IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Real Organics & Naturals House Ltd. v. Canadian Phytopharmaceuticals Corporation,* 2024 BCSC 1303

Date: 20240719
Docket: S177788
Registry: Vancouver

Between:

Real Organics & Naturals House Ltd. and Ivy Liou

Plaintiffs

And

Canadian Phytopharmaceuticals Corporation, Kok-Sing Lim, Daniel Wang and Carina Cai

Defendants

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

The Plaintiff, Ivy Liou, appearing on her own behalf and as Representative for the Plaintiff, Real Organics & Naturals House Ltd.:	I. Liou
Also appearing as Representative for the Plaintiff, Real Organics & Naturals House Ltd.:	S. Bong (November 21–22, 25, 2022, February 21–24, 27–28 and March 1–3, 2023)
Counsel for the Defendants:	R. Cooper, K.C. E. Aitken
Places and Dates of Trial:	Port Coquitlam, B.C. November 21–22 and 25, 2022
	Vancouver, B.C. February 21–24, 27–28, March 1–3, April 11–14, 20, August 28–31 and September 1, 2023

Place and Date of Judgment:	Vancouver, B.C. July 19, 2024

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Introduction

[1] The plaintiffs seek an award of damages in respect of an alleged breach of contract with respect to the manufacturing of certain natural health products.

[2] The defendants say that none of the individual parties are properly parties to this action. As between the corporate parties, they deny any breach, but also say that to the extent any breach has been established, that breach did not cause any losses to the corporate plaintiff.

Facts

Background to the Parties

[3] The defendant Canadian Phytopharmaceuticals Corporation ("CPC") is a Richmond, BC-based contract manufacturer and private labeler of natural health products, including herbal extracts, dietary supplements, vitamins, minerals, and natural health products. It was founded in 1996 by Dr. Yuan Ma ("Dr. Ma"). It is licensed by Health Canada and, as such, is required to comply with Health Canada's Good Manufacturing Practices ("GMP").

[4] The plaintiff Real Organics & Naturals House Ltd. ("RO") is a company controlled by the other plaintiff, Ivy Liou. The company was reorganized in March 2016, and various other shareholders invested in the company as it prepared to launch a business selling and distributing natural health products manufactured by a contract manufacturer.

[5] Ms. Liou is an entrepreneur with a background in nursing.

[6] The three individual defendants were all either directors or employees of CPC who had dealings with Ms. Liou on behalf of CPC at material times. Kok-Sing Lim, who died in 2023, was a long-time shareholder and began to play a lead role at CPC in September 2016. Mr. Daniel Wang joined CPC in October 2016, as its Vice President, Production, and Chief Scientist, with responsibility including CPC's Quality Control ("QC") and Quality Assurance ("QA") departments. Dr. Carina Cai was employed by CPC beginning in 2010, initially to do laboratory research and

technical support, then expanding to work as an auxiliary QC person, and ultimately, in November 2016, being appointed as Manager, Quality Control.

[7] Ms. Liou's evidence was that, in 2015, she had begun developing a business plan for RO that would see it market and sell health and beauty products. Although she had no prior experience selling health products, she had general familiarity with natural health products including traditional Chinese medicinal products.

[8] One of the products identified by Ms. Liou was Chaga, a mushroom-like fungus that is parasitic on birch trees, and known for various active health ingredients including polysaccharides. Ms. Liou found a supplier of Chaga in Quebec, and decided that Chaga-based products would become a flagship for her new business.

[9] Ms. Liou agreed that Chaga had been known for hundreds of years for its health benefits, and that it grows in many areas including Siberia. She acknowledged as well that there are other suppliers in Canada who manufacture and sell Chaga-based health products. She saw the available market niche as the sale of powder extracted from Canadian Chaga and sold in capsule form. Her intention was to process the Chaga using a dual extraction product – an approach that is well-established in China but not well known in Canada.

[10] In March 2016, Ms. Liou embarked on negotiations with the Quebec supplier of Chaga. In late March, she ordered a sample of Chaga that had been harvested and dried, then sent it to a commercial laboratory run by Silliker JR Laboratories ULC ("Silliker"). Silliker received the sample on April 11, 2016, then performed the requested tests. A certificate of analysis ("COA") produced by Silliker on May 2, 2016, indicated, among other things, that the concentration of polysaccharides in the sample it had received was 8.84%.

Initial Discussions Between the Parties

[11] Ms. Liou also began searching for an appropriate contract manufacturer for the products that RO was planning to develop. One of the potential manufacturers

she approached, which did not have the capacity to do dual extraction work, referred her to CPC. She contacted CPC to set up a meeting.

[12] On about April 15, 2016, Ms. Liou met with Dr. Ma to discuss the possibility of CPC performing contract manufacturing work. Dr. Ma arranged for Dr. Cai to attend the meeting as well as Jie Ma. Jie Ma is Dr. Ma's daughter. Her role in the company as of April 2016 was not consistently described in the evidence – at one point, she was described as CPC's QC manager, and at other points in the evidence, she was described as its production manager.

[13] The meeting included a conversation about the use of a dual extraction process. Ms. Liou said that Dr. Ma suggested that they begin with a test batch, and if she was satisfied with the results, then they could proceed to full production. They also discussed pricing. Dr. Cai's evidence was that it was unusual for her to be made part of a meeting like this, and that at the time of the meeting, she understood her role would simply be to receive an email from Ms. Liou and forward it on to others in the company. She acknowledged that, within a short time, she had become a key contact person for Ms. Liou on behalf of CPC.

[14] On Sunday April 17, 2016, Ms. Liou sent an email to CPC's general informational email, saying:

> Dear Dr. Ma,
>
> As per our meeting on last Friday, please proceed [on] our agreed schedule as below:
>
> 1. Applying NPN at the price of $400 CAD for my company Pure Chaga Capsules using the following outlined procedure:
>
> The First Process: Hot water extraction – performed under high pressure (480 psi / 4.0 MPa) at 80-90 degree C to. Using around 40 L of water to retrieve bioactive constituents such as beta-glucans polysaccharides, melanin etc. The products are concentrated of 5:1 ratio in liquid.
>
> The Second Process: Alcohol (Ethnol] precipitation for water-insoluble components, such as phytosterols, betulinic acid and betulin. The products are concentrated of 5:1 ratio in liquid.
>
> The Final Process: Combined and powdered the above 2 products plus the residue fiber [dietary fiber and trace elements] into capsule of size 1 or 2. The ratio for the final product: 1 [water extraction] : 1 [ethnol precipitation] : 2 [residue fiber]

> 2. I will send 10 kg Chaga to your company within 1 week and start the trial of the pure Chaga capsules. We may increase the order up to 10,000 kg per year. As you roughly quotation, the price will be around $90 CAD per 1 kg product including bottling, labelling and packaging. I will provide the polyethylene label.
>
> As an experienced pharmaceutical manufacturer and the fiduciary relationship have been built up between us, I believe your firm will protect our products and its process procedures as confidential information. In addition to apply for the NPN, we are planning to register the process patent or product patent of our pure Chaga powder in the near future.
>
> 3. We will nail down the content and dosage of the other 4 products [as below] with your pharmaceutical specialist and will apply for NPN by Friday:
>
> a. Organic Soybean Protein Powder with Vit D & E, Vit B12 and trace amount of Zinc.
>
> b. Health product for Liver, Curcumin, pepperine, Anise seeds, Choline, Methionine and Betaine
>
> c. Health products for respiratory system: Turmeric, Honeysuckle, Cruciferous Vegetables, Pomegranates, Lycopene, Green tea, Chaga, Astragalus
>
> d. Nature's Brain Protection: 600 mg of DHA supplement [docosahexaenoic acid], Turmeric, Green tea, Vit A & E, Astragalus
>
> 4. At last, I need to add one more products – Gel capsule of water-soluble Vit E + B12 + Zinc. Does this common vitamins need to apply for NPN?
>
> I will make a call to your company to facilitate the process of our orders.

