emphasis in *Geophysical Services*]

[243] NewCo refers to *Hepting v. Schaaf*, [1964] SCR 100, and *Bitton v. Jakovljevic* (1990), 75 O.R. (2d) 143, 1990 CarswellOnt 560 (Ont. H.C.J.), for the proposition that in a case involving a property sale, damages for deceit are the difference between the amount paid and the amount the claimant would have paid had they known the true circumstances (*Hepting* at 104-105). In *Bitton*, the Court held that the measure of damages was not limited to the difference between the price actually paid and that which the plaintiff would have paid with full information (as suggested by the formulation in *Hepting* and *Parna v. G. & S. Properties Ltd.* (1969), 5 D.L.R. (3d) 315 (Ont. C.A.)), but also permitted consequential damages in a case where it was established "that the plaintiff would never have purchased the property at all if there had been no fraud" (para. 53).

[244] The Respondents refer to *K.R.M. Construction Ltd. v. British Columbia Railway Co.* (1982), 40 B.C.L.R. 1 (B.C.C.A.), for the proposition that damages for fraud are not "unlimited." The Court in that case cited *McGregor on Damages*, 14th edn., for the statement that damages for deceit are "subject to the rules of remoteness, mitigation and the like" (para.97). The Court held that "damages for consequential loss are recoverable. But … a plaintiff is limited to damages for losses flowing directly from the fraudulent misrepresentation - and not too remote" (para. 98).

[245] In Peter Burns and Joost Blom, *The Law of Economic Torts in Canada*, 2d edn (LexisNexis Canada, 2016), at §12.25, the authors state that while "but for" causation is usually required to prove damages for negligent misrepresentation, the authorities indicate that in cases of fraud, the measure is "material contribution", as described, for instance, in *Clements v. Clements*, [2012] 2 S.C.R. 181. As a result, the plaintiff would succeed "if the fraudulent statement formed one element in the cumulative motivation for the loss-creating decision, even if that element cannot be shown to have tipped the scales in favour of the decision" (*Law of Economic Torts* at §12.25). The authors continue, at §12.26:

> … Thus the plaintiff does not have to prove that he or she would not have entered into the transaction but for the misrepresentation, and is entitled to recover the whole loss from entering into the transaction that the representation, in whatever degree, induced. The defendant's liability is unaffected even if the defendant can show that the plaintiff was negligent in holding the co-inducing belief. Damages in civil fraud are not subject to reduction for contributory fault.

[246] The Respondents say that NewCo failed to behave with "reasonable prudence" during negotiations and claim that this limits its ability to claim damages for fraud. They say that NewCo knew there were rebates due but conducted only cursory due diligence. They say that the only evidence of "hidden" rebates was in respect of those due to Couche-Tard and that NewCo made no inquiries into rebates to other customers. NewCo responds that since Mr. MacKenzie told Mr. Carroll that

there were no longer rebates going to larger customers, and that there were no rebates going forward, there was no reason for further inquiries.

[247] NewCo says, correctly, that a claimant's alleged ability to find out that a representation was untrue is no defence to fraud. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, the appellant argued that the misleading documents he provided should have been identified by the respondent. Binnie J. said, for the majority:

> 67 … It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected.
>
> [F]raud 'unravels everything'": *Farah v. Barki*, [1955] S.C.R. 107, at p. 115 (Kellock J. quoting Farwell J. in *May v. Platt*, [1900] 1 Ch. 616, at p. 623).
>
> The appellants' concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C. who said, "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty'": *Central R. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99, at pp. 120-21.
>
> 70 Lord Chelmsford's strictures were quoted and applied by Southin J. (as she then was) in *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322 (S.C.), where she observed that "[c]arelessness on the part of the victim has never been a defence to an action for fraud" (p. 335).
>
> Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.
>
> And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute

> to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue. [p. 336]
>
> See also *Dalon v. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89 (B.C.S.C.). To the same effect is Spencer Bower and Turner, *The Law of Actionable Misrepresentation* (3rd ed. 1974), at p. 218:
>
> > A man who has told even an innocent untruth, by which he has induced another to alter his position, -- much more one who has fraudulently lied with that object and result, -- has debarred himself from ever complaining in a court of justice, any more than he could in a court of morals, that the representee acted on the faith of his misstatement in the manner in which he, the representor, intended that he should. He can never be heard to resent the fact that another believed the lie that was told for the very purpose of inspiring that belief, or plead as an excuse that, if the representee had not been such a fool as to trust such a knave, no harm would have been done.

