Court of King's Bench of Alberta

Citation: Brown-Forman Corporation v Charton-Hobbs Inc, 2024 ABKB 261

Date: 20240503
Docket: 2001-12887
Registry: Calgary

Between:

Brown-Forman Corporation and Benriach Distillery Company Limited

Plaintiffs/
Defendants by Counterclaim

- and -

Charton-Hobbs Inc. and Authentic Wine & Spirits Merchants Inc.

Defendants/
Plaintiffs by Counterclaim

Corrected judgment: A corrigendum was issued on May 7, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Justice L.M. Angotti

I. Summary

[1] This matter comes before the Court as a contractual dispute, involving contract interpretation, notice of termination, and good faith contractual performance. There are also claims of negligence and negligent misrepresentation, arising from the contractual relationship.

[2] Benriach Distillery Company Limited owns three different distilleries in Scotland that manufacture single malt scotch. The distilleries are Benriach (the original distillery), GlenDronach (acquired September 2008), and Glenglassaugh (acquired 2014). Each distillery produces a variety of products, which are collectively referred to as the Benriach Brands.

[3] Brown-Forman Corporation has its principal place of business in Louisville, Kentucky. It is a manufacturer and supplier of many different brands of liquor products, which products are distributed throughout the world, including Canada. Since Brown-Forman purchased Benriach in June 2016 through several intermediary subsidiary corporations, such products and distribution include the Benriach Brands.

[4] Authentic Wine & Spirits Merchants Inc. is a Canadian corporation that carries on the business of a liquor agency in several Canadian provinces. It was formed from the January 1, 2020 amalgamation of 6465561 Canada Inc. (known as Authentic West) and 11157485 M&T Canada Limited (known as Authentic East), which carried on business together as Authentic Wine & Spirits Merchants prior to the amalgamation. Authentic West was formed from Vintage Consultants Ltd. in January 2006. Authentic West was the liquor agency for Benriach in Western Canada pursuant to an oral agreement from June 2005, until the termination of the Western Canada Agreement as of July 1, 2018. Authentic East was the liquor agency for Benriach in Ontario pursuant to a written agreement from June 2008, until the termination of the Ontario Agreement as of July 1, 2018. In this decision, the name Authentic refers to Authentic Wine & Spirits Merchants Inc. and all of its predecessors collectively.

[5] Charton-Hobbs Inc. is also a Canadian corporation that carries on the business of a liquor agency in various Canadian provinces. Charton-Hobbs obtained 50% ownership in Authentic West in January 2006 and Authentic West became a wholly owned subsidiary of Charton-Hobbs on June 1, 2018. Upon amalgamation of Authentic West and Authentic East, Authentic became a wholly owned subsidiary of Charton-Hobbs. Charton-Hobbs provides various administrative services to Authentic as its wholly owned subsidiary.

[6] The claim and counterclaim arise from the termination of Authentic as liquor agency for the Benriach Brands.

[7] Benriach and Brown-Forman[1] claim damages based on allegations that Authentic and Charton-Hobbs refused to transfer inventory to the Plaintiffs' new agency upon termination of the Western Canada Agreement. Such retention of the inventory after the termination prevented the Plaintiffs from selling the Benriach Brands in the Western Canada market for approximately three years. The Plaintiffs submit that the retention of the inventory was a breach of contract, breach of the duty of good faith contractual performance, and negligence.

[1] Benriach and Brown-Forman will be collectively referred to as the Plaintiffs, regardless of whether the claim discussed arises from the claim or the counterclaim.

[8] Authentic and Charton-Hobbs[2] claim damages based on allegations of a breach of contract for a failure to provide appropriate notice in the termination of both the Western Canada Agreement and the Ontario Agreement, as well as alleged breaches of the duty of good faith contractual performance under the Western Canada Agreement prior to termination. Authentic also claims the tort of negligent misrepresentation with respect to the relationship following Brown-Forman's acquisition of Benriach.

[9] In addition to the contract and tort claims made, the Court needed to deal with determining the property parties to the actions, whether this Court had jurisdiction to determine the claims with respect to the Ontario Agreement, and whether the Ontario claims were properly plead.

[10] The proper parties to the action are Benriach and Authentic, being the only parties to the two agreements that form the basis of all claims. Employees and executives of Brown-Forman and Charton-Hobbs were acting as agents for Benriach and Authentic, respectively. The Court has jurisdiction to deal with the claim regarding the Ontario Agreement; however, the claim made was not properly plead such that the claim failed. Benriach failed to provide reasonable notice for termination of the Western Canada Agreement, which reasonable notice was six months. Benriach did not breach its duty of good faith and did not engage in negligent misrepresentation. Authentic breached its duty of good faith in its performance of post termination contractual obligations by retaining the inventory for an improper purpose.

[11] Authentic's damages are $100,259.50. Benriach's damages are $846,248.40.

II. Background

[12] The basic facts are not in dispute and many were included in an Agreed Statement of Facts.

[13] In 2005, Benriach sought a liquor agency in Western Canada to distribute the Benriach Brands (as they then existed). In June 2005, Darryl Weinbren, a representative of Authentic, met with Billy Walker, a representative of Benriach, at Heathrow Airport in London, England. The two men came to an agreement that Authentic would be Benriach's liquor agency in Western Canada, which unwritten agreement was sealed by a handshake. In coming to the Western Canada agreement, Mr. Weinbren and Mr. Walker discussed the market for single malt whisky and how Authentic operated, including its sales structure and approach to marketing whisky. There was no discussion about terms for termination of the agreement. After the meeting, Authentic and Benriach made the necessary filings with the Alberta Gaming, Liquor and Cannabis Commission ("AGLC") and the British Columbia Liquor Distribution Branch ("BCLDB"), so that Authentic could begin selling the Benriach Brands. When Benriach acquired the GlenDronach distillery and the Glenglassaugh distillery, those respective Benriach Brands were added to the Western Canada Agreement, without further discussion about the agreement's specific terms.

[14] The Benriach Brands are all single malt Scotch. Each single malt scotch comes from only one distillery in Scotland. The production of single malt scotch involves a fermentation process, a distillation process, and an aging process. The aging process is very important. After it has

[2] Authentic and Charton-Hobbs will be collectively referred to as the Defendants, regardless of whether the claim discussed arises from the claim or the counterclaim.

been fermented and distilled, the whisky is placed into a barrel and aged for several years, ranging from approximately eight years to twenty-five years or more. The number of years for the aging process is determined when the whisky is placed in a barrel at the start of the aging process, the length of which cannot then simply be extended or shortened. To do so would significantly impact the qualities of the end product.

[15] The Benriach Brands consist of several products, called individual expressions. Each distillery has its own various expressions. Each expression is like a flavour profile, representing different ages, maturation techniques, different types of barrels, different geographical locations, and other variations. Each individual expression is assigned a unique stock-keeping unit ("SKU") and is considered either a core expression or a special expression. A core expression is the primary product that represents the bulk of a particular distillery's business. It makes up the majority of sales volume, is the primary focus of advertising and promotion, and usually constitutes the consumer's primary point of entry into the brand. Thus, a distillery's brand equity and loyalty is built upon its core expressions. A special expression is a specialty or one-time product, where production is restricted and availability is not guaranteed, such that the purchase price is higher than for core expressions. Core expressions made up approximately 90% of revenue and case sales for Benriach Brands. The Plaintiffs considered the Benriach 10, Benriach Curiositas, GlenDronach 12, GlenDronach 12 Mini, and GlenDronach 18 to be the core expressions of the Benriach Brands.

[16] Brown-Forman acquired the shares of Benriach on June 1, 2016. For approximately the first year, Benriach staff continued to operate the business, including working with Authentic on the Benriach Brands in the Canadian markets. In or about the summer of 2017, this role for the Canadian markets transitioned from Benriach staff to Brown-Forman staff, through Brown-Forman Canada. Brown-Forman Canada continued to work with Authentic on the sale of Benriach Brands in Canada.

[17] In September 2017, Brown-Forman decided it wanted a single national agency for all Brown-Forman products, including but not limited to Benriach Brands. It commenced a Request for Proposal (RFP) process. Neither Authentic nor Charton-Hobbs were invited or made aware of the RFP process. After the conclusion of the RFP process, Brown-Forman engaged Peter Mielzynski Agencies Ltd. (PMA) as its liquor agency across Canada. On May 15, 2018, Authentic received notice from Brown-Forman, on behalf of Benriach, that both the Western Canada Agreement and Ontario Agreement would be terminated effective July 1, 2018. Brown-Forman and PMA filed appropriate documentation with the respective liquor boards to change the liquor agency to PMA.

[18] At the time of termination, Authentic owned inventory of the Benriach Brands in Alberta and British Columbia. So long as Authentic continued to hold specific SKUs of the Benriach Brand in inventory, PMA was unable to market and sell the specific SKUs in Alberta and British Columbia. The parties entered negotiations for payment in lieu of notice of termination for both agreements and the transfer of the inventory in Alberta and British Columbia to PMA. However, they were unable to come to an agreement. Authentic kept the Benriach Brands inventory following termination, the majority of which it sold, but did not deplete the inventory of most SKUs to zero. Finally, in December 2021, Authentic sold Brown-Forman the remaining inventory, at which time PMA was able to engage its full role as the liquor agency for the Benriach Brands in Alberta and Canada.

[19] Prior to the transfer of the inventory, Brown-Forman sued Authentic and Charton-Hobbs for contractual breaches and negligence. Authentic and Charton-Hobbs counterclaimed against Brown-Forman and Benriach. An application at the beginning of trial was granted, to add Benriach as a Plaintiff, in addition to being a Defendant by Counterclaim.

III. The Regulatory Scheme for Liquor Distribution in Alberta and British Columbia

[20] The AGLC administers and regulates the liquor industry in Alberta, including the importation, distribution, and sale of liquor products, which is governed by the *Gaming, Liquor and Cannabis Act*, RSA 2000, c G-1 and the *Gaming, Liquor and Cannabis Regulation*, AR 143/1996. The AGLC has also published policies, guidelines, and handbooks.

[21] The BCLDB administers and regulates the liquor industry in British Columbia, including the importation, distribution, and sale of liquor products, which is governed by the *Liquor Distribution Act*, RSBC 1996, c 268, the *Liquor Control and Licensing Act*, SBC 2015, c 19, and the *Liquor Control and Licensing Regulation*, British Columbia Reg 241/2016. The BCLDB has also published policies, guidelines, and handbooks.

[22] There are many similarities between the Alberta and British Columbia liquor regulatory schemes. Liquor cannot be imported or sold within either province, other than through the respective liquor board and in accordance with its governing laws and policies. In both provinces, a liquor supplier must register a liquor agency to represent and distribute its products (each product identified by a unique SKU) with the provincial liquor regulator. The registered agency deals only with specified SKUs; only that registered agency can represent and distribute those SKUs in the province. Documentation confirming the agreement between the supplier and liquor agency to have the liquor agency represent identified SKUs must be filed with the liquor board. In both provinces, the liquor agency buys the product from the supplier and owns the inventory upon the product being imported into the country. The liquor is stored in consignment warehouses approved and operated by the liquor board. Liquor is then distributed to licensees, such as bars, restaurants, and others in the hospitality industry, and liquor stores for purchase by the public, either directly in Alberta or through the BCLDB in British Columbia.

[23] Both provinces also have a process for a supplier to transfer representation of specific SKUs from one liquor agency to another.

[24] In British Columbia, the supplier may cancel the authorization upon written notice to the BCLDB. Notwithstanding such cancellation, if any inventory remains from a Purchase Order issued prior to the cancellation, the BCLDB will continue to deal with the previously authorized liquor agency until the inventory under the purchase order is depleted, either through transfer between the two agencies or sale in the marketplace.

[25] In Alberta, a different agency cannot represent a SKU until the current registered agency no longer owns inventory of that SKU. This requires that the current agency deplete their inventory of that SKU to zero, either by transferring the inventory to the incoming agency or selling the inventory in the market. When the supplier chooses a new agency, both the supplier and the new agency file the necessary documentation with the AGLC, including notice that the agreement with the current agency is cancelled. However, before the new agency can take any active steps to market and sell the impacted SKUs, the AGLC also requires “a letter from the current agency releasing the inventory on hand to the new agency (this letter is normally received after the new agency has purchased the inventory from the current agency and payment

has actually been received).” The AGLC does not govern how the inventory is depleted, such that it does not require that the inventory be transferred to the new agency. Rather, it seeks confirmation that the current agency’s inventory of the relevant SKU is zero, which can be effected by a transfer or sale in the marketplace.

[26] The AGLC *Liquor Agency Handbook* is clear in Policy 3.1.6:

> If a supplier and the registered agency the supplier has designated to represent its products in Alberta become involved in a dispute regarding the ownership of, payment for, or representation of liquor products or any sort of conflict, AGLC will not become involved in resolving the dispute. AGLC will rely upon direction agreed to by the parties involved or by court order.

[27] The BCLDB takes a similar position with respect to disputes between a supplier and a liquor agency.

[28] The Defendants submit that the regulations and policies around a supplier’s change in liquor agency representation are put in place to protect the current (outgoing) agency. They rely upon a statement to this effect in ***Peter Lehmann Wines Ltd v Vintage West Wine Marketing Inc.***, 2015 ABQB 481. They argue that they were not required to call evidence to prove this was the purpose and rationale behind the policies, because that purpose and rationale is part of the public record in the ***Peter Lehmann Wines*** decision and this Court can take judicial notice of that factual finding. I reject this position in its entirety.

[29] In ***Peter Lehmann Wines***, the statement that the AGLC policies were to protect outgoing agencies was not a finding by the Court, but was part of the summary of one party’s arguments. There was no finding as to the purposes of the AGLC policies, including no specific finding that they protect only the outgoing agency. As well, the case only considered the AGLC; it did not consider the BCLDB and its policies. In the “Product Registration Process” of the BCLDB, it states that the BCLDB “...commits to protecting British Columbia agencies and their suppliers by requesting supporting documentation in instances where brand ownership, representation, or authorization is not clearly defined.” That is contrary to the submission of the Defendants.