The Initial Batch of Chaga

[15] On April 27, 2016, RO's Quebec supplier shipped to RO a package of 50 kg of raw Chaga nuggets. Ms. Liou's evidence was that she was not certain whether this shipment was from the same batch of Chaga that had been tested earlier in April, but she said that she personally believes that it was.

[16] At around the same time, CPC sent RO a Sales Confirmation using CPC's then standard form. The document in evidence is dated April 28, 2016. It appears to refer to a different company – which presumably is an error. The document notes that a 30% deposit is required, and quotes the following prices:

a) Hot water extraction – 50 kg at $90 per kg for a total of $4,500;

b) Residue – dry and ground – 50 kg at $10 per kg for a total of $500; and

c) NPN application - $400.

[17] Under “Notes”, the form says:

> Product Processing: Please refer to the product specification confirmation.
> Label will be provided by client.

[18] It appears that this document was never signed. It was sent to Ms. Liou by Dr. Cai on the afternoon of April 27, 2016, with a cover note that:

> … when our quote department reviewed the purchase order from you, they said there was misunderstanding of the extraction fee, it should calculate based on the original quantity of the raw material, because the process is quite hard for this kind of materials.

[19] Ms. Liou responded that she would call to discuss the fee issue. Her view was that the industry standard was for processing fees to be quoted and charged based on the quantity of the extracted material, not the quantity of the raw materials. Presumably some discussions occurred over the next little while; however, the Sales Confirmation does not appear to have been revised until July 13, 2016. It will be discussed below.

[20] On May 6, 2016, RO issued a cheque to CPC for $3,000. The “re” line of the cheque identifies that it is for “deposit of Chaga”.

[21] There was an exchange of emails on May 16 and 17, 2016, between Ms. Liou and Dr. Cai. Dr. Cai wrote at 11:22 a.m. on May 16, 2022, asking:

> Would you please let me know the potency of alcohol you want to use in the extraction for Chaga? 50% or 70%?

[22] Ms. Liou responded at 6:10 p.m., saying “Please refer to the following info”, below which was a series of Chinese characters, translated as follows:

> The extract was processed by reflux extraction with 95% ethanol, and the ethanol dry powder was obtained by centrifugation and concentration under reduced pressure, and freeze drying.

[23] Following these Chinese characters, Ms. Liou asked “How do you think of this idea?”. Dr. Cai responded at 9:13 a.m. on May 17, 2016, stating:

> I did some research yesterday and found that 70% Alcohol used in the extraction, and we preper [*sic*] to go that way.
>
> Please let me know if you have any question.

[24] Dr. Cai was asked about her role in dealing with RO's Chaga project. She stated that she was not involved in the production process, but rather had been asked to be a contact person for Ms. Liou. It was suggested to Dr. Cai in cross-examination that Dr. Ma had been in China for an extended period of time in mid-2016 to care for his father. She did not recall whether that was this particular year, but did recall that even when Dr. Ma was in China, he was continuing to deal with day-to-day business operations matters from China.

[25] Also on May 17, 2016, RO entered into a "Supply and Purchasing Collaboration Agreement" with its supplier in Quebec. That agreement provided a five-year term, with a fixed price of $18/lb of Chaga in the first year, and with RO to have exclusive distribution rights in certain parts of Asia. It required RO to pay a "long-term collaboration deposit" of $10,000. RO paid that deposit on or about May 17, 2016. Ms. Liou's evidence was that this was a key part of her business plan, which ensured a sustainable supply of raw material at a reasonable price, which in her view was essential to making the business feasible. Her evidence was that, at the time of trial, the same supplier was now charging $45/lb of Chaga.

[26] The package of 50 kg of raw Chaga was delivered to CPC on May 18, 2016. On May 20, 2016, Ms. Liou noted in an email to Dr. Cai (which dealt primarily with other products that CPC was to manufacture for RO) that "hope the process of extracting the Chaga is going well". Dr. Cai responded on May 24, 2016, noting:

> Hi Ivy, It was nice to meet you this morning and please be kindly informed that the Chaga project will start tomorrow

[27] As noted, CPC also agreed to manufacture various other products for RO. With respect to those products, RO determined what ingredients were to be included in each product, with some consultation with CPC (the scope of which is not exactly clear). CPC then applied to Health Canada for a natural product number ("NPN") for each of those products, and later manufactured them. Most of them did not contain

Chaga, and so while the existence of these products is relevant to consideration of the overall relationship between the parties, and to their financial dealings, they had little bearing on the specific dispute with respect to Chaga.

[28] The documents produced in this litigation include production sheets for the processing of the initial 50 kg batch of Chaga, said to have occurred on May 25-27, 2016. The records indicate that the batch was processed by a Mr. Ying, who was one of CPC's production employees. Mr. Ying was trained as a mechanical engineer in China, but his degree was not recognized in Canada. He worked with CPC, primarily in the liquid manufacturing department, from August 2008 to November 2018.

[29] A second CPC employee, Mr. Li, also claimed to have been involved in processing this first batch of Chaga, which Mr. Ying disputes. Mr. Li was employed in the processing department until he was laid off on October 31, 2017. He provided two affidavits at the request of RO, that were prepared for and used in the course of a summary trial application that was heard in early 2019. Unfortunately, Mr. Li passed away before this matter came to trial. Mr. Li's two affidavits were admitted into evidence at trial.

[30] In terms of CPC's general production procedures, Mr. Ying's evidence was that, when a project was sent to his group, they would be provided with a "Production Sheet" prepared by someone in the office. That is the only document he would be given. He would not, for example, see a customer purchase order, a CPC quotation sheet, or any other document. Rather, someone in the office would review all of those documents and provide him with a production sheet that would constitute his instructions.

[31] The production sheets from the May 2016 work were in evidence. There are three such sheets. They are in a form that appears to have been created by a word-processing program, with certain typed information added to the form (presumably by the "someone in the office" described by Mr. Ying), and then a few handwritten notations. For example, near the top of the production sheet, there is a space for

"Product Name", where the words "Chaga 5:1-A Powder Extract" have been typed. For "Specifications", the typed words are "Brawn [*sic*] Fine Powder".

[32] Each of the forms has boxes for "Start Date" and "End Date". These boxes are completed with handwritten notes – the first page shows "May 25" and "May 26", the second shows "May 26" and "May 27", and the third has a blank start date and a finish date of "May 27".

[33] The middle section of the form is titled "Dispensing Records". The first of the three pages provides as follows:

a) It specifies that the raw material is to consist of 50 kg of client-supplied Chaga, which is to be mixed with 300 litres of pure water. The instructions then say:

> Extract with 80 ºC & 6 hour under high pressure (480 psi/4.0Mpa), then filter it. 253 litres
>
> Evaporate it to: 180 litres

b) Under Part 2, the instructions then provide for the addition of 8 kg of Maltodextrin, then to "Mix well & Oven dry" and then to "Grind or sift", all of which should produce 10 kg of powder extract.

c) The only portions of this part that are handwritten are Mr. Ying's name (he says he wrote his name there so it would be known who did the work) and a correction to the amount of Maltodextrin – the handwritten change is to 6 kg.

d) The final section is titled "Manufacturing Instructions". The typed note says "After Spray dry, grind or sift". A handwritten note in this section records "one bag 10 kg". A handwritten note at the bottom of the page (which appears to be in a different handwriting than Mr. Ying's notations) says:

> [Dr. Cai] to send to client for lab testing – if passes, then encapsulation needs to start.

[34] The second page is similar, except that rather than 300 litres of pure water, the “Chaga after water extraction” is to be mixed with 150 litres of 70% ETOH (ethanol). The instruction then says:

> Extract with 80 ºC & 6 hour under high pressure (480 psi/4.0Mpa), then filter it. 127.5 litres
>
> Evaporate it to: 90 litres

[35] The third page of the production sheets provides that the two 10 kg packages of Chaga powder extract are to be dealt with as follows:

> 1. Blend above ingredients as per blending instructions.
> 2. Package as instructions.