[248] The Respondents rely on the concurring reasons of McLachlin J. (as she then was) in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, where, in the context of a claim for breach of fiduciary duty, she considered damage principles in deceit by analogy:

> 22 *Doyle v. Olby (Ironmongers) Ltd.* is likewise helpful in considering mitigation. Sachs L.J. stated, "the court must obviously take care not to include sums for consequences which may be due to the plaintiff's own unreasonable actions" (at p. 171). In a similar vein Winn L.J. remarked that:
>
> > ... no element in the consequential position can be regarded as attributable loss and damage ... in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense or can in any true sense be said to have been the author of his own misfortune. The damage that he seeks to recover must have flowed directly from the fraud perpetrated upon him. (at p. 168)
>
> (It should be noted that while in *Doyle v. Olby (Ironmongers) Ltd.* Lord Denning said that "[t]here is nothing to be taken off in mitigation" this is because "there is nothing more that he could have done to reduce his loss" (at p. 167). In that case the plaintiff was indeed behaving as a reasonable and prudent person in the circumstances.)

> 23 The thrust of these *dicta* is that while the plaintiff will not be required to act in as reasonable and prudent a manner as might be required in negligence or contract, losses stemming from the plaintiff's unreasonable actions will be barred. This is also sound policy in the law of fiduciary duty. In negligence and contract the law limits the actions of the parties who are expected to pursue their own best interest. Each is expected to continue to look after their own interests after a breach or tort, and so a duty of mitigation is imposed. In contrast, the hallmark of fiduciary relationship is that the fiduciary, at least within a certain scope, is expected to pursue the best interest of the client. It may not be fair to allow the fiduciary to complain when the client fails forthwith to shoulder the fiduciary's burden. This approach to mitigation accords with the basic rule of equitable compensation that the injured party will be reimbursed for all losses flowing directly from the breach. When the plaintiff, after due notice and opportunity, fails to take the most obvious steps to alleviate his or her losses, then we may rightly say that the plaintiff has been "the author of his own misfortune." At this point the plaintiff's failure to mitigate may become so egregious that it is no longer sensible to say that the losses which followed were caused by the fiduciary's breach. But until that point mitigation will not be required. This said, it must also be emphasized that behaviour by the defendant which is a not unreasonable attempt to make the best of a difficult situation, as in *Doyle v. Olby (Ironmongers) Ltd.* or *Esso Petroleum Co. v. Mardon* [1976] Q.B. 801 (C.A.), will not be penalized.
>
> [Emphasis in original]

[249] However, as Binnie J. pointed out in *Performance Industries*, it does not stand in the mouth of the party making a fraudulent misrepresentation to say the other party should not have believed it or should have made their own inquiries to determine whether the representation was correct.

[250] NewCo’s evidence was to the effect that had it been aware of the truth about the rebates it would be required to pay, it would have withdrawn from the transaction, or offered a lower price. The Respondents, however, submit that the evidence does not support a finding that Gary MacKenzie would have accepted a lower price for the business.

[251] NewCo, however, says that whether the seller would have accepted a lower price is irrelevant to damages. As the Court said in *Harland*:

> 31 The defendants contend that the plaintiffs must prove causation on a balance of probabilities. They argue that the plaintiffs must prove that they would not have sold their house for less than the original price but for the fraud of the defendants.
>
> 32 In very similar circumstances our Court of Appeal once said in *Page v. Clark* (1914), 31 O.L.R. 94 at p. 112, 19 D.L.R. 530:
>
> > [I]t is not open to the appellants, having practised deception with a view to inducing the respondent to enter into the contract, and having succeeded in doing so, "to speculate upon what might have been the result if there had been a full communication of the truth".
> >
> > I take it the court meant that the defendants would bear some kind of reverse onus to prove the fraud was not the causative factor.
>
> 33 In any event, the law concerning proof of causation in tort cases is now found in *Snell v. Farrell*, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289. That case was concerned with the tort of medical negligence but I understand it to be applicable to all tort cases. In that case the Supreme Court of Canada rejected the concept of reversing the onus where it is difficult for a plaintiff to prove causation. It ruled that where the facts lie particularly within the knowledge of the defendant or where the tort of the defendant has deprived the plaintiff of the opportunity to know what might have happened but for the tort then very little affirmative evidence will justify the drawing of an inference of causation in the absence of evidence to the contrary.