[30] The suggestion that the policies are to protect outgoing agencies is also inconsistent with the liquor boards’ positions that they take no position in disputes between agencies and suppliers. The main purpose, as demonstrated by the protections set out in each provincial liquor board’s policies and legislations, is to protect the public through protection of minors who cannot legally consume alcohol or engage in gambling, the discouragement of irresponsible consumption, and the assurance of fair competition for buyers of liquor. There is nothing in the policies or legislation that supports that either liquor board put in place the agency transfer requirements to protect the outgoing agency. Such an argument would mean that the incoming agency is not entitled to protection, which would mean treating agencies differently depending on their status. Rather, the issue of inventory needing to be transferred is logically required, given the prohibition against more than one agency representing a particular SKU. It is not put in place for the protection of the supplier or either agency. It is simply the regulatory environment within which those parties must operate and informs the agreements they enter into with each other.

IV. Credibility of Duncan Hobbs

[31] Duncan Hobbs is the President of Charton-Hobbs and Authentic and, as such, oversees the operation of both corporations.

[32] The Plaintiffs submit that Mr. Hobbs was not a credible witness, such that much, if not all, of his evidence should not be accepted.

[33] I find that Mr. Hobbs' evidence was often both internally and externally inconsistent with other evidence. It was often not plausible, as measured by consistency with the probabilities affecting the case as a whole. He was evasive on cross-examination and often did not answer the questions asked of him. His responses were often prone to exaggeration, and his memory was good when it served his purpose, but poor when it did not. For example, he spoke confidently of the impact of the termination on Authentic, yet could not even identify the core expressions of the Benriach Brands that Authentic represented. At one point he requested that the Brown-Forman's employees put their positions writing, yet apparently failed to do so himself for important matters that he says were discussed orally with such employees. Other examples are highlighted later in these reasons. Therefore, unless noted, I do not accept Mr. Hobbs' evidence as he was neither reliable nor credible.

V. Proper Parties to the Action

[34] It is not disputed that the original parties to the Ontario Agreement were Authentic East and Benriach. It is also not disputed that the original parties to the Western Canada Agreement were Authentic West and Benriach. As a result of the amalgamation, Authentic became a party to both agreements: *Canada Business Corporations Act*, RSC 1985, c. C-44, s 186 (*CBA*).

[35] Brown-Forman's purchase of Benriach involved the purchase of Benriach shares, through a series of subsidiary corporations of Brown-Forman. After the acquisition, Benriach remained a separate corporate entity, a subsidiary to Brown-Forman. There is no evidence that the Ontario or Western Canada Agreements were assigned from Benriach to Brown-Forman. In the summer of 2017, Brown-Forman Canada, another subsidiary corporation of Brown-Forman which is not involved in the ownership of Benriach, assumed the role of liaising between Benriach and Authentic for the sale and marketing of Benriach Brands in Canada, so that Benriach could focus on its production facilities. George Puyana, General Manager, Canada for Brown-Forman headed up the negotiations following the termination on behalf of Benriach.

[36] Charton-Hobbs acquired full ownership of the shares of Authentic, following its creation from the amalgamation of Authentic West and Authentic East. There is no evidence that the Ontario or Western Canada Agreements were assigned from Authentic to Charton-Hobbs. Richard Carras and Mr. Weinbren, who started Authentic, worked for Authentic in conducting its operations as a liquor agency. Throughout its relationship with Authentic, Charton-Hobbs provided (and continues to provide) certain administrative services, such as finance, payroll, and IT, but did not play any role in Authentic's liquor agency operations including Benriach Brands. Neither Mr. Hobbs nor Christopher Chan, the Senior Executive Vice President of Charton-Hobbs, were involved in the day-to-day business of Authentic. Mr. Hobbs headed up the negotiations following termination on behalf of Authentic.

[37] Following Brown-Forman's acquisition of Benriach, documentation such as invoices and customs documents with respect to the Benriach Brands continued to be between Benriach and

Authentic. Brown-Forman was not identified in the documents, although sometimes Charton-Hobbs was named alongside Authentic. The documentation filed with the AGLC and the BCLDB was not revised to include either Brown-Forman or Charton-Hobbs.

[38] Corporations are distinct legal entities with the powers and privileges of a natural person: *Salomon v Salomon & Co. Ltd*, [1896] UKHL 1. A consequence of this legal principle is that corporations cannot sue or be sued on behalf of or in place of another related corporation or be liable for the legal obligations of a related corporation, regardless of the financial, control, or economic aspects of their relationship: ***Driving Force Inc v I Spy-Eagle Eyes Safety Inc***, 2022 ABCA 25 at para 51, 56, 57. Corporations are distinct and separate entities from their shareholders, a bedrock principle of corporate law: ***Yaiguaje v Chevron Corporation***, 2018 ONCA 472 at para 57.

[39] The main claim and the counterclaim are based upon the Western Canada Agreement and the Ontario Agreement. Only a party to a contract can be liable for breach of the contract. In the pleadings filed, there are no separate causes of action that would impose liability on an entity that is not a party to the contract at issue. It was neither plead nor have any facts been established that would support a consideration of lifting the corporate veil of either Authentic or Benriach.

[40] Simply stating, as do the Defendants, that a party caused harm, without a legal basis for liability, is insufficient. Further, this issue is not moot or of no legal difference, as suggested by the Plaintiffs, simply because one of two named parties that are related corporations would be a proper party to the action. It is of significant legal import. If the Court is to impose liability, it can only do so upon a property party through a proper cause of action. In relation to contracts, a proper party is the one who has privity of contract; a party who does not have privity of contract does not have any rights or obligations in respect of the contract: ***Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc.***, 2013 ABCA 200, at para 95-103.

[41] Therefore, as neither Brown-Forman nor Charton-Hobbs are a party to the contracts at issue and are only shareholders of Benriach and Authentic, respectively, they are not proper parties to the action. As Brown-Forman Canada was never a party to the respective agreements, it would not have been a proper party to the action.

[42] Benriach and Authentic, as the parties to the contracts at issue, are the only proper parties to the action, for both the main claim and the counterclaim. Regardless of any actions taken by Brown-Forman Canada, Brown-Forman, or Charton-Hobbs on behalf of their respective related corporations that resulted in Benriach or Authentic breaching the contract, the liability for such a breach remains with Benriach or Authentic. Any actions taken by employees or officers of Brown-Forman or Brown-Forman Canada were on behalf of and with the consent of Benriach. Any actions taken by employees or officers of Charton-Hobbs were on behalf of and with the consent of Authentic.

VI. Jurisdiction over the Ontario Agreement

[43] On June 6, 2008, Benriach and Authentic East entered into the Ontario Agreement, a written agreement that appointed Authentic East as Benriach's liquor agency in Ontario for the Benriach Brands (to the extent that a Benriach Brand was acquired by Benriach after the Ontario Agreement was entered into, it is not disputed that the Ontario Agreement applied to the new brand). In the same email and letter dated May 15, 2018, Brown-Forman terminated both the Ontario Agreement and the Western Canada Agreement on behalf of Benriach.

[44] On February 2, 2023, the Plaintiffs brought an application to strike portions of the counterclaims relating to claims arising from Ontario (the Ontario Claims). Justice Feasby directed that the Plaintiffs could amend the Statement of Defence to Counterclaim in respect of the Ontario Claims, following which there would be further disclosure and questioning, limited to the Ontario Claims. The substance of the application to strike was adjourned to trial, without prejudice to either party's position on the application.

[45] The Plaintiffs submit that 1) there is no jurisdiction simpliciter to hear claims relating to a contract made, performed, and allegedly breached in Ontario; 2) there is no real and substantial connection with Alberta, as the Ontario Agreement pertains to commerce in Ontario between two parties who have never been domiciled in Alberta and is governed by the law of Ontario; and 3) Authentic East, a party to the Ontario Agreement, is not a party to this action.

[46] The Defendants submit that this Court has jurisdiction to determine the dispute related to the Ontario Agreement because 1) there is a real and substantial connection to Alberta which requires this Court to assume jurisdiction based on fairness and efficiency; 2) the Court has already assumed jurisdiction over the Counterclaims brought in Alberta; and 3) the Plaintiffs have attorned to Alberta's jurisdiction over the Ontario claims.

[47] The test for jurisdiction simpliciter is a minimum threshold to determine if the Court has jurisdiction, on the basis of a real and substantial connection between the chosen forum and the subject matter of the litigation. The onus is on the party bringing the claim in a particular jurisdiction to establish that the chosen court has jurisdiction based on a real and substantial connection, by establishing presumptive connecting factors. The opposing party may then rebut such presumed jurisdiction by demonstrating that there is no real relationship or only a weak relationship: ***Deadman v Jager Estate***, 2019 ABCA 481 at para 12-14; ***Club Resorts Ltd v Van Breda***, 2012 SCC 17 at para 100.

[48] Relevant presumptive factors to consider are 1) the claim is related to a contract made, performed, or breached in the chosen forum; 2) the chosen forum's law governs the claim; 3) the defendant to the claim is resident in the chosen forum; or 4) the defendant carries on business, by an actual presence, in the chosen forum: *Alberta Rules of Court*, Alta Reg 124/2010, r. 11.25(3); ***Van Breda***, at para 86-90. Abstract concerns for order, efficiency or fairness in the system are not a substitute for such connecting factors, for the purposes of the law of conflicts: ***Van Breda***, at para 82.

[49] These factors establish a real and substantial connection with respect to both parties' claims relating to the Western Canada Agreement, which was performed in and allegedly breached in Alberta. The claims arising out of British Columbia are intertwined, as they relate to the same contract and the same parties. In contrast, the claims arising of Ontario do not have a real and substantial connection, as the Ontario Agreement expressly provided that Ontario law applied and the contract was made, performed and allegedly breached in Ontario. The close connection between Authentic East and Authentic West and the fact that Benriach was a party to both agreements is not sufficient to say the claims are intertwined.

[50] However, if a real and substantial connection is established with respect to at least some of the claims being advanced by the party, then the Court is required to assume jurisdiction over all the claims being advanced based on fairness and efficiency: ***Van Breda***, at para 99-100. In ***K-Lath Division v Gemini Structural Systems Inc.***, 1997 ABCA 256 at para 12-13, the Court

concluded that, by bringing the main claim in Alberta, a plaintiff attorns to the jurisdiction for the purposes of any counterclaim.

[51] The Defendants submit this is such a situation: as the Plaintiffs chose the jurisdiction of Alberta for their claims, the Court has automatic jurisdiction over any counterclaim. As a real and substantial connection to Alberta exists with respect to the claims of the Plaintiffs, this Court must also take jurisdiction over the counterclaims, including any portion of the counterclaim that involves a claim arising from another jurisdiction. The Plaintiffs argue that this situation is distinguishable, because Authentic East is not a party to the action and thus the Ontario claims involve a non-party. As the amalgamation occurred after the termination of the Ontario Agreement, it would be unjust to rely upon the amalgamation, a unilateral action of the Defendants, to consider Authentic East a party.

[52] Authentic, a party in both the main action and the counterclaim, was formed out of the amalgamation of Authentic West and Authentic East. Authentic West was the actual contracting party to the Western Canada Agreement and Authentic East was the actual contracting party to the Ontario Agreement. The amalgamation occurred after the termination of both agreements. The effect of the amalgamation was to continue the property and rights of both Authentic East and Authentic West with the amalgamated entity, Authentic.

[53] The amalgamation does not affect "...an existing cause of action, claim or liability to prosecution...[or] a civil...action or proceeding pending by or against" either Authentic East or Authentic West, as such are continued with the amalgamated entity, Authentic: *CBA*, ss 186(d), 186(e). This is a complete answer to the Plaintiffs' argument. It is the reason why Authentic is the proper party in the main claim filed after amalgamation, for claims that arose prior to amalgamation. Authentic is, by law, a continuation also of Authentic East and any claims continued from Authentic East are properly brought by Authentic. There is nothing to suggest that the amalgamation was done for an improper purpose or even as a result of this action, which was not yet commenced at the time of the amalgamation.

[54] As a real and substantial connection exists to Alberta with respect to the main claims of the Plaintiffs, this Court must take jurisdiction over the entire action, including portions of the counterclaim that arise from another jurisdiction.

[55] The Plaintiffs acknowledged that if jurisdiction simpliciter is found to exist, that Alberta is a convenient forum. Therefore, it is unnecessary to consider *forum non conveniens*. As the Court has jurisdiction, it is also not necessary to consider attornment.

[56] However, even if the Court has jurisdiction, the Plaintiffs submit that the Counterclaim is a deficient pleading with respect to the Ontario Agreement, as it does not claim the existence of the agreement, any breach of the agreement, damages for breach of the agreement, or the existence of Authentic East. The inclusion of documentation relating to the Ontario Agreement or the inclusion of damages in an expert report does not cure the deficient pleading.

[57] The Defendants submitted that the claim for termination of the Ontario Agreement was sufficiently plead. The obligation was on the Plaintiffs to seek particulars, especially given the document production and inclusion of damages for the Ontario Agreement in the Defendants' September 2022 expert report. They also argue that the amendments contained in the Fourth Amended Statement of Defence are incorporated by reference into the Third Amended Counterclaim and such amendments speak from the date the original Statement of Defence, filed

on December 11, 2020. They take the position that the Plaintiffs substantially defended the merits of the counterclaim as it relates to the Ontario Agreement and the claims arising from it.

[58] Pleadings are of central importance to a legal action. Just as "[t]he pleadings must be taken to frame the action for the purposes of analysing the assumption and exercise of jurisdiction" (***Deadman***, at para 24), the pleadings also frame the action for the purpose of determining the substantive issues. The purpose of pleadings is to sufficiently set out the cause of action by setting out the material facts relied upon for the elements of the cause of action, even if the specific cause of action is not named: ***677960 Alberta Ltd. v Petrokazakhstan Inc.***, 2013 ABQB 47 at para 46-53. Rule 13.6(2), *Rules of Court*, requires that a pleading set out the relevant facts upon which a party relies for the cause of action and the remedy claimed.

[59] Here, the cause of action with respect to the Ontario Agreement is breach of the termination provision of the Agreement, which would result in specific damages for that action. There are no claims for torts, breach of the duty of fairness, or other breaches in relation to the Ontario claim. Material facts for breach of a contract's termination clause, would be the contract itself and any relevant terms of the contract, including any specific termination term.