[36] Mr. Ying identified his signature on these three production sheets. His evidence was that he did the work on his own. The supervisor, Mr. Cheung, was away, and although Mr. Li was available to him, he was helping the packaging department with an urgent order and this was a relatively small project which Mr. Ying was able to complete on his own. He said that his practice was that, just before starting work, he would write down the start date. The various other handwritten notations would be added by him after the work was ended. Then someone from the office upstairs would come down to collect the production sheet.

[37] Mr. Ying said that the quantities for the production (50 kg of Chaga, 300 litres of water) was something determined by the people who prepared the production sheet and not by him.

[38] He said that the first extraction was done using 300 litres of water. After the extraction was done, the water was extracted into another tank to be concentrated, with the remaining Chaga solids left in the tank. The next day, he did the alcohol extraction.

[39] His evidence was that he used 70% alcohol for the alcohol extraction procedure. Because the alcohol the company had on hand was 100%, he would dilute it – in this case, by combining 105 litres of alcohol and 45 litres of water. He

would do so by adding each of the alcohol and water into a square container, mixing them, then lifting up the container with a forklift, placing it over the equipment, and opening up a valve.

[40] Mr. Ying's evidence, based on having recorded 10 kg of finished product from each extraction, was that the total finished product was 20 kg.

[41] Mr. Li's evidence was that he worked with Mr. Ying. In an affidavit made April 25, 2018, he said that the 50 kg of Chaga was placed in a tank which was then filled with a combination of alcohol and water, that the lid was closed and the tank was heated to around 230 ºF (which took 3-4 hours), then they waited a bit before turning off the heating apparatus and extracting the liquid to a parallel tank. The liquids in the second tank were then heated – which again took 3-4 hours – following which alcohol was removed from a side apparatus that allows alcohol to be recycled, and then the remaining concentrated Chaga liquid was removed to the spray-drying facility.

[42] As noted, the third day of the extraction process was May 27, 2016. That afternoon, Dr. Cai emailed Ms. Liou asking:

> Would you please give a written confirmation that the water extract part of Chaga and the Alcohol extract of Chaga need to be mixed together first and then pick the mixed powder for testing?

[43] Ms. Liou responded:

> Yes Carina our final products have to combine the two extracts – water and alcohol. Therefore, the 50 kg raw Chaga will turn out to 20 kg of powder products. Thank you

[44] Ms. Liou's evidence was that, after the initial batch of Chaga had been processed, Dr. Ma gave her a bottle of the powder, which she sent to Silliker for testing. Silliker's records indicates that a sample of Chaga powder was received on June 1, 2016.

[45] RO paid a further deposit to CPC on June 1, 2016 of $3,700. The "re" line on this cheque stated "NPN application". On June 2, 2016, CPC issued its invoice 16-

9355 to RO for NPN application fees for nine different products, including Chaga capsules. The amount invoiced was $3,700 plus taxes, for a total of $3,885.

[46] On June 14, 2016, Health Canada issued a product license for Chaga capsules. The license specifies the medicinal ingredient as Chaga (inonotus obliquus).

[47] On June 16, 2016, CPC and RO entered into a Confidential Non-Disclosure Agreement (the "June CNDA"). The main document was a standard CPC form and was somewhat generic in nature. It provided that the parties would use confidential information they shared "for the sole purpose of evaluating their proposed project" and that they would limit disclosure of such information to those persons reasonably necessary to evaluate their proposed project. Ms. Liou agreed that this was requested by CPC and intended to keep their extraction procedures confidential.

[48] However, Ms. Liou asked that CPC add an addendum, drafted by her, which set out her then-understanding of the procedure to process Chaga powder, which was also to be confidential and to be protected by the June CNDA. She said this was important to her because she intended to eventually apply for a patent. The addendum described the process as follows:

> 1. The First Process: Hot water extraction – Performed under high pressure (480 psi / 4.0 MPa) at 80-90 degree C to. The volume of water being used is 8 times of raw materials. The extract process takes 6 hours long for retrieving bioactive constituents such as beta-glucans polysaccharides, melanin and polyphenols etc. The products are concentrated of 5:1 ratio in liquid.
>
> 2. The Second Process: Alcohol [Ethanol] precipitation for water-insoluble components, such as phytosterols, betulinic acid and botulin. The volume of 95% alcohol being used is 8 times of raw materials and the extract process takes 6 hours long. The products are concentrated of 5:1 ratio in liquid.
>
> 3. The Final Process: Combined and powdered the above two products into capsule of 300 mg each. The ratio of the final product: 1 [water extraction] : 1 [ethanol precipitation]

[49] Also on June 16, 2016, RO paid a further deposit of $20,000 to CPC. The only note on the "re" line of this cheque is "Ivy Liou". Ms. Liou's evidence was that she saw this as a deposit toward CPC's production of the Chaga product. However,

it appears that CPC applied the funds to nine different invoices over the next five months relating to a variety of different products that CPC was producing for RO.

[50] Also in about June 2016, RO began preparing promotional materials for what it described as its "Canadian Gem – Wild Chaga" product. Ms. Liou's evidence is that in mid-2016, they began heavily promoting the product.

[51] On July 6, 2016, RO received a COA from Silliker with respect to the processed Chaga powder it had submitted for testing on June 1, 2016. That certificate set out various tests performed, including a test for polysaccharides which indicated that the polysaccharide content of the product was 50.2%.

[52] Ms. Liou's evidence is that achieving a polysaccharide content at this level was key to RO moving forward with production. Based on her understanding of the market, she was of the view that a high polysaccharide content was key to customer acceptance of the product and to ensuring that the product would be saleable and become, to use her words, RO's "flagship product".

[53] Dr. Cai's evidence is that she was not advised of the test result in 2016, nor was she told prior to CPC embarking on processing the Chaga that RO required any particular level of polysaccharide content.

[54] In none of the documents exchanged between CPC and RO to this point is any particular polysaccharide content specified.

[55] Once the July 6, 2016 Silliker COA was received, work began in earnest on preparing for the processing of commercial-sized batches. I will describe that in the next section. Before turning to that, however, I note that with respect to the initial batch of Chaga:

a) On July 12, 2016, CPC issued an invoice to RO for processing the initial 50 kg batch of Chaga. The invoice price was $5,670, less a credit of $750, for a net amount of $4,920. CPC's financial records indicate that this invoice was paid by the application of the May 9, 2016 deposit of $3,000

and by the application of $2,670 from the June 20, 2016 deposit. It is not clear why the account statement did not include this $750 credit.

b) There are two revised versions of CPC's Sales Confirmation documents in the evidence, both dated July 13, 2016. The first of these (identified as RHO_071316) is similar to the April 28 document, except that:

   i. the quantity for the hot water extraction line item is 20 kg instead of 50 kg (presumably representing acceptance of Ms. Liou's assertion that the charge should be based on the final product, not the raw materials),

   ii. the line item for NPN application is deleted, and

   iii. a line item is added for encapsulation and packaging of the Chaga capsules – a quantity of 740.74 and a unit price of $2.68.