[252] If fraudulent misrepresentation is made out, the Court will consider the quantum of any such damages further to this decision.

Negligent Misrepresentation - Damages

[253] In order to make out a claim in negligent misrepresentation, NewCo must prove it suffered a loss as a result of the misrepresentation.

[254] In *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3, Sopinka J. set out the law on recovery of damages for economic loss in cases of negligent misrepresentation. He said:

> 20 The plaintiff seeking damages in an action for negligent misrepresentation is entitled to be put in the position he or she would have been in if the misrepresentation had not been made. In Fridman, *The Law of Torts in Canada*, vol. 2, the author says at p. 136:
>
> > What sort of economic loss is recoverable in an action for negligent misrepresentation is still to be resolved conclusively, although the accepted test seems to be restoration of the plaintiff to the position in which he would have been if the negligent misrepresentation had never been made. Some cases suggest that what the plaintiff can recover is what might be termed "out of pocket expenses". In other words, he is entitled to be reimbursed for those costs and expenses which he has incurred and has expended in reliance on the misrepresentation.
>
> 21 To the same effect is the statement in "Assessment of Damages for Misrepresentations Inducing Contracts" by D. W. McLauchlan (1987), 6 Otago L.R. 370, at p. 388:
>
> > It is axiomatic that the object of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. Therefore, in a tort action the object is to put the plaintiff in the position he would have been in if the tort had not been committed.
>
> 22 What that position would have been is a matter that the plaintiff must establish on a balance of probabilities. In a case in which a material negligent misrepresentation has induced the plaintiff to enter into a transaction, the plaintiff's position is usually that, absent the misrepresentation, the plaintiff would not have entered into the transaction…
>
> 23 Once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue. It is an issue that requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence. In the absence of evidence to support a finding on this issue, should the plaintiff or defendant bear the risk of non-persuasion? Must the plaintiff negative all speculative hypotheses about his position if the defendant had not committed a tort or must the tortfeasor who sets up this hypothetical situation establish it?

> 24 Although the legal burden generally rests with the plaintiff, it is not immutable. See *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481, and *Snell v. Farrell*, [1990] 2 S.C.R. 311. Valid policy reasons will be sufficient to reverse the ordinary incidence of proof. In my opinion, there is good reason for such reversal in this kind of case. The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position". A tortfeasor who says "Yes, but you would have assumed a position other than the status quo ante", and thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear the burden of displacing the plaintiff's assertion of the status quo ante.

[255] NewCo submits that the application of negligence damages principles leads to the same measure of damages as the fraud analysis, i.e., a range of $975,000.00 to $980,000.00.

[256] The Respondents say no loss was established. They submit that the EBITDA range used to calculate the purchase price factored in the rebates on a go-forward basis, and with minimal due diligence and a review of the documents provided, it was abundantly clear that rebates were the norm in the industry and to be expected going forward.

[257] Further, the Respondents say, even if there were agreements between the Respondents and the customers eliminating rebates, there was no guarantee that customers would not expect rebates from a new company taking over the business.

[258] The Court will assess, on a provisional basis, the quantum of damages under “Issue 7”.

Issue 3: Are the Respondents liable to NewCo for conspiracy?

[259] This Court finds that there is no evidence that the predominant purpose of anything Gary MacKenzie or SWI did, or failed to do, was carried out for the predominant purpose of causing injury to NewCo. Accordingly, the claim against the Respondents in conspiracy is dismissed.

Issue 4: Have the Respondents been unjustly enriched?

[260] SWI acknowledges that it received the sum of $94,300.59 and that amount should go to the credit of NewCo. The evidence of Marlene Nicholson was that after the closing, NewCo made payments totalling $223,954.85 to Couche-Tard and other vendors which were owed by SWI for 2017 and 2018. There was no obligation for NewCo. to make these payments. It did so to maintain good commercial relationships with Couche-Tard and other vendors.