[60] The Counterclaim adopts the facts as set out in the Statement of Defence; therefore, both must be considered. While Ontario is defined in the Statement of Defence as being one of the "Agreement Provinces", there is only one distribution agreement plead. Based upon the terms of the Agreement plead and that it was in response to claims arising out of Alberta, this could only be a reference to the unwritten Western Canada Agreement. This was not the Ontario Agreement, which was a different written distribution agreement. The Western Canada Agreement had at least two fundamental terms different than those of the Ontario Agreement – the ownership of inventory that was not possible in Ontario due to the legislative scheme and the specific termination provision in the Ontario Agreement that was completely different than the one alleged in the pleadings. The ownership of inventory was particularized specifically as between Ontario and Western Canada in the Amended Counterclaim, but this is not otherwise connected to the issue of termination of the Ontario Agreement. Rather, the Amended Counterclaim continues to reference one distribution agreement, specifically of an unwritten nature and specifically with terms of termination based upon the length of the relationship between the parties, which is fundamentally different than the termination provision in the Ontario Agreement. In the Amended Counterclaim, the remedy sought was also amended from a remedy of $300,000 for "damages" to a remedy of "Damages for wrongful termination of the Distillery Agreement" in an unspecified amount. It is not a concern that there is an unspecified amount, but the remedy is limited to a single agreement, which can only by the content of the pleadings be the Western Canada Agreement.

[61] It was not until the Fourth Amended Statement of Defence, filed on March 10, 2023, that the Defendants plead two separate distribution agreements, the Western Canada Agreement and the Ontario Agreement. The timing of this is important, as the trial had commenced on March 6, 2023. On the first day of trial, the Court granted the Plaintiffs' application to add Benriach as a Plaintiff and permitted any consequential amendments to the Statement of Claim and Statement of Defence, to deal with the addition of Benriach as a Plaintiff. As Benriach was always a Defendant by Counterclaim, any claims against Benriach would not have been impacted by the addition of Benriach as a plaintiff. It would certainly not require the Defendants to substantively amend their pleadings, so as to add a new cause of action in the Counterclaim. Adding a new

cause of action in the Counterclaim is exactly what is sought by the substantive amendments to the Fourth Amended Statement of Defence.

[62] I agree with the Plaintiffs' position, expressed during trial, that the amendments contained in the Fourth Amended Statement of Defence go well beyond what was permitted by the Court and attempt to plead a new cause of action by asserting new material facts for the breach of the Ontario Agreement by failure to comply with its termination provision. The Defendants also raised a new defence of estoppel by convention or conduct and attempted to plead new material facts around Authentic's sale of inventory. As these amendments were not permitted by the Court, were contrary to the express direction of the Court, and were made after the commencement of the trial, such amendments are not properly before the Court.

[63] It would be nonsensical to accept that the amendments contained in the Fourth Amended Statement of Defence are incorporated by reference into the Third Amended Counterclaim and thus should be considered, given that such amendments were neither agreed to nor permitted by the Court.

[64] The only pleading prior to the commencement of trial that dealt with the Ontario Claims was the Plaintiffs' Second Amended Statement of Defence to Counterclaim, which was permitted by Justice Feasby. This pleading was permitted out of an abundance of caution if the Plaintiffs' application to strike portions of the Defendants' pleadings relating to the Ontario Claims was dismissed at trial and essentially without prejudice to such application. It cannot now be used to the disadvantage of the Plaintiffs.

[65] The Defendants also submit that it would be unfair to now require Authentic to bring their claim in Ontario, after the Plaintiffs have raised a limitation defence. This argument fails. First, the Court would have had jurisdiction over the Ontario claims, but they were not properly plead. Thus, the Court is not requiring the claim to be brought in Ontario. Second, the limitations defence raised by the Plaintiffs is specific to the law in Alberta, in the event that the claim was accepted as properly plead. It was not. It would be unfair to the Plaintiffs to allow the claim, despite the deficient pleadings.

[66] Neither the existence of the Ontario Agreement or a breach specific to that agreement were set out in the pleadings. As a result, the claim for breach of contract with respect to the Ontario Agreement was not properly plead and any portion relating to the Ontario Claims, including the amendments made after trial commenced, are struck.

VII. Termination of the Western Canada Agreement

[67] It is common ground that termination terms were not discussed between Authentic and Benriach when they entered into the Western Canada Agreement or at any time afterwards. Therefore, there was no express termination provision. It is also common ground that where an express without cause termination provision is not included in a commercial agreement, including a distributorship agreement, termination of the agreement without cause can only occur upon the terminating party providing reasonable notice of termination: ***Hillis Oil Sales Ltd v Wynn's Canada Ltd***, [1986] 1 SCR 57 at para 16.

[68] Authentic claims that Benriach did not provide sufficient notice of termination and so it claims damages in lieu of reasonable notice.[3] In its closing arguments, Benriach conceded that it was required to provide reasonable notice of termination, but disputed the amount of notice that was required.

[69] Therefore, the key issues are the determination of the amount of reasonable notice that Benriach was required to give for termination of the Western Canada Agreement and the assessment of damages for that period of notice.

[70] A dispute arose as to when notice of termination was provided to Authentic. There was evidence at trial that Authentic received verbal notice from Brown-Forman Canada about the termination as early as May 11, 2018. While the termination letter was dated May 11, that formal written notice was not provided until May 15, 2018. The Agreed Statement of Facts provided:

> ...no evidence may be adduced to contradict the facts in this Agreed Statement of Facts, but evidence may be called to explain or place into context the facts in this Agreed Statement of Facts;
>
> 24. On May 15, 2018, Brown-Forman sent Authentic a termination letter as an attachment to an email from Mr. Owens, terminating Authentic as the agency representing the Benriach Brands in Canada effective July 1, 2018.

[71] Any argument that notice was provided prior to May 15 contradicts the Agreed Statement of Facts. Formal notice of termination was provided on May 15, 2018. Thus, Benriach provided Authentic with 47 days of actual notice.

[72] The Defendants have urged upon the Court to find a liquor industry practice of reasonable notice for termination of a liquor agency calculated by one month per year of service. In response to the Plaintiffs' submission that the evidence at trial indicated a wide range of negotiated notice periods involving termination of liquor agencies in Canada, the Defendants argued that "[n]egotiated and compromised severance of different parties in various circumstances is an irrelevant consideration". Evidence of actual notice payments for termination are highly relevant and material to both the determination whether an industry practice exists and, if it does not, what would constitute reasonable notice. For this reason, ***Lifford Agencies Limited v Kobrand Corporation***, 2022 ONSC 4863 does not assist the Defendants in establishing an industry practice, as the Ontario Court noted that there was no evidence before it of an industry practice or the usual amounts of compensation in such terminations.

[73] Neither did the evidence at trial establish an industry practice. The Defendants' attempt to introduce expert evidence on this point failed. Therefore, the trial evidence was restricted to the personal experience of the witnesses. Three witnesses, all with decades of experience in the industry, had significant experience with negotiating terminations of both written and unwritten agreements.

[74] Both Mr. Chan and Mr. Hobbs testified that the standard practice for Charton-Hobbs and its subsidiaries was to seek one month per year of service in notice, but suppliers did not always agree with that formula. Negotiations sometimes resulted in payment of notice that was less than

[3] The parties and their witnesses often used the term "severance" during the trial to describe payment in lieu of reasonable notice. Severance is a term used in employment law, but is not a legal term used with respect to termination of a commercial contract. The proper term is damages in lieu of reasonable notice.

the proposed formula and sometimes would result in notice that was higher than the proposed formula, although it was not explained how negotiations would result in notice higher than originally requested. Mr. Chan also testified that it was a common occurrence for a liquor supplier to refuse to pay the notice requested by a liquor agency. Mr. Hobbs testified that the majority of terminations he had dealt with involved payment of one month per year of service, but I do not accept his evidence given his overall credibility issues and the failure of the Defendants to provide any evidence of specific agreements reached as to reasonable notice. Further, it contradicts his agreement on cross examination that each agreement is unique, including the notice and termination provisions.

[75] Peter Mielzynski, who operates PMA as a national liquor agency, also has had experience with the termination of liquor agency agreements with suppliers across Canada, including in Alberta and British Columbia. The outcome of each termination was different in terms of what, if any, notice was provided by the supplier to the agency arising from the termination. PMA itself had received notice upon termination, ranging from no notice to a maximum on one occasion of twelve months for termination of a 44 year relationship. He described the twelve months notice as the exceptional case, with most terminations in the range of three to six months.

[76] Based on the evidence, notices in the liquor industry vary, depending on a number of factors, such as the performance of the agency or whether specific staff had been hired to manage the particular brand. I find that twelve month or longer notice periods are the exception in the industry and that most notices are lower. An industry standard of notice based on one month per year of service has not been established. The notice for the termination of the Western Canada Agreement must thus be determined by the purpose and various factors that inform reasonable notice, as that is the actual practice of the liquor industry as supported by the evidence.

[77] The Defendants submit that a thirteen month notice period should be granted, even if an industry standard is not established. They argue that the purpose of the notice is to compensate the people that built the brand for lost revenue moving forward. Brown-Forman set the expectation for Authentic in the fall of 2017 that the agency agreement would continue. Authentic was economically dependent in the early years of the agreement on the Benriach Brands, even though at the time of termination, the Benriach Brands were not a significant portion of the overall business. Authentic worked diligently to build the Benriach brands into a recognized brand, such that Benriach became a “high image brand” bringing lots of value to Authentic. Authentic also trained two whisky experts to travel Western Canada and conduct educational seminars and whisky tastings. The Defendants submit that these facts are established and support thirteen months.

[78] The Plaintiffs seek a six month notice period. They argue that termination of agency relationships was a regular occurrence in the industry. The purpose of the notice is to ameliorate the transition resulting from the termination, assessed by the amount of time Authentic needed to re-establish its ordinary course of business. Long periods of notice in commercial contracts are not consistent with commercial reality. Authentic did not go above and beyond the expectations of a liquor agency and recouped its costs for marketing efforts from Benriach. The termination had little effect on Authentic’s business, as the Benriach Brands represented only 4% to 7% of annual revenue. Authentic had no designated sales staff and made no business changes or investments for the Benriach Brands beyond that compensated by Benriach. Thus, the Plaintiffs submit the termination had minimal effect on either Authentic’s viability or profitability.

[79] The purpose of requiring the provision of reasonable notice is important when assessing the amount of notice to be given. The purpose of notice is to allow the terminated party to rearrange its affairs, either by securing alternate business or rearranging its resources, to adjust to the termination of the contract: ***JKC Enterprises Ltd. v Woolworth Canada Inc.***, 2001 ABQB 791 at para 112; ***Clarke, Irwin & Co. v George C. Harrap & Co.***, [1980] O.J. No. 482 at para 48. The ease with which the transition is made to rearrange affairs and the negative impact upon the business at the time of termination are factors. Still, as noted in ***JKC*** at para 118, "...very long periods of notice between parties in a commercial relationship is not consonant with commercial reality."

[80] Although each party relied on various cases of exclusive (or almost exclusive) distributorships to support their position as to the length of notice, they agreed that the determination of reasonable notice is fact specific, dependent upon the particular circumstances of the agreement and parties involved. The cited cases had similar and distinguishing factual features. However, they helped set out the factors that assist in assessing the length of reasonable notice: ***1193430 Ontario Inc v Boa-Franc (1983) Ltee***, 2003 CanLII 47647 (ONSC) at para 81; ***1193430 Ontario Inc v Boa-Franc (1983) Ltee***, 2005 CanLII 39862 (ONCA) at para 45; ***Yamaha Canada Music Ltd. v MacDonald & Oryall Ltd.***, 1990 CanLII 545 (BCCA); ***JKC*** at para 113; ***Clarke*** at para 48; ***Western Equipment Ltd. v A.W. Chesterton Company***, 1983 CanLII 527 (BCSC); ***Paper Sales Corporation Ltd. v Miller Bros. Co. (1962) Ltd.***, 1975 CanLII 555 (ONCA); ***Lifford Agencies Limited***, at para 120**.**

[81] First, the type of business or industry involved. A complicated or highly specialized industry where it may take the plaintiff years to find a similar product line tends toward a higher notice. Authentic represents a wide variety of wines and spirits as a liquor agency; it was not reliant or focused upon single malt Scotch or even whiskies overall. The liquor industry is not complicated or highly specialized. As Mr. Chan stated, "brands come brands go". Shortly before the termination, Authentic had begun representing a competitor's scotch products, which shows its ability to replace the "brands that go" in a fairly short time. This factor suggests a lower level of notice.

[82] Second, the duration of the relationship, which was thirteen years in this case and supports a higher level of notice.

[83] Third, the distributor's dependency on the agreement in relation to its business as a whole, including the volume of the distributor's business that is derived from the sale of the supplier's product. A greater dependence upon the agreement or a higher level of exclusivity can impact the ability to find an alternate line of products. The loss of a product that generates significant volumes of a distributor's overall revenue can decimate a distributor's ability to continue business. The impact of the loss of a supplier to a liquor agency is related to the size of the supplier's portfolio compared to the agency's entire product portfolio. The loss of a bigger portfolio may result in staffing cuts, reputational impact with customers who desired the particular brand, or loss of what might be considered a major brand in the market. Benriach Brands were not significant products in the single malt Scotch market in Western Canada, although internally, Authentic believed that the Benriach Brands brought a level of image to Authentic in the industry. The Benriach Brands accounted for less than 8% of Authentic's gross margin. Authentic has a strong focus on the wine market as the majority of its product representation, such that the Benriach Brands were not a significant part of Authentic's business. Unlike other distributorship arrangements considered in the caselaw, the exclusivity in this

relationship was focused on the supplier, who could only use one liquor agency to sell one specified SKU within the province. By contrast, while Authentic was the sole agency for the Benriach Brands, Authentic could represent as many liquor products as it could get agreements from suppliers to represent. There was no limitation upon their ability to represent other single malt scotch products or any other type of liquor product, either expressly or by the actions of the parties. This factor favours a lower amount of notice.