   These three changes lead to a reduction in total price (including tax) from $5,670 (in the April 28 document) to $4,499.44. This document appears to be signed by Ms. Liou on July 15, 2016.

c) A further Sales Confirmation document with the same date of July 13, 2016 and the same sales order number shows a unit price of $3.37 for the encapsulation and packaging, with the price for this line item (net of GST) increasing from $1,985.18 to $2,621.11. It appears to be signed by Ms. Liou on July 26, 2016. By my calculation, the actual fee for processing the 50 kg batch of Chaga is thus $5,135.37.

d) At some point in about July 2016, RO asked to proceed with the encapsulation and bottling of the initial batch of Chaga extract. With respect thereto:

   i. RO was asked by CPC to sign a "Product Specification Confirmation" form. It describes the "Quantity Ordered" as 90's x ± 740 bottles (20 kg processed Chaga Powder)". It set out various specifications for the

capsule shell, noted that the active ingredients were supplied by client, and that each capsule would contain 300 mg of Chaga Powder Extract. It set out sizes as well for the bottle types and size. With respect to Microbiological Tests, the “No” box was ticked. This document was signed by Ms. Liou on July 18, 2016.

ii. on July 24, 2016, Ms. Liou emailed Dr. Cai attaching the label that they had prepared for the Chaga capsules. The labels include a list of active ingredients; among them being 50.2% polysaccharides. Ms. Liou identifies this as a document by which she communicated to CPC her understanding that these were the active ingredients on the basis of which the Chaga capsule product was to be marketed.

e) On August 6, 2016, Ms. Liou wrote to Dr. Cai:

> I just found out that my 20 kG chaga was processed in May. Since it’s storage for almost three months, I believe we should have the powder undergone the microbiological test prior to encapsulation. I have to make an amendment on the attached previously signed PS confirmation. For time saving, please don’t change the sale confirmation, just sent me a new invoice (sale confirmation) of $150 CAD for microbiological test.
>
> I will call you on Monday to confirm the encapsulation schedule for this 20 kg Chaga processed within this week. In addition, I will deliver Chaga labels and a new batch of Chaga materials of 1,100 lb (500 kg) to your company in afternoon.
>
> Please prepare a 250 cc and 350 gm bottle for us to design our product label.

It is not clear why Ms. Liou had “just found out” about the processing of the initial batch, given that she had been provided a sample of the final product which she had taken to Silliker on June 1, 2016.

f) Ms. Liou’s evidence was that Dr. Cai recommended to her that they do microbiological tests prior to encapsulation to ensure there was no mould on the product. On August 8, 2016, CPC invoiced RO for $157.50 for the microbiological testing of the initial batch of Chaga powder.

g) On August 26, 2016, Ms. Liou also attended at CPC's warehouse to pick up 679 bottles of Chaga capsules produced from the initial 50 kg batch, which CPC had by then bottled and labelled. As well, CPC provided RO with a COA with respect to the Chaga capsules. That COA confirmed that testing for yeast, mould, various bacteria and certain heavy metals all showed a result of "Conforms". The COA also contains a heading for "Quality/potency". In that section, for "Active ingredients", the COA stated "Each capsule contains: Chaga PE 5:1 300 mg".

h) RO thereafter began selling these bottles of Chaga capsules, initially to people connected with RO. The advertised price was $128 per bottle. However, the product was sold on many occasions at less than advertised price. One of the other shareholders purchased 50 bottles on August 29, 2016, at a 20% discount. Three sales on September 6 and 8, 2016, were discounted by 20%, 50% and 50% respectively.

i) On August 30, 2016, CPC invoiced RO for encapsulation and bottling of the 50 kg batch of Chaga, as well as for a microbiological test fee of $150, for a total of $2,560.14, which was paid from the $20,000 deposit.

The Large Batch of Chaga

[56] At 11:05 p.m. on July 6, 2016, Ms. Liou emailed Dr. Cai, as well as CPC's general email address, regarding "purchase order of Chaga capsules". The email stated:

> I will deliver 1100 LB Chaga nuggets to your company for processing into powder following the below procedure:
>
> 1. The First Process: Hot water extraction – performed under high pressure (480 psi / 4.0 MPa) at 80-90 degree C to. The volume of water being used is 8-10 times of raw materials. The extract process takes 8-10 hours long for retrieving bioactive constituents. The products are concentrated by 5:1 ratio in liquid.
>
> 2. The Second Process: 95% Alcohol (Ethanol) precipitation for water-insoluble components / The volume of 95% Alcohol being used is 8 times of raw materials and the extract process takes 8-10 hours long. The products are concentrated of 5:1 ratio in liquid.

> 3. The Final Process: Combined and powdered the above 2 products into capsule of 300 mg each. The ratio of the final product: 1 [water extraction] : 1 [ethanol precipitation]
>
> Each bottle contains 90 capsules in amber bottle with “Green” Cap and put in each cartoon.
>
> We will provide raw materials as well as labels and cartoons for each bottle.

[57] The copy of this document in CPC’s files includes a “Received” stamp.

[58] Ms. Liou said she prepared this based on what Dr. Ma had told her they had done in processing the initial, 50 kg batch. She understood that the ratio of 8:1 for solvent to raw material was what had been used, and matched what she understood from her own research was commonly used for such extraction procedures in China.

[59] Dr. Cai’s evidence was that she had no involvement in the development of the process shown in this email. Upon receipt, she would have simply forwarded it to the front desk to be dealt with by the purchasing department. She said that her understanding, based on what was said in the initial meeting she attended in April 2016, was that Ms. Liou was content to allow CPC to adjust the extraction process as it saw fit, based on the company’s experience. She said this based on her recollection that Ms. Liou:

a) Understood that Dr. Ma was very experienced, and

b) Trusted Dr. Ma to do the process correctly.

[60] However, Dr. Cai acknowledged that she would have no involvement in production, and that it would be up to the production manager to discuss with the client how the process would be carried out.

[61] The next day (July 7, 2016), RO ordered 1,100 lbs of Chaga from its Quebec supplier, at a price of $19,800.

[62] Also on July 7, 2016, CPC sent a “Sales Confirmation” form to RO. That confirmation referenced Purchase Order number 070716-271, noted that a deposit of 30% or $14,687.92 would be required, identified the lead time as 5-6 weeks after

all material arrives, and set out a contract price of $46,628.33 plus GST, for a total of $48,959.75. With respect to “Product Processing”, the document stated “Please refer to the product specification confirmation”. A copy of this document was signed by Ms. Liou and returned to CPC on July 26, 2016.

[63] On July 18, 2016, CPC sent a Product Specification Confirmation form to Ms. Liou. That form provided details of such matters as the capsule shell, packaging and shrink wrapping. There was a box to indicate whether microbiological tests were required – on this form, the “No” box was checked. This form was signed by Ms. Liou on July 18, 2016.

[64] On July 20, 2016, Ms. Liou submitted a patent application for a dual extraction process for Chaga. The process specified in the patent application was that set out in the addendum to the June CNDA. Ms. Liou said that she did not have any legal advice – she simply asked one of her employees to fill out the form, and she thought that stating that a patent application had been made would be part of her marketing of the product.

[65] Ms. Liou’s July 24 email also asked:

> BTW, please inform me [when] any of my other formulating supplements are ready to apply for NPN. It’s already been a long time, over a month, your colleagues still working on it.

[66] On August 1, 2016, RO ordered a second batch of 1,100 lbs of Chaga chunks from their Quebec supplier.

[67] On August 5, 2016, RO sent a further $30,000 deposit to CPC. The “re” line of this cheque was blank. It was deposited by CPC on August 11, 2016.

[68] On August 6, 2016, Ms. Liou sent a further email to Dr. Cai and to CPC’s general email line. The email’s subject line stated “purchase order of Chaga capsules – the third batch”. It confirmed that RO would be delivering a further 1,100 lbs (500 kg) of Chaga nuggets for processing. It again set out the process – using exactly the same language as in the July 6, 2016 email with respect to the first 1,100

lb batch, other than that the bottle cap was to be black rather than green, and it added the words:

> Please be advised that we don't need to process the residue to powder this time.

[69] On August 10, 2016, CPC sent RO a sales confirmation and a product specification confirmation for the second 1,100 lb batch of Chaga. With respect to these documents:

a) The sales confirmation is very similar to the one sent on July 7, 2016, except that it does not include a $5,000 charge for "Residue – dry and ground". As with the July 7, 2016 sales confirmation, it states: "Product Processing: Please refer to the product specification confirmation."

b) The product specification confirmation is similar to the one sent on July 18, 2016, except that for microbiological testing, the Yes box is checked.