The Court finds that the Respondents have been enriched, but not unjustly so, because the APA provided for a process for deducting amounts owed by SWI from the holdback. This needs to be done.

Issue 5: Are the Respondents liable to NewCo in conversion?

Issue 6: Are the Respondents entitled to the return of the holdback funds pursuant to the APA?

[261] The Respondents are entitled to the return of the holdback funds, once the amounts owed to NewCo are deducted from those funds, i.e., $94,300.59, and $223,954.85.

[262] The Respondents are not liable to NewCo in conversion.

Issue 7: Did NewCo suffer any loss as a result of tortious or fraudulent behaviour on the part of the Respondents, and if so, what is the quantum of damages?

[263] If this Court is incorrect, and the Respondents negligently or fraudulently engaged in misrepresentations of SWI's financial situation, including the status of the payment of rebates to its larger vendors, then the quantum of damages must be determined. There is no legal reason advanced by NewCo for the quantum of loss for breach of contract (in this case, the APA) to be different than the quantum for the claims in fraud and negligence.

Quantum of Damages

[264] The general rule is that "the measure of damages in negligent misrepresentation and fraudulent misrepresentation, both tort claims, are the same": MacDougall, *Misrepresentation and (Dis)Honest Performance in Contracts*, at §5.98.

[265] As NewCo submits, a trial judge who is satisfied that there has been a compensable loss must assess the damages, even where the evidence is less than ideally clear: see *Penvidic v. International Nickel*, [1976] 1 SCR 267, at 278-280 (in the context of breach of contract); *Spence v. St. Thomas* (2001), 238 N.B.R. (2d) 53 (Q.B.) at para. 14.

[266] The authors of *The Law of Economic Torts in Canada* make the following remarks about damages for fraud in the sale of a business, at §12.32:

> Although it is the plaintiff's current, actual financial position that is used for assessing damages, evaluating that position must take into account future events that are relevant to the loss caused by the defendant. If the plaintiff is claiming, for example, that it was tortiously induced to pay too much for a business that it continues to operate, the actual, current value of the business in the plaintiff's hands is essentially the discounted value of the business's future profits, and so all the contingencies that might affect those profits have to be taken into account, in one way or another, in putting a value on the business as a going concern.
>
> [Emphasis added]

[267] The authors go on to state that the plaintiff's hypothetical position had the tort not been committed "by definition cannot be proved, only estimated", with consideration of contingencies "in relation both to events that would have happened in the past (that is, before the assessment of damages takes place) if the tort had not intervened, and to events that would have happened, and may still happen, in the future" (*Law of Economic Torts* at §12.33). They continue, at §12.34:

> In many tort cases, economic loss arises from having entered into a transaction. The plaintiff claims damages based on the hypothesis that, but for the tort, it would not have entered into the transaction at all, or would have entered into it on different terms. If the basis for damages is that the plaintiff would have made the same contract, but on better terms, the question is how much extra the plaintiff would have earned under the more favourable terms. If the assumption is that the plaintiff would not have made the contract at all, the damages are typically the amount lost on the contract…
>
> [Emphasis added]

[268] NewCo submits that to be placed in the financial position it would have been in but for the misrepresentations, damages should be based on the difference between the price it paid and the price it would have paid had it known the actual circumstances. NewCo says it expected to acquire the business "without any, or minimal, ongoing rebate liabilities to its customers". According to NewCo, the evidence indicates (1) that it would have offered less had it been aware of the need to pay the rebates on an ongoing basis and (2) that the value of the business in September 2018 was $5.52 million, not the $6.5 million it paid, a difference of $980,000.00. NewCo says this is the measure of its damages.

[269] NewCo's counsel provides an alternative "indirect" assessment of damages based on the value as represented by the Respondents. The cost of "making good" that representation, NewCo submits, is adding $150,000.00 to the annual measure of value arising from the representations ($1 million) and applying the 6.5 multiplier. This gives a figure of $1.15 million multiplied by 6.5 ($7.475 million). The

difference between this figure and the $6.5 million actually paid is $975,000.00, virtually identical to the $980,000.00 resulting from the direct calculation.