[84] Fourth, the extent of the sales force employed and resources maintained by the distributor for the purposes of distributing the product that is the subject of the agreement. The termination may result in layoffs or render equipment useless, if an alternate product cannot be found, which increases costs and the negative impact of the termination. Mr. Carras testified that Authentic did not hire sales staff specific to the Benriach Brands. Sales teams in British Columbia and Alberta, respectively, managed all liquor portfolios, whether wine or spirits. Authentic had two whiskey experts initially, but one left well prior to the termination. The remaining whiskey expert serviced all of Western Canada and provided high level presentations for all different types of whisky (i.e., bourbons, European, Japanese). He continued to work for Authentic after the termination. There were no terminations, position eliminations, or resource rearrangements as a result of the termination. This factor supports less notice.

[85] Fifth, the acquisition and maintenance of inventory by the distributor, as time may be required to dispose of inventory. The longer the time required to dispose of inventory, the longer the reasonable notice. As previously explained, the liquor agency is required to own the inventory for sale in British Columbia and Alberta, at the time of its importation to Canada. However, upon termination of a liquor agency, it is common practice in the industry for the terminated agency to sell and transfer its inventory to the new agency as part of the transition of the product to the new agency, shortly after termination. Authentic held inventory at the time of termination. While it chose not to sell the inventory to the new agency, Authentic could have done so at the price the inventory would have been sold to the liquor boards by September 2018. The basis for this finding is discussed in greater detail in respect of good faith contractual performance. Although Authentic choose not to sell the inventory in this manner and instead sold it over the next three and half years, that choice should not extend the reasonable notice period. Authentic's choice to forego the sale of its entire inventory at one time in September 2018 was not forced upon it. Therefore, the appropriate consideration under this factor, was the ability of Authentic to sell the inventory less than four months after receiving notice of termination. This factor favours a lower notice period.

[86] Sixth, the time needed by the distributor to acquire a replacement line of products and to re-establish a viable business. It may take longer for a company that was not actively pursuing business, such as a company selling only one manufacturer's products, to acquire alternate business than a company that is always actively pursuing business. Authentic was always actively pursuing business. I do not accept Mr. Hobbs evidence that finding a replacement product was "more and more difficult everyday". As Mr. Chan stated, for liquor agencies, "brands come and brands go" routinely. Mr. Hobbs himself stated "We acquire new brands and we say goodbye to brands on a regular basis". From 2005 to 2023, Authentic had grown from representing less than 50 suppliers to representing over 160 suppliers. The evidence supports that Authentic had the ability to replace lost products or add new products in a relatively brief time period. This factor favours a lower notice period.

[87] Seventh, the commercial and regulatory climate for the product. There is always a need for suppliers outside of Canada to have a liquor agency, due to the requirements of the regulatory climate. Within the liquor industry, termination of liquor agencies and agreements with new liquor agencies happens on a regular basis, even one to two per year for unwritten agreements for Charton-Hobbs and its subsidiaries. As discussed above, long notice periods are not common in this commercial climate.

[88] In addition, Authentic's standard business practice was to create a brand plan for each supplier it represented on an annual basis. Authentic did a brand plan for the Benriach Brands in September 2017, several months before termination. The documentary evidence established that the first and fourth quarters of the calendar year were important to getting product samples to the BCLDB, as there was an annual spirits program in November and February to April was the BCLDB's key decision making time for purchasing. Based upon the public filings of Brown-Forman, the peak season for sales is the fourth quarter of the calendar year, as a result of holiday buying, and June, as a result of Father's Day. The termination occurred after all of these key promotional and sales times, that would have been considered in Authentic's brand plan. At the time of the termination, the Benriach Brands occupied a very small fraction of the single malt whisky market. There is nothing in the commercial or regulatory climate that would tend towards a longer notice period.

[89] Eighth, the investment made by the distributor in marketing the product at its own cost. Liquor agencies have a significant role in building a liquor brand that is new to the market and most of the work happens within the first three years or so to bring the brand to a national distribution level. Authentic was responsible for implementing and executing the brand plan within each province, with the overall objective to increase sales of the Benriach Brands. Authentic would receive both a profit margin on the sale of the product to the liquor board and payment from Benriach of approved advertising and marketing expenses. When asked what the significant investments were as claimed by Authentic, Mr. Chan responded that Authentic made the "normal required investments" of retail, trade shows, public relations, sampling, applications, and anything related to the promotion of the product, which is the case for any liquor product. He also stated that any investment that was not reimbursed by the liquor supplier was part of the business and not unique to the Benriach Brands. The evidence is insufficient to support that Authentic made any additional investments over and above the norm or its reimbursed costs, for the marketing of the Benriach Brands. Further, sales had peaked a couple of years prior to the termination and were on the decline, such that Authentic already had reaped the main benefit of establishing Benriach Brands within the Alberta and British Columbia markets. This factor favours a lower notice period.

[90] The Defendants rely heavily upon the ***Lifford Agencies*** case, which dealt with the termination of a 15 year liquor agency relationship lasted in the highly regulated Ontario liquor market. The supplier Kobrand used four agencies to sell its wines in Ontario, but each agency was exclusive to the particular wine being sold. Lifford, as one of the agencies, was able to sell a variety of liquors for a variety of suppliers, such that Kobrand represented less than 10% of Lifford's overall revenue. The liquor agency agreement was never reduced to writing, other than the necessary documents filed with the Liquor Control Board of Ontario ("LCBO"). Kobrand terminated the agency agreement, without notice, as it wanted to consolidate its liquor distribution in Canada with a single liquor agency.

[91] The focus of determining proper notice was on Lifford's success in introducing a particular Kobrand wine into the marketplace. The liquor agency's role included marketing the wine to the LCBO to attain inclusion on certain lists, as placement on specialty retail listings was an extremely valuable and sought after designation. The listing, once obtained, would result in a significant future ability to sell substantial inventory with minimal effort, which was a unique circumstance relating to the "commercial climate for the product". It took Lifford almost 14 years to establishing the wine as a popular luxury wine and attain placement on the LCBO's prestigious and exclusive retail listing, which occurred just prior to the termination. The Court found that, while Kobrand paid all advertising and promotion costs, Lifford had invested time, human capital, and opportunity costs into the promotion and development of the Kobrand wine, which it had thus implicitly decided not to devote to other brands. The significant value of the listing would pass to the new liquor agency upon Lifford's termination, while Lifford would lose the benefit of the listing. The loss of this value largely offset the lack of Lifford's economic dependency on Kobrand's products. The Court awarded Lifford fifteen months notice.

[92] While this case is useful in a similar fashion to the other cases, I disagree with the Defendants that it has persuasive value to establish reasonable notice on the basis of one month per year of service. First, in ***Lifford Agencies***, the Court was provided caselaw that established a range of reasonable notice of 12 to 24 months, which caselaw was relied upon heavily by the Court in the absence of evidence about industry practice. Second, the Court did not determine notice on the basis of any industry standard, let alone the Defendants' proposed formula. Third, each case depends on its facts. A major distinguishing feature was that Lifford attained a highly sought after and valuable inclusion on an exclusive LCBO list, which was the most significant factor in ***Lifford Agencies*** and counteracted the lack of economic dependence. Authentic introduced the Benriach Brands to the market, but did not achieve anywhere near such success. Instead, sales of the Benriach Brands had declined in the couple of years preceding the termination.

[93] Based on the above factors and the evidence of terminations within the liquor agency industry, I set the reasonable notice Benriach owed to Authentic for the termination of the Western Canada Agreement at six months. Of the six months, 45 days of notice was actually provided.

[94] The Plaintiffs submit that the Authentic's retention of inventory, preventing the Plaintiffs from selling the Benriach Brands in Alberta and British Columbia, was a self help remedy that should disentitle the Defendants to any further notice. There is no authority to support such a position with respect to reasonable notice. However, such conduct is a significant consideration under the doctrine of good faith contractual performance.

VIII. Duty of good faith in Contractual Performance

[95] In commercial contracts, there is an organizing principle of good faith performance in specific types of situations that require a contracting party to engage in honest, candid, forthright or reasonable contractual performance, so as not to undermine the legitimate interests of the contracting partner: ***Bhasin v Hrynew***, 2014 SCC 71 at paras 65-66; ***Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District***, 2021 SCC 7 at para 51. One such situation is the exercise of contractual discretion, which discretion must be exercised reasonably and for the purpose for which it was conferred: ***Bhasin***, at para 47; ***Wastech Services***, at paras 68-71.

There is also a duty of good faith where the contract requires the parties to cooperate: ***Bhasin,*** at para 47. Another situation is the duty of honest performance, which means that the parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract: ***C.M. Callow Inc. v Zollinger***, 2020 SCC 45.

[96] The duty of good faith is not a duty of loyalty, and it does not require a party to forego advantages flowing from the contract: ***Bhasin***, at para 73. The principle of good faith must be applied in a manner consistent with the freedom of a contracting party to pursue their individual self interest: ***Bhasin***, at para 70; ***Wastech Services***, at para 52. There is an overarching message that good faith in contractual dealings is necessary for the proper functioning of commerce and the economic well-being within society: ***IFP*** at para 2; ***Bhasin*** at para 60.

[97] The Defendants submit that the duty of good faith does not exist after the termination of a contract and thus, when the Western Canada Agreement was terminated, any legitimate contractual interest of Benriach ended and there was no contract to support a duty of good faith.

[98] This submission is contrary to well known contract principles. As recognized by the Defendants, the duty of good faith applies to the performance of the contract in accordance with the actual terms of the contract. Pursuant to an agreement's terms, certain obligations can continue following the termination of the agreement. Arguments of a breach of the obligation of good faith have failed where the agreement does not provide for the survival of the relevant contractual terms upon termination of the contract: ***Stoni Consolidated Holdings Inc. v Maple Reinders Capital Corp.***, 2021 BCSC 1018 at para 65; ***Core Insight Strategies Inc v Advanced Symbolics (2015) Inc.***, 2021 ONSC 1717 at para 135-138. However, where there are obligations that survive termination of the contract, the duty of fair dealing would continue to apply to such obligations to the extent they must be performed: ***New Vision Renaissance MX Ltd v The Symposium Cafe Inc***, 2020 ONSC 1119 at para 137. This is consistent with the statement in ***Bhasin***, at para 63, that the "...organizing principle [of good faith] is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily". That would include any obligations that survive termination of the contract.

A. Authentic's Conduct with the Liquor Inventory

[99] In the months following the notice of termination, the parties engaged in negotiations for both the transfer of inventory from Authentic to PMA and the payment of reasonable notice under both agreements. Authentic refused to sell the inventory back to Benriach for transfer to PMA and proceeded to sell the majority of the inventory to the respective liquor boards over a three year period, until an agreement was reached to sell the remaining inventory in December 2021. It was only at that time that PMA was able to market and sell the Benriach Brands in Alberta and British Columbia.

[100] The Plaintiffs submit that the Western Canada Agreement contained the following terms:

a) Upon termination of the agreement for any reason, the agency will transfer any remaining inventory in the products to the supplier for its reasonable fair market value. That fair market value will have regard to the CIF value of that remaining inventory, and reasonable additional expenses incurred in acquiring, importing, and managing that inventory; and

b) The agency shall under no circumstances restrict or inhibit the sale of inventory except and to the minimum extent necessary in order to perform

> an accurate count of the remaining inventory, which is done for the limited purpose of finalizing the purchase of that inventory by the supplier's nominee.

[101] The Plaintiffs assert that Authentic breached its duty of good faith contractual performance. First, they say Authentic was obligated to cooperate with Benriach in good faith for the transfer of inventory upon termination. Authentic intentionally undermined Benriach's legitimate contractual interest in selling the Benriach Brands, by refusing to cooperate and consent to the transfer of the Benriach Brand inventory upon termination in an effort to force a generous notice payment. Second, they say Authentic did not exercise their discretion to negotiate the fair market value of the inventory in the intended manner under the Western Canada Agreement and misused their discretion to freeze inventory in a manner contrary to the purpose for which the discretion was granted. The underlying purpose of the Western Canada Agreement was to allow the continued sale of the Benriach Brands, by getting the products from the supplier to the customer, which informed both the requirement to cooperate and the purpose of the discretion. Therefore, the duty of good faith arose with respect to both a situation requiring cooperation to achieve the objects of the contract and a situation involving the exercise of a discretionary power, categories identified in ***Bhasin***, at para 47. Authentic admitted that it intentionally refused to agree to terms for the transfer of the Benriach Brands inventory to exert leverage over Benriach for severance. Thereby, Authentic actively undermined Benriach's contractual interests in selling its product, by holding those interests hostage to further Authentic's self-interest in obtaining the desired payment in lieu of notice. This was outside the bounds of the purpose for which the discretion was granted and failed to meet the obligation of cooperation. Thus, the Plaintiffs argue, Authentic breached the duty of good faith contractual performance.

[102] The Defendants submit that the evidence does not support that Authentic used the inventory as leverage. Rather, the reliable and credible evidence of Mr. Hobbs is clear that Authentic did not engage in such a practice, did not intend to do so with Benriach, and did not actually do so. Mr. Carras testified that Authentic had never frozen inventory in the past for the purpose of exerting leverage and he would never do such a thing. Mr. Chan never testified that Authentic was engaging in this type of conduct with Benriach. The Plaintiffs were unclear in the price they were willing to pay for the inventory and neither Mr. Hobbs nor Mr. Chan were clear on the descriptions used by their Chief Financial Officer, but the logical conclusion of the evidence is that the Plaintiffs were not prepared to pay the full sale price to the liquor boards. There was also no obligation on Authentic to seek clarification on the Plaintiffs' offer. Authentic's sale of the inventory in the marketplace was done to satisfy its obligation for mitigation, not to undermine Benriach's interests. Authentic's ability to sell in the marketplace was negatively impacted by the Plaintiffs' business strategy to premiumize the Benriach Brands, the termination of Authentic, which prevented Authentic from engaging in any marketing activities, and the PMA selling new Benriach Brands in the marketplace. Therefore, the inventory took longer to sell than otherwise expected. A term cannot be implied into a contract, except where it is necessary for business efficacy, accords with industry usage, or meets the officious bystander test. The Defendants argue that there was no implied term requiring the transfer of the inventory, an obligation to cooperate with respect to the transfer, or any term restricting Authentic's use of its inventory. Thus, there was no term by which Authentic failed to meet its duty of good faith contractual performance in respect of the inventory.