[70] Ms. Liou's signature on the August 10, 2016 sales confirmation is dated August 10, 2016.

[71] CPC received the two 1,100 lbs deliveries of raw Chaga from RO on August 10 and 23, 2016, respectively.

[72] On August 18, 2016, CPC sent RO a quotation for five other products. One of them was called "Beauty Secret Powder for Women 30's+ in Powder", for which the quotation was $12.52 per bottle. The quotation specified the contents for the product, which included 4000 mg/10 g of "Chaga Fiber (Client Supplied)" – which the evidence indicated was to be the residue of the raw Chaga after the Chaga capsule extraction had been completed. This product gave rise to a second set of issues in this action, which will be discussed further below. The other products were Organic Soybean Protein Powder with vitamins and minerals, Eye Formula Capsule, Joint Formula II Capsule and Skin Beauty Formula.

[73] On August 23, 2016, RO paid a further deposit of $50,000 to CPC. Ms. Liou's evidence was that the three large deposits provided in June through August of 2016 ($20,000, $30,000 and $50,000) were all related to Chaga. She said that these amounts were paid – even though they exceeded the 30% deposit required by CPC for the Chaga processing – because she wanted to establish a good relationship with CPC.

[74] On August 24, 2016, CPC provided RO with a Sales Confirmation form for the five products on which it provided quotations on August 18, 2016. The total amount of the quotation was $45,475.50, and the deposit requested was $13,642.65. The Sales Confirmation stated "Lead Time: 5-6 weeks after all material arrives". It seems clear from the evidence that, although the five products were all produced by CPC, there was no other deposit paid beyond the three amounts described in the previous paragraph.

[75] On August 26, 2016, Ms. Liou signed the Sales Confirmation form that CPC had sent two days earlier.

[76] In mid-September 2016, there was a dispute amongst the shareholders of CPC. Dr. Ma, the founder of the company, was dismissed from his work with the company. The circumstances of his dismissal were unpleasant – a director's meeting was held with legal counsel present, a vote was taken, and immediately after the vote, security guards who had been brought in, along with two of the other directors, immediately escorted Dr. Ma from the building. I note that the evidence was inconsistent as to the specific date this occurred – at one point, it was said to have happened on September 13, while at another point, it was said to have happened on September 15.

[77] Dr. Ma's daughter, Jie Ma, who had been CPC's production manager, also left the company. There was no production manager in place until mid-November 2016.

[78] Also in mid-September, 2016, work began on processing the two large batches of Chaga. There is no contemporaneous note of when that occurred. However, when various investigations were undertaken the following year, Mr. Ying recalled that about two days' worth of production had occurred with respect to the Chaga at the time that Dr. Ma was removed from the company.

[79] Three witnesses gave evidence as to the process followed when these two large batches were processed: Mr. Ying (who had processed the earlier batch), Mr. Cheung (who was his supervisor) and Mr. Li, who assisted them as required.

[80] The supervisor, Mr. Cheung, was apparently away when the initial 50 kg batch was processed, but was at work and involved in production of the large commercial batches in the fall of 2016. In terms of background, he was educated in Hong Kong, then moved to Canada permanently in 1997 and began working at CPC. He had no post-secondary education and no training in the pharmaceutical industry, but worked his way up within CPC, learning primarily from Dr. Ma, and ultimately became the supervisor of the liquid department, which was one of CPC's production groups (the others being capsule/tablet and packaging). He retired in 2019.

[81] Both Mr. Cheung and Mr. Ying said that they followed the instructions provided to them by the production records. As will be described further below, when controversy subsequently arose, CPC was unable to locate the actual production records from the time. However, both Mr. Cheung and Mr. Ying were confident that they had production sheets at the time the production occurred. Presumably, those production sheets were prepared by someone from the production department – likely Jie Ma, prior to her departure from the company.

[82] The evidence included a photograph of the extraction tanks – which are two somewhat similar looking tanks side-by-side. Mr. Cheung explained that, while both tanks can be used for extraction, the way he and his crews used the tanks was to use the left tank for extraction, then move the liquid to the right tank which was used for concentration.

[83] Mr. Cheung recalled that, when dealing with the Chaga project beginning in September 2016, the first task was extraction with water. They began by loading a set amount of Chaga material into the extraction tank, then filling it up with water. Because the Chaga would float, they would use a pole to push it down until it absorbed water. His recollection was that they put about 80 kg of Chaga into the tank each time. He said they added 500 litres of water to the tank for each water extraction. He did not need to measure the water, because he can tell how much water there is based on his 20 years of experience. Mr. Cheung said that the capacity of the tank is 500 litres – it is not clear how he was able to put 500 litres of water into a tank that already had 80 kg of organic material in it, but that was his evidence.

[84] Mr. Cheung's evidence was that he would keep an eye on the tank as it was heated and boiled, and that if the water level went down, they would add water. Initially, they would cover the tank with a metal lid with holes, which allowed them to use a pole to keep pushing down the Chaga. His view was that, by the time the water was fully absorbed by the Chaga and the tank was full, there would be enough water for there to be eight times the amount of raw Chaga. Once that had occurred, they would put the solid lid on. That lid is necessarily closed for the extraction and concentration to take place.

[85] Mr. Cheung said that work would generally start about 9 a.m. each day, the product would reach the boiling point of 100 degrees Celsius by about 11:30 a.m., and the process would continue with the lid closed until about 4 p.m., at which time the liquid would be moved over to the other tank.

[86] Mr. Cheung said that the alcohol extraction would be done in a similar manner. They would use 100% alcohol, but Mr. Cheung's evidence was that "when you pour it in it comes out more like 75%". I took that as a reference to the liquid that had been absorbed the previous day during the water processing. With the alcohol extraction, the mixture boils around 70-73 degrees so the temperature is different than with the water. Again, upon completion of the extraction process, the liquid

would be moved to the other tank for concentration and the remaining Chaga residue in the initial tank removed.

[87] Mr. Cheung's evidence was that, after the production of this product was completed, someone from upstairs collected the production sheets. He did not recall being subsequently asked how he processed the Chaga.

[88] Mr. Ying's evidence was that the 1000 kg of Chaga came in the form of pallets each of which was about 172 kg. A pallet would be brought in, and half (approximately 86 kg) would be placed in each tank. His recollection was that the job started around September 10 (with only about two batches having been done before Dr. Ma's departure), and finished around October 20, but that in between, there were other products that had to be processed so they would stop work on the Chaga product to work on other urgent jobs.

[89] When Mr. Ying was shown the production records that were eventually produced, he said the dates on the production sheets were likely based on someone else's recollection. He was firm in his recollection that the start was just before Dr. Ma's departure, while the job was finished just before Mr. Cheung went on a long vacation on October 22, 2016.

[90] Mr. Ying said that, after each batch had been processed, they removed the Chaga residue from the tanks and put it on top of cardboard that was laid on the floor.

[91] Mr. Ying said that Mr. Cheung was primarily dealing with the product in the tanks, while his own focus was on dealing with the spray dry of the liquid product as well as assisting Mr. Cheung to load the raw material and remove the residue. He said that Mr. Li and another person, a Mr. Ping, also helped with removal of the residue.

[92] Mr. Li, in his April 2018 affidavit, said that with respect to the batches of Chaga processed in the fall, he and Mr. Ying loaded Chaga raw material into the tank, then poured alcohol and water in until it was nearly full, but were unable to affix

the lid because the tank was so full, so instead they placed a perforated metal sheet on top of the tank. As with the previous batch, the tank was heated to 230 degrees Fahrenheit (which took 3-4 hours), then left to boil for a bit longer before the heating apparatus was turned off and the liquid extracted to a parallel tank. The liquids in the second tank were then heated – which again took 3-4 hours – following which alcohol was removed from a side apparatus that allows alcohol to be recycled, and then the remaining concentrated Chaga liquid was removed to the spray-drying facility.