[270] The Respondents dispute the quantum of damages. They submit that valuing a business on the basis of a multiple of an EBITDA "requires normalizing the EBITDA figures and including some assumptions in the valuation. It is not a straightforward equation where a $150,000 yearly liability would equate to a clear $150,000 reduction in normalized EBITDA".

[271] The Respondents say that the Couche-Tard rebates for the years 2016, 2017, and 2018 were as follows: $87,744.00; $83,367.00; and $111,379.00, respectively, for an average of $94,830.00. They submit that this is the highest possible undisclosed ongoing liability. They additionally point out that Mr. MacKenzie disclosed an ongoing Couche-Tard rebate of $80,000.00 in September 2018.

[272] The Respondents argue that damages should be "limited to the delta between the disclosed rebates and the actual rebates owing. Using the average rebates from the three years preceding the sale, the delta is $14,830 ($94,830 - $80,000). Applying the 6.5 multiplier, this would result in total damages of $96,395.00."

[273] This Court finds that there is a problem with drawing a straight line between the supposed rebate figure of $150,000.00 and the value of the business. As the

authors of *The Law of Economic Torts in Canada* explain, where the plaintiff has tortiously been induced to overpay for a business and it continues to operate that business, "the actual, current value of the business in the plaintiff's hands is essentially the discounted value of the business's future profits, and so all the contingencies that might affect those profits have to be taken into account, in one way or another, in putting a value on the business as a going concern" (§12.32). Those contingencies relate "both to events that would have happened in the past (that is, before the assessment of damages takes place) if the tort had not intervened, and to events that would have happened, and may still happen, in the future" (§12.33).

[274] Neither party has directly addressed the question of potential contingencies that would affect the value of the business, but the burden is on NewCo to prove its damages.

[275] This Court finds that NewCo has not proven that it suffered damages caused by negligent misrepresentation on the part of the Respondents.

[276] There was no evidence before the Court that NewCo suffered a loss. All NewCo has said is that it now has to pay $150,000 in rebates that it didn't know about. Approximately three years have passed since the close of the asset purchase. NewCo lead no evidence to prove that it was costing it another $150,000 a year to

operate. There was no evidence that NewCo attempted, in any way, to mitigate its damages. NewCo led no expert evidence that it overpaid for SWI's assets.

[277] As previously noted, Kevin Fraser's EBITDA's calculation was net of rebates. Kevin Fraser provided NewCo with a range of normalized EBITDA – $840,000 "on the low side" and $1,000,000 "on the high side" with a "mid-point" of $920,000. Kevin Fraser said that "at a 6 x multiple, this equates to an enterprise value…of just over $5,500,000.

[278] Counsel for NewCo submits that ultimately NewCo went with $1,000,000 because NewCo thought they weren't paying rebates anymore and that NewCo could expect that they would be able to do much better than the $1M without having to pay rebates. The latter part of this submission, i.e., that they NewCo would do better than $1M without rebates was not evidence before the Court; it was the submissions of counsel.

[279] Based on this analysis, and on a provisional basis only, the Court finds that the most that NewCo is entitled to as damages is $95,000, which is the approximate amount of the rebate that it had to pay Couche-Tard in the year following the closing of the sale (based upon a three-year average of past rebates paid to Couche-Tard).

After that, this Court finds that NewCo was free to attempt to negotiate new and potentially better deals with Couche-Tard.

[280] Finally, if NewCo breached the terms of the APA by not listing its contracts with its vendors or in any other material manner, this Court finds that the measure of damages in breach of contract results in the same measure of damages - $96,395.

Conclusions

[281] Each of the NewCo's claims is dismissed with costs to the Respondents, except as follows.

[282] NewCo is entitled to the sums of $94,300.59 and $223,954.85, which shall be deducted from the holdback amount of $300,000. If interest is applicable to those amounts, I leave it to counsel to agree to the applicable rate or brief the Court.

[283] The Court leaves it to the parties to determine whether other, if any, amounts (not in evidence before this Court) should be credited to either party in terms of the holdback amount.

[284] If the parties are unable to agree on costs, the Court will receive written submission on costs within 30 calendar days of the date of this decision.