[103] While the Plaintiffs argue that Authentic engaged in the bad faith due to animosity from the termination of a previous agreement between Charton-Hobbs and Brown-Forman, the evidence was insufficient to establish such a finding. At most, the evidence established that Charton-Hobbs was disappointed that the contract was not renewed, but understood that it was business. Regardless, it is not necessary that the Plaintiffs prove a motive to establish bad faith conduct.

[104] Where there is an unwritten contract, the Court by necessity must determine the terms of the contract. A term can be implied into a contract based on custom or usage, legal incidents of a particular kind of contract, or as required to give business efficacy to a contract or meet the officious bystander test: ***M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.***, [1999] 1 SCR 619 at para 27. It is not disputed that the factual matrix of the contract helps to inform the court of its potential terms where there is an oral agreement only or to establish the reasonable expectations of the parties: ***IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 192. The factual matrix includes the nature or custom of the industry in which the contract was created, which in this case includes the regulatory regime within which the parties operated.

[105] I reject the Defendants' argument that there is a power imbalance that requires protection of the agency in this situation. There is no presumption of a power imbalance in the commercial context, even where the parties may not have the same level of power and authority: ***Payette v. Guay inc.***, 2013 SCC 45 at para 37; ***Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)***, 2010 SCC 4 at para 131. Both parties had the power to terminate the agreement and, while Benriach had the power to allocate products and control prices, Authentic had the power upon termination to control the inventory. All four parties were sophisticated commercial entities, with long histories of business in the Canadian liquor industry. To suggest that there was a power imbalance here, would be to establish that there is always a power imbalance between a liquor agency and a supplier, regardless of the particular circumstances. That is not consistent with the regulatory or commercial context of the liquor industry.

[106] I also disagree with the Plaintiffs' characterization of the discretion held by Authentic under the Western Canada Agreement or that there was a contractual obligation upon Authentic to transfer inventory for fair market value upon termination. As stated in ***Peter Lehmann Wines***, at para 71, "...the marketplace imperative of a willing vendor and willing purchaser is only overridden..." when the contract, statutory obligations, fiduciary duties, or other legal duties require it. There may be situations where the agency is not prepared to transfer the inventory, or a supplier is not prepared to pay for and effect a transfer of the inventory. Certainly, neither the AGLC nor the BCLDB specifically required a transfer of inventory. This argument is not consistent with either the regulatory environment or the commercial context.

[107] Based on the regulatory scheme, it is apparent that a liquor agency has a choice to make upon termination: 1) sell the inventory, in cooperation with the supplier, to the new liquor agency; or 2) continue to sell the inventory to the liquor boards until the inventory is depleted to zero. The purpose of this discretion is to enable the liquor agency to protect its required capital investment in the inventory, by being paid a commercially reasonable amount so as not lose its capital investment or by taking all commercially reasonable steps to sell the inventory in the marketplace. This accords with the commercial context, where both Mr. Carras and Mr.

Mielzynski testified that they would never freeze inventory for the purpose of leveraging a negotiation for reasonable notice.

[108] Neither party's submissions as to the contractual terms would have been acceptable to both parties nor pass the officious bystander test. In the circumstances of the liquor industry, agencies change on a frequent basis throughout the industry. To permit the terminated agency to hold the inventory until a disputed reasonable notice claim is dealt with only to the satisfaction of the agency would grind the industry to a halt, as it would completely prevent the liquor supplier from accessing the market. At the same time, to require the liquor agency to transfer the inventory would impose upon it an obligation would ignore the ability of the agency to continue selling the product under the current regulatory scheme.

[109] I find that the Western Canada Agreement granted Authentic the discretion, upon termination, to choose between transferring the Benriach Brand inventory to PMA or continuing to sell the inventory to the liquor boards. The purpose of this discretion is to enable Authentic to protect its required capital investment in the inventory, while allowing the supplier to continue to access the marketplace. Each choice also imposed an obligation upon Authentic, which survived the termination of the contract, just as Authentic's discretion survived the termination of the contract. If Authentic chose to transfer the inventory, it would be required to do so at a commercially reasonable amount consistent with its capital investment. If Authentic chose to continue selling the inventory to the liquor boards, it would be required to take all commercially reasonable steps necessary for such sale. The purpose of having the discretionary power, is to permit an orderly transition of the inventory so that a product is not pulled from the marketplace simply due to a change in agency, to permit the agency to continue to profit from the inventory that it purchased and owned despite no longer being the appointed agency, and to permit commercial activity in the marketplace to continue.

[110] In determining if a party has breached its duty of good faith in respect of discretionary power, the question to be asked is whether the exercise of contractual discretion was unconnected to the purpose for which the contract granted discretion: ***Wastech Services***, at para 69-70. This limitation is implied on the exercise of discretion in order to give effect to the reasonable expectations of the parties: ***IFP Technologies***, at para 190.

[111] Upon Benriach providing notice of termination of the Western Canada Agreement and the Ontario Agreement, the parties entered into settlement negotiations to resolve the issue of notice for both agreements and, in Western Canada, transfer of the Benriach Brand inventory. Authentic was not prepared to settle any single one of these; they wanted all three issues settled together. This did not occur and, as a result, Authentic held the inventory.

[112] The evidence establishes that Authentic acted in two ways with the inventory, contrary to the purpose for which they had the discretion regarding the inventory. One, Authentic refused to sell the inventory to Benriach for a commercially reasonable price that Benriach agreed to pay. Two, Authentic also put some inventory of the Benriach Brands on hold, so that the inventory would not be reduced to zero and those Benriach Brands remained frozen out of the marketplace. The purpose of these actions was to exert leverage to obtain the severance Authentic felt was appropriate for the termination of the Western Canada Agreement.

[113] Authentic had no obligation transfer the inventory, but indicated to Benriach that it was prepared to do so for the proper price. Authentic rightfully insisted upon payment for transfer of the inventory at a price that ensured Authentic did not suffer a loss. The price was the equivalent

of what Authentic would sell the inventory to the liquor boards. This would be a commercially reasonable price for sale, as it would make Authentic whole for inventory that it was required by law to own. There was no obligation upon Authentic to sell it back to Benriach at the "free on board" (FOB) price Authentic had paid to Benriach upon initial purchase, as Authentic would have incurred further costs following receipt of the inventory. Had Authentic's reason for not transferring the inventory been based on the price offered, Authentic would have used its contractual discretion within the bounds permitted by the Western Canada Agreement.

[114] However, when Authentic's requested price was agreed to by Benriach, Authentic refused to transfer the inventory, because Authentic also insisted on payment in lieu of notice that it felt entitled to receive. Authentic advised Benriach by email on July 17, 2018, that the "total inventory value at our selling price to the Liquor Board" was $362,721.70. Attached to the email was the Charton-Hobbs group Chief Financial Officer Brigitte Lachance's documentation supporting that number, which referred to CIF (cost, insurance, and freight). By email dated Sep 4, 2018, Mr. Puyana advised Mr. Hobbs that the Plaintiffs would pay "...the full CIF price on the inventory you currently have in stock...".

[115] The exact meaning of CIF in determining the value of inventory was disputed by the parties. Witnesses agreed that CIF was more than FOB pricing, as it included additional costs. There were a variety of different costs, including freight, transport, warehousing, insurance, customs, marketing, and profit, that could be added to the FOB price to ultimately value the inventory. Which of those costs were included in CIF pricing depended on the parties involved and their particular practice. Mr. Chan acknowledged that CIF was a point of confusion within the liquor industry. In various business dealings, the Defendants often sought clarification from the business or individual they were dealing with on what CIF included in that situation.

[116] It is not necessary for the Court to determine what costs went into valuing the inventory at various stages, whether when it landed at the port, when it was stored in the warehouse, or when it was sold to the liquor store. A commercially reasonable price would have been the price that Authentic could sell the liquor to the liquor boards. Mr. Chan confirmed that the inventory, when ultimately transferred to PMA in December 2021, was sold for such a price.

[117] Ms. Lachance, as CFO for the Charton-Hobbs group including Authentic, used the term CIF as an all inclusive number in the accounting records to be the same as the selling price to the liquor board. This is also consistent with Benriach's Letter of Authorization sent to the AGLC on September 12, 2008, which stated that "...prices quoted to the AGLC will be **C.I.F.** St. Albert warehouse in Canadian dollars" (emphasis added). In the documents created by Ms. Lachance setting out the inventory values as of December 2021, the value of the Alberta inventory was described as "CIF" and the value of the British Columbia inventory was described as "In-Bond". The total of these two values was confirmed by Authentic as the price liquor would be sold to the liquor boards and Benriach paid that price. This was the same process used by Ms. Lachance in July 2018, to arrive at the liquor board price of $362,721.70 offered to Benriach. In 2018, she also created a summary sheet adding the inventory for Alberta (CIF) and British Columbia (In-Bond) together, which total was identified as being "CIF". Mr. Hobbs accepted her documentation in both 2018 and 2021 with that term as setting the proper value of the inventory. It was this CIF number that Mr. Hobbs presented to Mr. Puyana as the inventory value in July 2018, as based on Authentic's selling price to the Liquor Board.

[118] In his role with the Charton-Hobbs group and as the individual in charge of negotiations on behalf of Authentic, Mr. Hobbs would have been aware of the CFO's use of CIF in this fashion. There is no evidence Mr. Hobbs attempted to clarify the use of the term by Mr. Puyana in September 2018, despite his earlier assertion in July 2018 that Authentic wanted to ensure that Brown-Forman purchased the inventory as soon as possible. Mr. Hobbs' explanation at trial that he did not accept the offer because he did not know what Mr. Puyana meant by "CIF" is also contrary to his email response in February 2019 that inventory would not be dealt with until severance had been agreed upon. Mr. Chan admitted that this was Authentic's position, that there would be no inventory transfer until severance was finalized.

[119] Therefore, I find on the evidence that Benriach, on September 4, 2018, had agreed to pay for the inventory at the same price as Authentic would have sold it to the liquor boards. Authentic refused to transfer the inventory for the very price it asked for, a commercially reasonable price, because they wanted to settle the severance matter. Authentic knew that transferring the inventory to PMA would immediately allow Benriach to sell the Benriach Brands through PMA in the Western Canada markets. Authentic was not prepared to allow this, in order to maintain leverage in the severance negotiations. Exercising their discretion to hold on to the inventory and refuse to transfer it to the new agency, was an exercise of the discretion outside of the range of choices connected to the underlying purpose for including that discretion in the Western Canada Agreement.

[120] Authentic also exercised its ability to continue to sell the inventory it held after the termination. However, it took steps to ensure that the inventory would not be depleted to zero, for the purpose of exerting leverage to obtain its desired payment in lieu of notice.

[121] The Benriach Brand inventory was valued at $362,721.70 in July 2018 and $63,642.82 in December 2021. The two inventory valuations, prepared by the Defendants' CFO, detail the case inventory for each product within the Benriach Brand inventory by SKU. While all the Subject SKUs set out in the Statement of Claim (as amended) are included in the inventories, the inventories also included some additional SKUs of the Benriach Brands.

[122] For the purposes of this analysis, I will focus only on the core expressions included in the Subject SKUs, as the Plaintiffs took the position that specialty expressions were not impacted by Authentic's conduct. For the Subject SKUs, the core expressions were Benriach 10, Benriach Curiositas, GlenDronach 12, GlenDronach 12 Mini, and the GlenDronach 18. The following chart shows the depletion of cases on hand for these core expressions in Authentic's inventory from July 2018 to December 2021:

Product (SKU) - Province	July 2018	December 2021
Benriach 10 (793274) - AB	104	32
Benriach Curiositas (724411) - AB	19	9
GlenDronach 12 (738255) - AB	261	6
GlenDronach 12 Mini (741056) - AB	10	10
GlenDronach 18 (738253) - AB	56	4
Benriach 10 (246298) - British Columbia	64	46

Benriach Curiositas (324624) - British Columbia	73	5
GlenDronach 12 (132969) - British Columbia	90	3
GlenDronach 18 (676494) - British Columbia	45	9

[123] While Authentic sold a handful of products to zero, none of them were the Subject SKUs. Despite the above core expressions being among the best sellers in the market prior to termination, none of them were sold out three years later. However, most of the Subject SKU inventory had been depleted by well over 50% and in some cases, well over 90%.

[124] The Defendants stated in their evidence that it became difficult to sell the Benriach Brands, as Authentic was no longer authorized to market the brands and could not commit product amounts to customers, beyond the inventory they held. Given that Benriach's agreement to purchase the inventory at the selling price to the liquor boards would have avoided this issue, it begs the question of why the Authentic did not choose that option. The evidence provides the answer: because Authentic wanted to hold on to the inventory, so that Benriach could not continue to sell these products, and thus Authentic would have leverage in the notice negotiations. I find the Defendants' explanation about the difficulties in selling the product to simply be a convenient one, not an accurate one.

[125] In the liquor industry, inventory is frozen with the liquor boards for the purpose of making an inventory count. Such a count can be done in as little as three days, but may take as many as ten days. In some circumstances, the products may continue to be frozen, to allow for the determination of the price to be paid and a transfer to occur. Generally, the liquor agency and the supplier would try to negotiate the transfer of the inventory quickly. No one testified to a situation where the inventory was held for a significant time. If the inventory was not sold and the freeze was released so the product could be sold in the market, another freeze and inventory count would be required if and when the inventory was to be sold to another agency.

[126] At times following May 15, 2018, Authentic froze the inventory with the AGLC and the BCLDB. Mr. Hobbs testified that any freezes on the inventory were placed at the request of the Plaintiffs for inventory counts, which were done repeatedly. But this is not supported by the evidence. At the time of the termination, Authentic requested that the AGLC and BCLDB place the Benriach Brands on hold, pending agency transfer. There is no indication this was at the request of the Plaintiffs. A few days later, the hold was released for certain products, as Authentic stated "we're not ready to transfer the stock quite yet".

[127] The termination letter did not request an inventory count. It wasn't until about one week later that Chris Hills on behalf of Brown-Forman Canada, requested an updated inventory list as a starting point for discussions about the inventory transfer. This was the only request of the Plaintiffs seeking details about the physical inventory. Even if this communication could be interpreted as a request to freeze the inventory, which is highly debatable, it did not permit Authentic to freeze the inventory indefinitely.