[93] Mr. Li's evidence was that he and Mr. Ying removed the Chaga residuals from the first tank and placed them in plastic bags. They waited two to three days before closing and tying the plastic bags, then placed them into cardboard boxes and placed them on the warehouse shelves.

[94] Mr. Cheung disagreed that Mr. Li was involved. He said that Mr. Li drove the forklift around, and helped to clean out the tanks, but was not part of the extraction process.

[95] Ms. Liou's evidence was that, at some point in the fall of 2016, she asked to speak with Dr. Ma as to why the Chaga was taking so long to process. In late October, she learned from others in the business community that Dr. Ma had been removed from the company. In early November 2016, she arranged to meet with the defendant Mr. Lim, who was the CPC director responsible for its ongoing operations. On November 7, 2016, Dr. Cai emailed Ms. Liou to confirm that she would be meeting with Mr. Lim the next day. Ms. Liou also requested a sample of the processed Chaga extract for laboratory testing, but was told it was not yet available.

[96] At the meeting on November 8, 2016, a new CNDA was signed. The document is in the same form as the one that had been signed in June 2016, including the schedule setting out the Chaga processing procedure, but it was signed by one of CPC's then-directors (Mr. Loh) instead of by Dr. Ma. Ms. Liou's evidence is that it was important to her to have a CNDA in place with the new management team.

[97] At some point in November 2016, Dr. Cai was appointed CPC's Manager for Quality Control, and Alice Chen was appointed as Production Manager. Ms. Chen had previously worked as the assistant to Jie Ma. Ms. Chen testified, although she continued to work as a production assistant between the September 2016 departure of Jie Ma and her appointment as production manager in November 2016, she had no involvement in the processing of the Chaga product in the fall of 2016.

[98] As noted above, Mr. Wang joined CPC in October 2016, initially as Chief Scientist and then, in November 2016, as Vice President, Production, and Chief Scientist. His background included a Master's degree in natural product chemistry and pharmaceutical analysis from China. He had worked for CPC from 2003 to 2013 in research and development and QC. When he became VP Production and Chief Scientist, he was in charge of research and development work as well as overseeing the QC and QA groups. Mr. Wang was not involved in the processing of the Chaga in the fall of 2016, but he was involved in 2017 in dealing with issues that arose with respect to it.

[99] The evidence included a photograph of a bottle of the Chaga extract product produced in the fall of 2016, with a handwritten date on the bottle of November 9, 2016. It appears that the date was written on the bottle by the people who prepared the bottle. Ms. Liou's evidence was that this bottle was not provided to her until November 28, when Dr. Cai called her and told her the product was ready to be picked up.

[100] On November 29, 2016, Ms. Liou took the bottle to Silliker for testing. Silliker's COA was dated December 29, 2016. It showed a polysaccharide concentration of 6.0%. Ms. Liou was very disappointed with this result, given that the Chaga extract produced from the 50 kg batch had tested at 50.2%, and even the raw Chaga that she had tested had a polysaccharide concentration of 8%. I note that the raw Chaga that was tested in the spring of 2016 was ordered separately, although from the same producer. While Ms. Liou testified that she believed it to have likely

come from the same batch of harvested Chaga, she had no actual knowledge of that matter.

[101] Ms. Liou was of the view that the product could not be sold if the key active ingredient was at a 6% level. She said that she called Dr. Cai to express her concern. Dr. Cai was going back to China for a time, so Ms. Liou said she ended up talking to Mr. Wang. Her evidence was CPC told her they would do some testing and an investigation to try to figure out the reason for this result.

[102] Dr. Cai's evidence was slightly different from that of Ms. Liou. She said that Ms. Liou told them that if they could re-do the test, and get a better result for the polysaccharides, then that would do. Dr. Cai said that over the next few months, CPC embarked on research with respect to possible testing methods, and conducted various tests on the processed Chaga extract, but were unable to get a consistent result. Her evidence indicated that the testing work was done in about March and April 2017.

[103] Mr. Wang's evidence was that he had no direct dealings with Ms. Liou until the summer of 2017, and that any involvement he had prior to that time was indirectly through Dr. Cai. I note that the evidence includes a photograph taken on February 20, 2017, involving a visit to CPC's facility by Ms. Liou and a Dr. Maret, who had been hired by RO to be a spokesperson for the Chaga product. The photo shows the two of them along with Dr. Cai and Mr. Wang in front of the two processing tanks that CPC had used to produce the Chaga extract. Ms. Liou said that, on this visit, Mr. Wang and Dr. Cai explained to them how the extraction had been done with the tanks. Dr. Cai in her evidence confirmed the photograph, but said that it was Mr. Wang doing most of the speaking because she was not familiar with either the equipment or the production process.

[104] Ms. Liou's evidence was that, while this investigation by CPC was under way, she continued ordering other products from CPC. In cross-examination, it was suggested to Dr. Cai that she and Mr. Wang were simply trying to put off Ms. Liou with respect to her Chaga product so that they could continue the other work they

were doing for her. Dr. Cai said she simply remembers that Ms. Liou agreed that CPC would do an investigation and that she would wait for the results.

[105] On January 25, 2017, Ms. Liou sent an email to CPC stating:

> To Whom It May Concern
>
> Please serve this email as a written notice to stop processing our Chaga product instantly, such as dual extraction on raw chaga nor encapsulated the extracted Chaga and not to powder the residue as well, due to the lab result which revealed a quality concern. I have already brought it to [Dr. Cai] and [Mr. Wang] in the first week of January and believed they are following up on it.
>
> For not worsening the problem, please hold all the process of our Chaga which we delivered to your company in Aug 10, 2016 of 513 KG and another batch was delivered on Aug 23, 2016 of the same 513 kg. However, of which, I can just find 1 sale confirmation from my record. (I supposed should receive 2 sale confirmations). Please check with the enclose documents.
>
> Please feel free to contact me for this matter and keep me posted in your follow up.

[106] Mr. Wang's evidence was that CPC treated this email as a complaint about quality, which led to CPC initiating its process for investigation. That required the QA/QC and production departments to investigate the complaint to determine whether there was really an issue and, if so, what the possible causes were. He said that one of his first steps in this investigation was to review the production records to see how the product had been processed.

[107] The evidence of both Mr. Wang and Ms. Chen was that CPC did not have the production records that should have been created in the fall of 2016. The paper copies should have been collected at the conclusion of the processing and, after review, filed by the QA department in a filing cabinet in the office area. However, they could not be found. As well, their evidence was that CPC no longer had the computer that had been used to generate the production sheets, so they were unable to locate an electronic copy of the documents that would have been given to the production staff the previous fall.

[108] Mr. Wang and Ms. Chen testified that they spoke on two occasions with three staff members from the production department: Mr. Cheung, Mr. Ying and Mr. Li.

The timing of these two sets of discussions is unclear. Mr. Wang thought it was in May or June. Mr. Ying thought it was in about May 2017. Mr. Cheung did not recall having ever been asked about this. Mr. Li gave evidence in an affidavit made in November 2017 that it was about June 2017 when Mr. Ying was asked to sign the resulting documents. What is clear is that, by July 26, 2017, a “replacement” set of records was made available to RO staff to review.

[109] Mr. Wang recalled that, when it came to determining what production dates to use, Mr. Ying had told them that he remembered specifically that the production began one or two days before Dr. Ma left the company. Although Mr. Wang searched for other ways to verify the production dates, he found nothing more accurate than that.

[110] After the two meetings with the technicians, Mr. Wang went to the then-director of the company, Mr. Lim, to ask for instructions as to how to deal with the situation. He provided Mr. Lim with information on what the technicians had said, as well as what was on the order information. Mr. Lim advised Mr. Wang that the information that had been collected should be put on paper. Mr. Wang asked Ms. Chen to prepare the production records based on her understanding of what had happened, and using CPC’s template for production records.