[128] Authentic did not provide any evidence of actual inventory count requests to the liquor boards.

[129] Mr. Hobbs denied that he told Mr. Hills that Authentic would sell products down to a few cases and then hold the inventory until notice had been agreed to by the parties. Rather, he told Mr. Hills he was aware of other agencies taking this course of action. Mr. Hobbs was evasive at trial as to his purpose in making this statement, with a vague explanation that it was important for Mr. Hills to know this, because Authentic wanted to settle.

[130] Mr. Hobbs testified that, when he told Mark Owens on June 29, 2018 that the Benriach Brands had been frozen and Authentic was waiting to hear regarding severance, the freeze was simply in response to the inventory request on May 22, 2018 by Mr. Hills. This undermines his evidence that Authentic would always release the freeze once the inventory count was completed. There is no indication that Authentic provided inventory numbers prior to July 17, 2018, almost two months later, despite all witnesses acknowledging that counting of inventory was to be done in a timely manner to assist with discussions and allow the product to continue to be sold in the marketplace.

[131] In his email of February 25, 2019 to Mr. Puyana, Mr. Hobbs stated that Authentic would be very happy to settle this matter and "release the brands we are holding", once an appropriate period of notice was provided. He went on to say that there was no concern over the calculation of the value of the inventory, as when the notice amount is agreed to, "we can sell the stock and make our full margin and all interest charges." Mr. Chan gave evidence that, when there is an impasse in negotiations upon termination, it is quite normal and common for the Defendants to freeze inventory as leverage to expedite a settlement. He confirmed that Benriach Brand inventory remained frozen by Authentic with the AGLC as of October 2021.

[132] Mr. Hobbs testified at trial that "on hold" meant stock being held in the warehouse as available for sale, as distinct from stock that was frozen and couldn't be sold. This is not consistent with his use of both terms in the same contexts in discussions with the Plaintiffs and is contrary to his answer in questioning that placing a product on hold meant that it could not be sold. Ms. Schiewe gave evidence that, at some point after the termination, her Western Canada team were directed to hold the inventory. Her explanation of the "hold" was that "some [product] can be purchased. You put the last couple of cases on hold. Inventory can still flow, so you would put, like, two out of the 100 cases or whatever it might be..." on hold, to ensure that the inventory did not go down to zero. Mr. Carras did testify that Authentic had never frozen inventory in the past to obtain a desired severance, but he was not involved with this termination or its negotiations.

[133] The evidence is clear that the inventory discussions between the parties were tied to the pay in lieu of notice discussions. Mr. Hobb's denials to the contrary are rejected.

[134] I find that Authentic, at the direction of Mr. Hobbs, did exactly what was described by Ms. Schiewe. Mr. Hobbs employed the exact strategy that he warned Mr. Hills could happen in the industry, which was his purpose in telling Mr. Hills about the use of such strategy by other liquor agents. Authentic placed a few cases on hold of various Benriach Brand products, including the core expressions, so that it could sell most of its remaining inventory and ensure that the inventory did not go down to zero. These were not commercially reasonable steps. This was done for the purpose of exerting leverage on Benriach in negotiations over severance, because Benriach would not be able to sell the Subject SKUs in the market through PMA while Authentic continued to hold inventory. Authentic took advantage of the regulatory scheme, which was not in itself wrongful. However, by doing so, Authentic did not exercise its discretion

to sell the inventory in a commercially reasonable manner for the contractual purpose that the parties agreed the discretion existed.

[135] In both refusing to transfer the inventory at a commercially reasonable price and failing to take commercially reasonable steps to sell the inventory in the marketplace for the purpose of ensuring a desired notice period is provided, Authentic went well beyond the purpose for which it had discretion under the contract with respect to the inventory sold and, in doing so, breached the duty of good faith. Authentic had other options to pursue remedies for the failure of Benriach to provide reasonable notice. Instead, by exercising its discretion in the manner it did, Authentic undermined the interests of Benriach and substantially nullified the ability of Benriach to pursue the sale of the Benriach Brands in Western Canada: ***IFP Technologies***, at para 191-193; ***Bhasin***, at para 65; ***Wastech***, para 71. By holding Benriach Brands hostage from the market, Authentic failed to meet the minimum standard of honesty and good faith in contractual performance, thus preventing Benriach from having "...a fair opportunity to protect their interests..." when the contract did not work out: ***Bhasin*** at para 86. This was contrary to the proper functioning of commerce in the liquor industry, in the context of the regulatory regime under which the parties were required to engage: ***Bhasin*** at para 60.

[136] The refusal to transfer the inventory at a commercially reasonable price to the new agency and the refusal to allow the inventory held to be depleted to zero constitute separate acts of bad faith. Their impact was the same, as they both resulted in the inability of Benriach to continue to market and sell the Benriach Brands in Alberta and British Columbia, until the remaining inventory was sold in December 2021.

B. Benriach's Imposition of a New Brand Strategy and Change of Liquor Agent

[137] The Defendants allege that Benriach breached its duty of good faith, by changing its business model for the Benriach Brands in 2018 to a strategy of premiumizing Benriach products globally. This business model involved 1) an aggressive increased pricing approach; 2) allocating stock to markets other than Western Canada; and 3) replacing core expressions with older specialty expressions that were difficult to sell in Western Canada. This new strategy caused harm to the revenues of Authentic, the Defendants argue.

[138] The Defendants acknowledge that Benriach had the right under the Western Canada Agreement to determine what products to produce, to determine what products to sell in a particular market anywhere in the world, and to set pricing of the Benriach Brands in Western Canada. They also acknowledge that Benriach's discretion in these areas was for the purpose of building the desired global market for their products.

[139] The evidence establishes that Benriach did engage in a strategy to premiumize its products globally, including increasing prices, allocating stock strategically on a global basis, and introducing specialty expressions to replace some core expressions. The Plaintiffs wanted to establish the Benriach products in the single malt scotch market as a premium brand, which carried a higher price point. The Plaintiffs were upfront with Authentic about this new strategy and the reason behind it. The evidence supports that the new strategy was negatively impacting Authentic's revenue in the early stages of the transition to the new business plan and that Authentic staff expressed their concern about the implementation of this strategy upon the Benriach Brand's success in the Western Canada market. But harm to Authentic is not sufficient to establish a breach of good faith.

[140] As stated above, the measuring stick of good faith is whether the discretion was exercised for the purpose set out in the agreement: ***Wastech***, at para 70. Benriach exercised its discretion through its business strategy for the purpose it had been granted, to build the desired global market for its products. Whether Benriach was successful in its business strategy is not relevant. Therefore, these actions do not constitute a breach of good faith.

[141] The Defendants also allege bad faith by Benriach, arising from Brown-Forman's conduct of the RFP process for a national liquor agency for all of Brown-Forman's products, including the Benriach Brands. Again, as Brown-Forman is not a party to the Western Canada Agreement, it does not owe a duty of good faith to Authentic. However, even though the process captured a broader range of products beyond those manufactured by Benriach, by acting on behalf of Benriach in finding a new liquor agency for the Benriach Brands, Brown-Forman's actions may give rise to a breach of good faith by Benriach.

[142] The Defendants submit that the one of the core principles of the duty of good faith contractual performance is that the parties to a contract cannot lie or knowingly mislead each other about the performance of the contract, through lies, half-truths, omissions, and silence. The essence of the Defendant's position is that Benriach engaged in active deception, by deciding to replace Authentic as the liquor agency and not advising Authentic of this decision until it formally terminated the agreement with Authentic following the RFP process conducted without Authentic's knowledge.

[143] The Supreme Court of Canada has held that there is no duty to disclose under the duty of good faith, but a failure to disclose can be knowingly misleading in certain circumstances and such misleading conduct would amount to a breach of good faith. As stated at para 77, 90 and 104 of ***Callow***:

> [77] There is common ground that parties to a contract cannot outright lie or tell half-truths in a manner that knowingly misleads a counterparty. It is also agreed here that the failure to disclose a material fact, without more, would not be contrary to the standard. Beyond this, however, the parties continue to disagree about what might constitute knowingly misleading conduct as that idea was alluded to in *Bhasin*.
>
> [90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct…
>
> [104] I would note, however, that I do agree in part with the Court of Appeal's observation that the trial judge went too far in concluding that "[t]he minimum standard of honesty would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (trial reasons, at para. 67). In my respectful view, to impute these first two requirements would amount to altering the bargain struck between the parties substantively, a conclusion not sought by Callow before this Court. That said, I agree with the trial judge that, at a minimum, Baycrest had to refrain from

> false representations in anticipation of the notice period. Having failed to correct Mr. Callow's misapprehension that arose due to these false representations, I too would recognize a contractual breach on the part of Baycrest in the exercise of its right of termination in clause 9...

[144] Benriach decided to terminate the Western Canada Agreement, as part of Brown-Forman's business plan to move towards a consolidated agency distribution of all Brown-Forman products. Neither Brown-Forman nor its subsidiaries communicated this decision to Authentic prior to the termination and neither of the Defendants were invited to participate in the RFP process.

[145] However, there was no duty upon Benriach to disclose this decision to explore changing agencies or that a new agency had been chosen. Authentic must show that Benriach, on its own or through Brown-Forman, engaged in some form of active dishonesty that resulted in knowingly misleading Authentic about the status of the Western Canada Agreement.

[146] Authentic relies upon the following actions by the Plaintiffs:

a) the 2016 Benriach notice to Authentic about Brown-Forman's acquisition of Benriach;

b) Brown-Forman's issuance of the RFP in the fall of 2017 for one agency to provide national distribution of all Brown-Forman's products in Canada, including the Benriach Brands; and

c) Brown-Forman Canada's request for and approval of the 2018 Benriach Brand Presentation on behalf of Benriach.

[147] The Defendants suggest that these actions resulted in Authentic continuing to work hard and invest in the Benriach brands, on the basis that any changes brought by Brown-Forman's acquisition of Benriach would only be positive and that would mean Authentic would represent the Benriach Brands well into the future. I reject this proposition.

[148] On April 27, 2016, Mr. Walker of Benriach communicated to "Benriach Distillery Co Ltd Customers" that Brown-Forman was in the process of purchasing Benriach, with a closing date of June 1, 2016. This communication was not specific to Authentic. In the written communication, Mr. Walker stated "...business **at the moment** will continue as usual as Brown-Forman begins learning our business and way of doing things...We are only in the very early stages of our learning and integration work. Whilst there will be changes, **we believe** that these will be positive changes" (emphasis added). Authentic's interpretation that this communication actually said "business as usual" and "any changes will be positive changes" is inaccurate.

[149] The wording used cannot be construed as a representation to Authentic that Authentic would never be replaced as Benriach's liquor agency, that Authentic should never expect a change in business strategy by Benriach, or that any changes implemented by Benriach would only be positive for Authentic. These were generic and short-term focused expressions, in announcing a change in ownership to every Benriach impacted customer of Benriach, who were spread throughout the world.

[150] Authentic's interpretation is not consistent with its own reaction to the 2016 announcement. Mr. Weinbren advised Authentic staff that it would be "business as usual until further notice". Mr. Carras testified that Authentic had been through takeovers before, such that

"you have to hope" that things will carry on as usual and the Walker letter was positive for Authentic, in a "positive sense that hang in there and hopefully everything will be fine". Mr. Carras understood the statement that "business at the moment would continue as usual" to mean that Mr. Walker was no longer making the decisions at Benriach. Authentic was hopeful they would keep the brand, but on the distribution side, it was a "wait and see". Ms. Schiewe, upon hearing of the acquisition, had some concern that this could result in Authentic losing the Benriach Brands. Mr. Chan testified that Authentic decided, upon receiving this news, to do the best it could to be seen as the company that should continue to represent the Benriach Brands in Canada. As stated by Mr. Chan, there was conceivably a risk that Authentic would lose the Benriach Brands. None of this evidence indicates that Authentic was led to believe that it would continue to be Benriach's liquor agency into the foreseeable future.

[151] Authentic never expressed to the Plaintiffs or Brown-Forman Canada that it held such a belief, so as to put Benriach on notice of a potential misapprehension that may require correction. Authentic did not provide evidence that there were specific discussions between Authentic and the Plaintiffs or Brown-Forman Canada as to whether Authentic would continue as the liquor agency. They did not know about the Plaintiffs' plan to change agencies until the termination, but this was not the result of specific conversations or a failure by the Plaintiffs or Brown-Forman Canada to correct some obvious misconception by Authentic. Benriach was not under a duty to disclose this plan.

[152] Authentic also did not provide evidence that it went above and beyond its obligations under the Western Canada Agreement in anticipation of a continued relationship or because of a representation by or on behalf of Benriach. The evidence also does not support that the Plaintiffs relied upon such a misapprehension to continue to have Authentic do its work under the contract, until the contract was formally terminated. Authentic simply continued to fulfil its obligations under the Western Canada Agreement, such as developing its annual brand plan, as it had in the years prior.

[153] The evidence does not support that the Plaintiffs or Brown-Forman Canada, by lies, half-truths, omissions, or silence, engaged in active deception or knowingly misled Authentic about the status of the contract. There is no evidence that, based on action or inaction by or on behalf of Benriach, Authentic acted in a manner that compromised its ability to protect its interests if the Western Canada Agreement was terminated, such as forgoing other business opportunities.

[154] Benriach did not breach its duty of good faith contractual performance under the Western Canada Agreement.

IX. Negligence and Negligent Misrepresentation

[155] Authentic claims negligent misrepresentation by the Plaintiffs. The alleged misrepresentations by the Plaintiffs are: 1) Brown-Forman would learn and adopt Benriach's business model, including the customer base, and any changes made would be positive changes; and 2) Benriach would be releasing new expressions to Authentic to promote and market in the upcoming year. In making such representations, Authentic argues that Benriach did not take reasonable care to investigate whether Brown-Forman was the "right fit", whether Benriach's business model would continue, or whether there would be positive changes, as represented. Such misrepresentations were relied upon by Authentic to its detriment, as it continued to invest

in the promotion and marketing of the Benriach Brands, when the Plaintiffs knew that Authentic would not benefit from or recover such investment due to the impending termination.

[156] The Plaintiffs submit that no representations were made, let alone any negligent misrepresentations, about what changes might come or about the allocation of special expressions. At no time did the Plaintiffs represent to Authentic that the contract would continue. Even if the alleged representations had been made, Authentic did not rely upon them or show any detriment arising from that reliance, such that no damages have been proven.

[157] The tort of negligent misrepresentation is available to a party, even though there is a contractual relationship: ***Queen v Cognos Inc.***, [1993] 1 SCR 87 at p 111. The test for negligent misrepresentation was set out in ***Cognos***, at p 110, but that test, including the type of relationship that gives rise to a duty of care, has been refined and restated.

[158] The duty of care arises when there is the conjunction of proximity of relationship and foreseeability of injury. Proximity is established where the representor undertakes to perform a responsibility which induces the representee's reasonable and detrimental reliance upon the expressed undertaking, thereby possibly causing the representee to forego alternative and more beneficial courses of action available at the time of the inducement. Ultimately, the representee must show that the inducement caused it to relinquish its pre-reliance position and suffer economic detriment as a result. Detrimental reliance is manifested by the representee altering its position and foregoing more beneficial courses of action that it would have taken: ***1688782 Ontario Inc. v Maple Leaf Foods Inc.***, 2020 SCC 35 at para 29-40.

[159] As in ***Maple Leaf Foods***, there is no evidence here of any change in position by Authentic. Changing its position would not have been possible, as it was bound by the Western Canada Agreement to advertise, promote, and sell the Benriach Brands at the prices set by and with the specific expressions provided by Benriach. There was no evidence as to what different course of action Authentic would or could have taken. As set out in the good faith discussion, the Plaintiffs did not make any representations to Authentic. Even if one had been made to Authentic, it could not have caused Authentic to alter its position in reliance upon the representation. Authentic had no alternative action to pursue under the Western Canada Agreement. Thus, the claim of negligent misrepresentation by the Defendants is dismissed.

[160] For the same reasons – a lack of steps taken in reliance by Authentic – Authentic's claim of estoppel also fails.

[161] Benriach also brought a claim of negligence against Authentic. This was in the alternative to its claims of contractual breach. As I have found that Authentic breached the duty of good faith, giving rise to contractual damages, there is no need to address this alternative argument.

X. Damages

[162] Both parties provided expert evidence for the calculation of various damages. Jeff Pellarin (Plaintiffs' expert) and Scott Schellenberg (Defendants' expert) were qualified at trial as experts in economic loss or damages quantification.

[163] Calculations with respect to damages were based upon statistics from the Association of Canadian Distillers, which recorded sales of liquor based on the equivalent of a 9L case by specific SKU in each province, across Canada. Both parties agreed that this was an appropriate

source of sales information for the Benriach Brands in Alberta, British Columbia, and elsewhere in Canada.

[164] Mr. Pellarin's calculation is based upon a base level of sales of core expressions within the Benriach Brands, comparing Alberta, British Columbia, and the rest of Canada together. He focused on core expressions, based on the Plaintiffs' information that specialty products were not impacted by Authentic's conduct with the inventory. The data showed that, in all three regions, consumption was in decline prior to the termination of the Western Canada Agreement. Following the termination, the decline continued, but was far more pronounced in Alberta and British Columbia than in the rest of Canada. It was Mr. Pellarin's assumption that sale trends would be similar across the country but for Authentic's actions, given that Benriach Brand sales were in decline across the country prior to the termination, but more so in Alberta and British Columbia after the termination. These calculations were adopted by Mr. Schellenberg, as he agreed that Mr. Pellarin's methodology and calculations were reliable.

[165] Mr. Pellarin's calculations were based upon Brown-Forman's fiscal year, which ended on May 31. Therefore, fiscal year 2018 was the period of June 1, 2017 to May 31, 2018. Mr. Schellenberg's calculations appear to be based on calendar year. This difference does not impact upon the assessment of damages.

[166] Mr. Pellarin created two scenarios. In the first scenario, he used fiscal 2018 sales as the starting point, calculating the change in sales for each year thereafter. In the second scenario, he used the average sales over fiscal years 2016 to 2018, calculating the change in sales for each year thereafter. The second scenario was created to avoid the pitfall of assuming that fiscal 2018 was a normal year, when it may have been an anomaly for one or more reasons. By using the average of three years, a more stable baseline is created as it averages out the unique ups or downs of each year and does not perpetuate a specific year that may be an anomaly.

[167] The parties did not agree on which scenario should be used for damages. Scenario Two would result in higher damages both for Authentic on reasonable notice and for Benriach on breach of the duty of good faith. The Defendants submit that damages for reasonable notice should be based on an average of fiscal 2016 to 2018, although no basis for this is provided. They do not take a position which scenario should apply to damages owed to Benriach. The Plaintiffs submit that the same scenario should be used for damages in respect of both types of breach of contract. They argue that the appropriate scenario would be Scenario Two, noting the views of both experts, the trend in the industry to assess settlements based on revenue averaged over a number of years, and the Plaintiffs' submission that 2018 did involve an anomaly.

[168] Mr. Pellarin testified that, although 2016 was a peak year and the decline from that time continued until 2020, it was his view that using the three year average was more appropriate as it evens out the impact of peaks and valleys through the years. Mr. Schellenberg testified that using fiscal 2018 only was more appropriate, as it reflected what was actually occurring at the time of termination absent any knowledge that there was a problem with 2018. However, he agreed that the 25% drop in sales from fiscal 2017 to fiscal 2018 in Alberta, compared to a 10% drop in the rest of Canada, was unusual. In his assessment of damages, Mr. Schellenberg also used historical trends over a number of years to determine future sales of specialty expressions and expected gross margins. Mr. Schellenberg also confirmed that, whichever scenario is used, it should apply to both parties' damage claims.

[169] Witnesses for both parties describe that notice upon termination was calculated on either a three or five year historical average of commissions or gross margin. In the discussions between the parties, they both accepted that the calculation would be based on a five year historical average.

[170] I will use Scenario Two, the starting point based upon the average of fiscal 2016 to 2018, for the reasons cited by the Plaintiffs and as the Defendants also seek to use it, despite their expert's position.

[171] In an action for breach of contract, the innocent party has an obligation to mitigate their damages. The onus is on the offending party to establish that the innocent party had an opportunity to mitigate its damages and unreasonably failed to take that opportunity. Alternatively, the offending party may show on a balance of probabilities that the innocent party did mitigate some or all of its damages. In either case, the overall damages will be reduced by the mitigation or by the estimated amount of mitigation that reasonably should have occurred: ***Southcott Estates Inc v Toronto Catholic District School Board***, 2012 SCC 51 at para. 24.

XI. Damages for Reasonable Notice of the Western Canada Agreement

[172] Authentic is entitled to reasonable notice of six months. It received 47 days of actual notice, approximately one and a half months. The Defendants submit that the actual notice received should not be deducted from this notice period, on the basis that Authentic was unable to earn its normal revenue during the May to July notice period due to Benriach's actions with respect to allocation of product, availability of specialty expressions, and price changes. This argument is non-sensical. Such facts, if relevant, would have already been considered in setting the notice period. A notice period commences when actual notice of termination is given. Benriach's actions in respect of pricing and allocation were not a breach of contract. They began in the fall of 2017 and any detrimental impact on Authentic's ability to earn revenue would have begun well in advance of the termination and continued through the entire notice period, as Benriach's business strategy did not change. Therefore, damages for reasonable notice would be for four and half months, from July 1 to November 15, 2018.

[173] Damages for reasonable notice are to be determined based on what would restore Authentic to the position it would have been in, if not for the failure to provide reasonable notice upon termination: ***Naylor Group Inc v Ellis-Don Construction Ltd***, 2001 SCC 58 at para 73; ***Indutech Canada v Gibbs Pipe Distributors***, 2011 ABQB 38 at para 473. This is usually done in relation to reasonable notice under a distributorship agreement by determining the expected or prospective profits during the reasonable notice period reduced by the profits actually received through the sale of remaining inventory or profit earned from mitigation: ***JKC***, at para 133-134; ***Clarke***, at para 46, 60; ***1193430 Ontario Inc (ONSC)***, at para 92, 97.

[174] Mr. Schellenberg calculated losses, with Authentic's revenue being the selling price to the liquor board and the cost of goods sold being the purchasing and importing costs. Revenue less cost of goods sold established the gross margin. He relied upon the selling prices and projected sales volumes calculated by Mr. Pellarin as his starting point. He then calculated projected gross margins. In doing so, he relied upon Mr. Pellarin's calculation of projected volume sales for core products in Alberta and British Columbia for 2018 and 2019. As these numbers only reflected revenue from core expressions, he reviewed historical revenue for specialty expressions from 2011 to 2017, which showed that specialty expressions accounted for

52% of Authentic's revenue. He added revenue on that ratio for specialty expressions to the gross margin calculations, as specialty expressions are part of the reasonable notice claim. From this projected gross revenue, he deducted Authentic's actual gross revenue to calculate the lost gross margin, which would have been from the sale of Benriach Brand inventory by Authentic after termination. He determined that Authentic did not save on any fixed expenses as a result of the termination, so the net profit would be equal to the gross margin for the Benriach Brands.

[175] The Plaintiffs argue that Mr. Schellenberg has taken a hybrid approach to the calculation of damages, by mixing projected sales based on performance of PMA after termination and historical performance of Authentic, which they say resulted in an unreasonable and inaccurate assessment of the overall projected gross margin upon inclusion of the specialty expressions. The Plaintiffs submit that the calculation of damages should be based upon historical average margins, which is the typical approach in the liquor industry as established at trial. Ms. Lachance had calculated, for the purposes of negotiation, a historical average of $28,000 gross margin. The Plaintiffs seek to rely upon this number, less the actual gross margin earned by the sale of the inventory.[4] The projected gross margin calculations by Mr. Schellenberg for the period of July to November 2018 average just below $28,000 in Scenario Two. The minor difference would not result in a significant change to the damages calculation, so this argument need not be addressed.

[176] Both parties agree that there should be a deduction for sales of Benriach Brands following termination. I disagree with the Plaintiffs that it should be the deduction of all inventory sold post-termination; rather, it should be limited to the sale of inventory that could or should have been sold during the reasonable notice period. One measure is the amount of actual sales. Mr. Schellenberg accounted for this in his calculations, by deducting Authentic's sale of its Benriach Brand inventory. From July to November 2018, this was a minimal deduction. Another measure is what sales could have or should have been made. Authentic was not taking commercially reasonable efforts to sell the product at this time, as they had frozen the inventory and intended to maintain this freeze until settlement was achieved. Therefore, I find that the damages calculated by Mr. Schellenberg should be reduced by a further amount, to account for this conduct.

[177] Mr. Schellenberg's report shows the actual gross margin in June to be significantly lower than the preceding months and in the negative in July to September. Sales were much closer to pre-termination levels in October and November for Alberta and in November for British Columbia. Sales of GlenDronach 12 and GlenDronach 18 in 2018 were approximately half of what they were in 2017 or 2019. This reflects Authentic failing to actively sell their Benriach Brand inventory from June to September 2018. There is no evidence that these lower sales were the result of insufficient inventory.

[178] Simply because damages may be difficult to calculate, does not mean that a Court cannot establish an amount. Where damages depend upon the Court's view of what might have happened in the future, depending on certain contingencies, the Court must make an estimate of the chances that something happened and reflect that chance in the amount of damages: ***Naylor Group***, at para 85; ***Indutech Canada***, at para 481; ***Strategic Acquisition Corp v Starke Capital***

[4] The Plaintiffs submitted that there was an error in the "Actual Gross Margin" column of Schedule 2.1 of Mr. Schellenberg's expert report, which would reduce the damages calculation for Authentic. I am using Scenario Two, which was set out in Schedule 2.2. I do not see an error in this regard in Schedule 2.2 and need not address the Plaintiff's concern with Schedule 2.1, as I am not relying upon it.

Corp, 2017 ABCA 250 at para 78. I believe that the actual gross margins achieved from December 1, 2018 to March 31, 2019 reflect what could have been sold by Authentic in June to September 2018, if Authentic had acted reasonably. Authentic's damages shall be reduced accordingly.

[179] The Plaintiffs did not argue that Authentic failed to mitigate its damages. Thus, I will not consider the issue of mitigation with respect to the damages for reasonable notice.

[180] Based upon Mr. Schellenberg's monthly calculations, Authentic's lost profits in Alberta and British Columbia from July 1 to November 15, 2018, were $129,073.50. In making this calculation, I have used 50% of the November gross margin, as a reasonable approximation of what the first half of the month would have been. This amount is reduced by $28,814, based on December 2018 to March 2019 sales as an estimate of profit from further sales that Authentic could have and should have made by November 15, 2018. Therefore, Benriach is liable to Authentic for a failure to provide reasonable notice of termination, in the amount of $100,259.50.

XII. Damages for Breach of Duty of Good Faith Contractual Performance

[181] Authentic engaged in two separate acts of bad faith. The refusal to sell the inventory at a commercially reasonable price arose on September 4, 2018, when Benriach agreed to pay such a price. The failure to take commercially reasonable steps arose on June 29, 2018, when Mr. Hobbs advised Mr. Owens that the Benriach Brands had been placed on hold pending the provision of proper notice. Both breaches of good faith ended, when Authentic sold its remaining inventory to Benriach in December 2021.

[182] Mr. Pellarin calculated damages for the Plaintiffs from July 1, 2019 (one month into fiscal 2019) to September 2022. He recognized that the sale of inventory to the Plaintiffs in December 2021 allowed Benriach to engage in the market again through PMA, but estimated that it would take some time for Benriach to re-establish its products in Alberta and British Columbia to the sales levels prior to termination. The Plaintiffs submit that, prior to the sale of the inventory in December 2021, there was no anticipated end to the freeze of inventory by Authentic and it would take time to rebuild stocks both in the warehouses and on store shelves. Shipping was an issue due to COVID and PMA would need to rebuild customer equity and loyalty in the Benriach Brands. Recovery was still occurring to the date of trial.