[111] I turn to the evidence from the technicians to whom Mr. Wang and Ms. Chen spoke. Mr. Cheung denied having been asked by a colleague how the processing of the 1,000 kg batch of Chaga had been done.

[112] Mr. Ying recalled having a conversation with Mr. Wang. He understood that Mr. Wang had similar conversations with both Mr. Cheung and Mr. Li as well, although they were individual conversations rather than a group. Mr. Ying said that when Mr. Wang spoke with him, he had with him the production sheets from the initial, 50 kg batch, and asked about how the 1000 kg batch was processed. Mr. Ying told Mr. Wang roughly the number and the approximate weight of batches, but that he was doing it by memory which might not have been accurate because he was not the one responsible for the processing (rather, he was assisting

Mr. Cheung). Mr. Ying said he told Mr. Wang that they processed 172 kg in each batch, and that each batch was separated into two tanks.

[113] Mr. Ying said that later on, Ms. Chen came to him with production sheets and asked him to sign them. He said there was little discussion at the time – just that the company required him to sign the documents. He understood that Mr. Cheung did not want to sign them because he said that some of the batches were not done by him. He said he asked some questions about points that did not match his recollection – in particular, Mr. Ying recalled using 70% alcohol but the sheet said that 95% alcohol had been used – but was told that Mr. Cheung thought the information was accurate. He said as well that the initial sheets he signed said that the batch sizes were 86 kg, but that a few days later, he was asked to re-sign the sheets, and saw that the batch size had been changed to 60 kg. He says he asked about the change, and they gave him an answer, but he could not recall what the answer was. He said he did not think being asked to sign documents was particularly complicated, and he trusted the people who had put the documents together. He was not told that the documents were being prepared to show the client – he had simply been told that the company's original documents were missing.

[114] Ms. Chen's evidence was that she only ever prepared one set of production sheets for Mr. Ying to sign.

[115] Mr. Li deposed that he saw Ms. Chen come to Mr. Ying's workstation and ask him to sign a document about the Chaga capsules, and thought this was notable because it happened in about June 2017, while the work had been completed in about October 2016. He recalled hearing Mr. Ying tell Ms. Chen that he did not want to sign the document because it was not right, but that Ms. Chen told him not to worry and to just sign the document. Mr. Li also said that Mr. Ying had told him that he had to sign the document, even though the information in it was false.

[116] Mr. Ying denied telling Mr. Li that there were incorrect statements in the documents. He said he looked at the documents, and asked questions, but they told him there were no problems with it, and that Mr. Cheung had confirmed some of the

information. He did not recall telling Mr. Li that he had been asked to sign a second set of documents, but said that Mr. Li might well have seen someone come down to ask him to sign the documents.

[117] On cross-examination, Mr. Ying was asked about a dinner conversation he had with Dr. Ma in early July 2017. Mr. Ying said he was not aware the conversation was being recorded. He noted that, between the time he signed the documents and the time of the dinner, he had learned that some of his colleagues at work felt he should not have signed them, and he had learned that Mr. Cheung did not admit to having been involved in all of the production. Mr. Ying had reservations because, although the work was not actually done by him, he had to sign the document and take responsibility for it. Mr. Ying acknowledged that he had responded “Yes” when Dr. Ma asked him if Mr. Wang had asked him to lie for false documents. However, Mr. Ying said at trial that it was actually Ms. Chen who had asked him to sign the documents.

[118] Mr. Ying explained that when the documents were given to him to sign, he took it very innocently and, even though the documents did not accurately reflect what he recalled, he believed they were accurate because of the information that had come from others. He said he was trying to be “obsequious” at the dinner with Dr. Ma, and that at the time, he was angry and upset at the position he had been put in.

[119] I note in passing that neither the recording nor a translated transcript of it (the recording being in the Chinese language) were accepted in evidence. However, both Mr. Ying and Dr. Ma gave evidence about their conversation. Dr. Ma explained that he made the recording because he was a major shareholder of the company, who had been excluded from its business operations, but was concerned at things that were going on.

[120] On May 5, 2017, Ms. Liou emailed various CPC employees with an email titled “What’s Going On?”. The email asked a number of questions, including:

> As mentioned, our retail is going to grand opening. Has your company had already ordered Organic Protein Powder for our two protein powder products?
>
> Also, how's going on about the test for our Chaga? When I can get the result to proceed to production. It's not good for Chaga powder being exposed without encapsulation for such a long time.
>
> Thank you for your attention on our concerns.

[121] Dr. Cai's evidence was that she did not recall this email; rather, her recollection was that after the January 25, 2017 email stopping production, there had been no further discussions.

[122] Dr. Cai replied to the email later on May 5, 2017, stating:

> Yes we've signed the PO for the Organic Soymilk Powder and hopefully we can receive the product soon. And per our discussion, we'll prepare the new samples with some additional excipients for the taste.
>
> We've got the testing result of the content of Polysaccharides in our in-house lab, but for the Beta-Glucans testing, we've contacted some third party labs, and should get some confirmation in the next week.
>
> Yes, we'd like to move ahead with the Chaga PE encapsulation soon because based on our experience of the first batch of product, we know this is a really good product.
>
> Please let me know if you have any question. Thank you for your support and patience.

[123] With respect to this email, it was put to Dr. Cai that she was aware that RO was on a tight schedule for the opening of their store. Dr. Cai's evidence was that she had no knowledge of RO's store. [It is not clear what she understood from the earlier email that day, which said "our retail is going to grand opening".]

[124] RO opened its store at Lansdowne Centre on June 8, 2017. As part of that, it had prepared extensive marketing materials, had placed stories in both Sing Tao and The Province, and had hosted a launch event at a hotel in Vancouver. By this time, RO had over 100 products for sale, but Ms. Liou viewed the Real Chaga Capsules and Beauty Secret Powder as their flagship products. The products were promoted, although only a few jars of the Real Chaga Capsules and none of the Beauty Secret Powder were available.

[125] Also in June 2017, RO paid some US $15,000 to an online retail website, JD.com, to make use of that website in conjunction with its bricks-and-mortar store.

[126] By June or early July 2017, Ms. Liou was very frustrated with the lack of answers acceptable to her with respect to the status of the original Chaga project, and it had been approximately six months since her initial discussion with Dr. Cai about the December 2016 Silliker test result. At some point in July 2017, she asked Dr. Cai to see if she could look at CPC's production records.

[127] On July 11, 2017, Dr. Cai sent an email to Ms. Liou, stating:

> Per our discussion, attached please find the ducuments [*sic*] of Chaga PE manufactured last year, including two COAs of two different batch of Chaga PE and one Batch Summary.
>
> Please let me know if you have any question

[128] The two COAs each refer to a batch of 200 kg of Chaga powder extract, produced with water and ethanol. One describes the manufacture date as October 2016; the other describes the manufacture date as November 2016. Each indicates test results for yeast and mould, bacteria and residual solvents as "conforms". Both are dated July 11, 2017, and signed by Dr. Cai as "Senior Scientist, Quality Control" as well as by Dr. Peudru, who is described as "Senior Scientist, Quality Assurance".

[129] The other attachment is titled "Batch Summary of Chaga PE". It does not appear to be a standard form; rather, it provides nearly identical information with respect to each of the two large batches. With respect to the first batch, it states:

> 1. PO#: 070716-271
>
> – Raw Chaga material 513 kg was received on Aug. 10, 2016
>
> – Manufacture period: Sep 14, 2016 to Oct. 11, 2016
>
> – Manufacture procedure:
>
> A: Hot water extraction – Performed under high pressure (480 psi / 4.0 MPa) at 80-90 degree for 8-10 hours. Using 8 times of water (w/v). The products were concentrated of 5:1 ratio (w/w).
>
> B: Alcohol extraction – Using 8 times of 95% Ethanol (w/v) and extract for 8-10 hours. The products were concentrated of 5:1 ration (w/w).