[183] This expert assumption and the Plaintiffs' corresponding argument fail to account for important considerations. While PMA's inventory as of December 2021 was less than 10% of demand in the market, Benriach also held some inventory of the Benriach Brands for Alberta and British Columbia, already bottled and labelled. They cancelled purchase orders made by Authentic for such product, upon termination, and gave evidence that they neither destroyed nor resold inventory they had ready to sell in Alberta and British Columbia. Further, all of Canada was trying to recover in 2021 and 2022 from the downward trend in Benriach sales that started in 2017. Therefore, the benchmark for the end of damages should not be a return to 2018 levels. While Mr. Pellarin set out his assumptions on the lead times for PMA to obtain product, that information was not in evidence at trial. Once PMA was allowed into the Alberta and British Columbia markets for the Benriach Brands, a small period of adjustment would be appropriate.

[184] I agree that damages should commence as of July 1, 2018, as that was shortly after Authentic began to engage in bad faith by placing inventory on hold for the purposes of

obtaining settlement. The damages calculation should cease as of May 31, 2022, allowing for a period of adjustment.

[185] As with damages for reasonable notice, damages for a breach of good faith are also based on the expectancy principle, which attempts to put the plaintiff in the position they would have been in, had the contract been properly performed. It takes into consideration what occurred as a result of the breach and compares it to what would have happened if the breach had not occurred.

[186] In doing his comparisons and projections, Mr. Pellarin created categories of products on the underlying assumption that products in each category were the same or similar, so that the analysis would remain accurate yet take less resources to determine.

[187] Mr. Pellarin used the percentage change in sales in the rest of Canada from the average of 2016 to 2018, to 2019, and then the percentage change in sales for each year thereafter, to establish a sales trend. He then applied this trend in the rest of Canada to create the projected sales for Alberta and British Columbia, had Authentic sold its inventory to Benriach at the time of termination. Losses were then determined based on the difference between projected sales and actual sales, whether the difference was positive or negative for any one group of products. He made these calculations based on sales for all Benriach Brands, not just the Subject SKUs or the products held by Authentic in inventory, on the assumption that some Benriach Brand products may have sold better or worse given the unavailability of other Benriach Brand products. He estimated the profit Benriach would have lost on the difference between the projected sales and the actual sales.

[188] Mr. Schellenberg raised some concerns with Mr. Pellarin's report. The main concern was a failure to consider inventory held by Benriach that would be associated with its losses.

[189] The inventory concern centers around the valuing of lost profit, wherein the cost of sales would include the cost of manufacturing. The evidence establishes that the length of the aging process is determined when a product is put in a barrel and the creation of single malt Scotch is not such that the product can simply be left to age longer than intended. Therefore, if the product was properly "aged", it would need to be removed from the barrel and otherwise stored. Mr. Schellenberg assumes that the product was either bottled and available for sale or it was aging in the barrel but near the end of the process so it could be sold. Mr. Schellenberg took the position that, if the product was available to be sold or was sold, the profit associated with such a sale would offset Benriach's losses. This would take inventory into consideration in the calculations.

[190] The Defendants argue that, as Benriach could have or perhaps did allocate the Benriach Brands that would have been sold in Alberta and British Columbia to other markets, such sales would have fully mitigated any loss suffered by Benriach. The Defendants rely upon the evidence that establishes that Benriach was sold throughout the world and that there was increasing demand for its products in the US, Taiwan, and Europe. In addition, the closure of the GlenDronach distillery from 1996 to 2002 would have negatively impacted supply of GlenDronach products. As a result, the Defendants submit that the Court should find that global demand could not have been met and so Benriach could have fully mitigated its losses by selling the Benriach Brand inventory in other markets.

[191] The Plaintiffs argue that the sale of product elsewhere or later in time in Alberta or British Columbia, merely displaces a sale that would still have occurred during the period of 2018 to 2021. There is no doubt that Benriach lost sales in Alberta and British Columbia, due to

the held (frozen) product. Mitigation could only occur, they say, if there was excess demand that would have otherwise been unmet in that time or place. However, the Defendants, who bear the onus of establishing both the opportunity to mitigate and the failure to take the opportunity, did not provide evidence of excess and unmet demand. Also, to sell elsewhere would have required a rebottling and relabelling of product; there is no evidence to support that this was done or should have been done. Thus, the Plaintiffs submit it is not appropriate to reduce the damages.

[192] There is scant evidence as to the inventory held by Benriach. Some evidence was presented that the supply of GlenDronach 12, the main seller in Alberta and British Columbia, would not meet global demand in the relevant time frame. For core expressions generally, Mr. Shepherd testified that Benriach was able to fill the demand for such products, as a result of the forecasting and planning process involved at the time the Scotch is laid in a barrel to start the aging process.

[193] Further, Mr. Shepherd testified that it is expensive to not only manufacture the product, but also to bottle and label it. Therefore, the Plaintiffs would do their best to get the product into the market it was allocated to. Benriach would have waited for the Alberta and British Columbia markets to become available to it again, rather than incur the cost to relabel and/or rebottle product for another jurisdiction.

[194] While products bottled and labeled for the Alberta and British Columbia markets might be sold elsewhere in Canada, due to the similarity of regulations within provinces, the demand in Canada was declining. Therefore, there is no evidence that there was an available market in Canada to resell the product. Further, once Benriach could enter the Alberta and British Columbia markets again, it air-shipped product on an urgent basis to those markets for PMA.

[195] There is also evidence to establish that Benriach's presence in the Alberta and British Columbia markets was negatively impacted by Authentic withholding the Benriach Brands from those markets. This would create the loss of a business opportunity for Benriach and potentially the loss of consumers into the future. Retailers were inquiring about the product availability. In the whiskey market, lack of product availability may result in customers turning to other brands. I agree with the Plaintiffs that the availability of core expressions is important for the development and maintenance of brand equity and brand loyalty in a particular market, an important aspect of marketing single malt Scotch whisky. The selling of inventory in other markets would not mitigate against the loss of business opportunity and brand presence in the Alberta and British Columbia markets, when the product was not available and visible in those markets. While some loyal consumers may simply return to the product when it returns to the market, I find that there was still damage to Benriach's reputation and market share as a result of Authentic's actions.

[196] The evidence establishes that there was some, although limited opportunity, for Benriach to sell its inventory of Benriach Brands to other markets. It would not have been reasonable for Benriach, who maintained an intention to remain in the Alberta and British Columbia markets at all relevant times, to rebottle, relabel, and repackage products allocated for those markets so they could be sold elsewhere. This would have involved significant expense. It was a reasonable expectation that those markets would be reopened to Benriach at some point, based on the way the Westen Canada liquor industry works. Repackaging the product was not a reasonable opportunity to mitigate. However, to the extent that the product had not yet been bottled, labeled,

and packaged, it could be allocated to another market. The revenue and costs involved are unknown. I would reduce Benriach's losses by 20% in consideration of this mitigation.

[197] Benriach took other steps to mitigate its losses, by introducing and selling other products in the Alberta and British Columbia markets. One such product was GlenDronach 10. Mr. Shepherd agreed that its sales offset to some extent the loss of the ability to sell GlenDronach 12, but testified that it was not in the market for that sole purpose. Mr. Pellarin assumed that 80% of GlenDronach 10 sales would have occurred if the dispute between the parties had not arisen.

[198] The Defendants argue that all the GlenDronach 10 sales should be considered as mitigation and deducted from Benriach's damages. They submit that Mr. Pellarin makes an improper assumption that GlenDronach 10 would have been sold in the market, even if GlenDronach 12 was available. The Plaintiffs submit that the sale of GlenDronach 10 would have been at 80% in any event, but was boosted by 20% due to the absence of GlenDronach 12.

[199] Mr. Shepherd and Ms. Woodson testified that GlenDronach 10 was introduced into the market after the termination and the freeze of inventory, although it had been sold elsewhere prior to the termination. Neither was prepared to admit that it was a replacement product, because it was not an equivalent product to GlenDronach 12, but they acknowledged that it was introduced into the Alberta market to try to offset the loss of sales of GlenDronach 12 to some extent. While Mr. Pellarin's assumption that GlenDronach 10 may have been introduced into the market, absent the dispute, is not unreasonable, this evidence undermines the reasonableness of using 80%. Rather, it would have been reasonable to assume that 20% of the sales of GlenDronach 10 would have occurred, even if GlenDronach 12 remained in the market. Therefore, 80% of sales, being $131,832, should have been deducted, rather than 20% of sales, being $32,958. Therefore, the damages need to be further reduced by the difference between these two numbers, being $98,874.

[200] Mr. Pellarin's approach engaged in a portfolio wide methodology, rather than focusing on the Subject SKUs only. The Defendants take issue with Mr. Pellarin's grouping of similar products together into categories, as the inclusion of products other than the Subject SKUs results in an overstatement of Benriach's damages and such damages are too remote. The Plaintiffs submit this is an appropriate way to assess damages, as the inability to sell the frozen SKUs impacted sales of all the Benriach Brands. They refer to this as the knock-on effect, whereby some products that were not frozen either did better or worse, due to the lack of availability of the key products that were frozen.

[201] The Defendants argue that damages arising with respect to any product outside of the Subject SKUs fall within the special circumstances category of damages as defined in ***Hadley v Baxendale***. I do not accept this argument.

[202] This category involves special circumstances giving rise to damages, which is only permissible if the defendant had knowledge of such special circumstances at the time of the contract: ***Al Boom Wooden Pallets Factory v. Jazz Forest Products (2004) Ltd.***, 2016 BCCA 268 at para 75-78. Failure to establish special circumstances will result in a valid claim for direct damages only. Authentic would have been aware, at the time of the contract, that 1) it was the sole agency for the Benriach Brands, 2) that only Authentic, not Benriach, had access to the inventory levels of the Benriach Brands in the markets it serviced, and 3) that marketing to build brand equity was not limited to just certain products. Authentic handled the entire portfolio of Benriach Brands sold in Western Canada, so it would be aware of the interdependent relationship

of the products. When Authentic refused to transfer inventory and instead held the inventory, it did so for the purpose of keeping Benriach out of the Alberta and British Columbia markets for the Benriach Brands, not just the Subject SKUs. Authentic's actions were done for all Benriach Brands that it sold in those markets. Any new products that were introduced by Benriach, were done to maintain a presence in the market, which Authentic was trying to prevent. These are not special circumstances that makes such damages remote; such damages directly arise from both Authentic's actions and the reasons behind those actions.

[203] I agree with the portfolio wide assessment. If the Plaintiffs are limited to the Subject SKUs set out in their pleadings, it becomes an artificial consideration of damages by ignoring the interdependence of product sales. Since brand equity is built around customer loyalty, that the unavailability of key products may result in customers either purchasing or not purchasing other products in the Benriach Brands. The Defendants themselves argued that the introduction of other products into the market impeded their ability to sell the Benriach Brand inventory. It is logical that the removal of products from the market can also have effects on other products of the same brand.

[204] The portfolio wide calculations also make assessment of mitigation simple and complete. It includes the sale of any product that potentially constituted mitigation of Benriach's losses. To simply focus on the Subject SKUs would remove the mitigation effects of GlenDronach 10 or other mitigating sales.

[205] There is no prejudice to the Defendants, as they were aware prior to trial that the entire portfolio was at issue, both experts considered this in their assessment, and the Defendants used their full opportunity at trial to explore the impact of the dispute on the entire portfolio. As Mr. Schellenberg testified, he accepted the portfolio wide projections, as it would help to smooth out any irregularities caused by one product. One exception would be any product which was discontinued would be appropriate to remove.

[206] The Plaintiffs agreed, during trial, that two categories of products should be removed, as they were products discontinued by Benriach such that the decline in sales could not have arisen from Authentic's breach of contract. Mr. Pellarin adjusted his calculations accordingly. Given my acceptance of the portfolio wide approach, I do not agree with any other reductions for specific products argued the Defendants. This includes GlenDronach 18. While it was in limited supply and there was a significant drop in sales Canada-wide, this was not a result of the product being discontinued. The drop in sales in the rest of Canada would have been part of the determination of the trend of sales overall. Further, Authentic still had inventory of this product as of December 2021.

[207] Finally, Mr. Pellarin's calculations include June 2018, as this was part of fiscal year 2019. This was questioned by Mr. Schellenberg, as calculating damages for one month in which they did not occur. I agree that Mr. Pellarin's calculation should be reduced by 1/12 of fiscal year 2019. It is not that losses may not have occurred, but rather, any losses which did occur did not arise from Authentic's breach of contract.

[208] Therefore, Authentic owes damages to Benriach as follows:

Loss of Profits (fiscal 2019 to 2022, revised to remove discontinued product)	$1,177,844
Less June 2018 loss of profits (1/12 of fiscal 2019)	($21,159.50)
Less 60% of GlenDronach 10 sales (adjusted mitigation amount)	($98,874)

Less 20% for global mitigation	($211,562.10)
Total damages	$846,248.40

Authentic is liable for breach of the duty of good faith contractual performance, in the amount of $846,248.40.

XIII. Conclusion

[209] Benriach breached the Western Canada Agreement by failing to provide reasonable notice of termination. Authentic's damages are $100,259.50.

[210] Authentic breached its duty of good faith contractual performance under the Western Canada Agreement. Benriach's damages are $846,248.40.

[211] All other claims are dismissed.

[212] The parties are entitled to pre-judgment and post-judgment interest in accordance with the *Judgment Interest Act*, RSA 2000, c. J-1.

[213] The usual rule, that the winner is entitled to costs, shall apply unless there are other costs considerations. Benriach was substantially successful on its main claim and is entitled to costs of the same. Authentic was substantially successful on its counterclaim and is entitled to costs of the same. If there are other cost considerations and the parties are not able to resolve the issue of costs, counsel may seek further direction from the Court within 60 days of this judgment.

Heard on the 6th -10th day of March and 23rd-26th of May, 2023.
Dated at Edmonton, Alberta this 3rd day of May, 2024.

L.M. Angotti
J.C.K.B.A.

Appearances:

David Marshall, Ryan Phillips & Emily Amirkhani
for Brown-Forman Corporation and BenRiach Distillery Company Limited

Chidinma Thompson, Andrew Pozzobon & Briggs Larguinho
for Charton-Hobbs Inc. and Authentic Wine & Spirits Merchants Inc

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Corrigendum of the Reasons for Judgment
of
The Honourable Justice L.M. Angotti

Appearances: Added Emily Amirkhani to counsel for Plaintiff.
Appearances: Corrected counsel for the Defendants name to reflect Briggs Larguinho.