> C: Combined the above two powder extract with 1:1 ratio (w/w) to 200 Kg semi-powder product with Lot# PE81-2J3070.

[130] The information for the second batch was very similar, other than that the PO# was 080816-236, the material was received on August 23, 2016, the manufacture period was October 12, 2016 to November 8, 2016, and the Lot# was PE81-2A2080.

[131] Dr. Cai's evidence was that she prepared the batch summary based on the original purchase order sent by Ms. Liou in the summer of 2016. It was not made based on the production records that had been prepared in May or June 2017. She was not sure whether she had seen those production records at the time she prepared the batch summary. She said that she prepared the batch summary in order to communicate to Ms. Liou the information that she understood Ms. Liou to be looking for: when CPC received the order, when the products were made, and the order number.

[132] I note that the dates of manufacture on this document match what was in the re-created production documents that Mr. Wang and Ms. Chen were preparing. Mr. Wang's evidence was that the best evidence he had of the dates of manufacture was Mr. Ying's recollection of the start date – although as will be discussed below, none of them seemed to accept Mr. Ying's recollection of the end date (October 22). That may be because it would not have been possible to process the materials in small enough batches to match the purchase order requirements as to ratios of solvent to material in the time Mr. Ying said the work had been completed.

[133] Dr. Cai explained that she prepared this batch summary when Ms. Liou asked to see CPC's production records, and she learned that CPC's practice was not to provide original production documents to clients. She said that under normal conditions, a customer will not request a batch summary. When asked if this is a record kept by CPC in the ordinary course of business, her answer was that a batch summary is provided upon a customer's request and is only for showing to the customer.

[134] Ms. Liou was unsatisfied with the batch summary and continued to press to see the actual production records.

[135] On July 18, 2017, Mr. Wang sent an email to Ms. Liou, stating:

> Thank you for your valued business with CPC first!
>
> Regarding your request for detailed production batch records of chaga project, we have consulted with our lawyers. Those documents can be accessed and reviewed at our office only. This is company policy. Only batch summary and test reports can be sent to client for reference. If you and your partners want to check the details, please contact us.
>
> Should you have any questions or concerns with regard to above-mentioned matter, please feel free to contact us.

[136] Ms. Liou said that she reviewed this communication with her shareholders, who were unhappy that they could not be provided with the documents directly, but were at the same time not confident of their English language skills. It was suggested that she attend with some employees to conduct a detailed review of the production records and report back.

[137] On the morning of July 26, 2017, Ms. Liou and three of her employees went to the CPC office. The four of them met with Dr. Cai and Mr. Wang in a boardroom. Dr. Cai provided them with a stack of paper that was said to be the production records. Ms. Liou recalled being surprised because the documents seemed to be on fairly clean paper – not what one would expect from documents maintained and marked up on the production floor. She asked again if she could take a copy to show her shareholders to explain what had happened. Mr. Wang said “no”. It appears to be common ground that neither Dr. Cai nor Mr. Wang told Ms. Liou or any of her employees at that meeting that these were not the original production records.

[138] Two of the RO employees, Ms. Wong (RO’s office manager) and Mr. Beggs (RO’s marketing manager) gave evidence at trial with respect to what they did that day. Ms. Wong recalled asking a few questions when she first scanned the documents about some of them that showed a couple of days on which a smaller amount was processed. She recalled that Dr. Cai explained to her that that happened on two days as the remainder amount of each batch was processed.

[139] At some point, Dr. Cai and Ms. Liou left the room. The three RO employees remained, along with Mr. Wang. Mr. Beggs said that at some point, he began taking picture of some of the documents. He said that the CPC people clearly saw that he was taking photographs, but did not attempt to stop him from taking photographs. Mr. Wang said he did not pay attention to whether the RO employees were photographing the records.

[140] Mr. Beggs sent several WhatsApp messages to Ms. Liou, attaching photographs of several of the production records. The contents of the production records will be discussed further below.

Beauty Secret Powder

[141] Ms. Liou understood that some medicinal ingredients in the Chaga would remain even after the water and alcohol extractions had occurred. She planned a second product which would be made by drying out the Chaga residue, grinding it to powder and mixing it with certain other ingredients. The resulting product was to be called “Beauty Secret Slimming and Nourishing Powder”, and Ms. Liou described it as a second “flagship” product for RO.

[142] As noted above, CPC had provided an initial quotation for this product in August 2016. On November 15, 2016, CPC obtained a Health Canada product license and NPN number for the Beauty Secret Slimming and Nourishing Powder. The license stated that the product included a number of ingredients, including 3600 mg of Chaga per 10 g dose.

[143] On March 22, 2017, another CPC employee (Ms. Leung) sent Ms. Liou an email, apologizing for the delay, and attaching a revised quotation for Beauty Secret Powder as well as quotations for several other products. The cover email explained with respect to Beauty Secret Powder that the “slight increase from the previous quote in 2016” was due to a differently sized jar and a move to natural source Vitamin E, as well as to supplier price increases. The price was $13.61 per bottle (up from $12.52 earlier). Ms. Leung noted that a $400 set-up and clean-up fee was being waived to keep the costs down.

[144] The copy of this email produced by CPC includes a six-page set of "Contract Manufacturing Terms & Conditions". Ms. Liou denied having seen this document. It appears that it was something new management had put in place. There is no suggestion in the materials that it had ever previously been sent to Ms. Liou.

[145] Ms. Liou responded later on March 22, 2017, asking why there had to be a change in bottle size. Then on March 27, she emailed again, attaching signed confirmations and advising:

> I am still waiting for the updated quotation for Beauty Secret Slimming and Nourishing Powder. I can accept the slight increase of the price but not over $1 on each bottle. Please discuss this issue with Mr. Lin, since we are not the party to account for the delays.

[146] The attachment to this email, as produced by CPC, includes a Sales Confirmation form with respect to Beauty Secret Powder, signed by Ms. Liou but with the price crossed out and a reference to the earlier price. Also attached is the six-page Contract Manufacturing Terms and Conditions. Ms. Liou disputed whether the latter document was in fact a part of her email. This is potentially significant because these Contract Manufacturing Terms and Conditions included the following term:

> 8. Remedies for Defective Products
>
> 8.1 The Manufacturer should remedy the defects found in the Products expeditiously and in any case not to exceed 30 days after its confirmation of the defect. Where it is found that any of the Products contain defect that may impact the use, effect or marketability of the Products, then unless such defects are a result of deficiency or defects in the Client Supplied Raw Materials, the Manufacturer may, in consultation with the Client, reasonably elect to a) provide a reasonable discount from the pricing under the Order; or b) provide partial or full refund to the Client; or c) provide replacement products, taking into account the seriousness of the defects.
>
> …
>
> 8.3 The remedies provided under this Section 9 represent all the remedies available to the Client for any defective Products, and under no circumstances will the Manufacturer be liable for anything more than the costs of the Client Supplied Raw Materials.

[147] On March 28, 2017, Ms. Leung responded with a new quotation of $12.85 per bottle. In her cover email, she noted:

> We have changed back to 750 cc jars, cost is still higher than previously quoted in 2016 from supplier increases. I have been advised by production department when they were preparing for your order that your labels are extra long, will overlap. Our labelling machines are unable to label the overflap, it is a one pass labelling machine design. We will have to manually adhere the overflap, hence the extra $0.15/bottle. If the price is agreeable with you, please sign the quotation and send us a copy. The signed copy will be acknowledged as a Sales confirmation, to avoid delays.

[148] The documents include a CPC form of Product Specification Confirmation for the Beauty Secret powder, which is signed by Ms. Liou as of March 28, 2017.

[149] The documents at trial include a production sheet for the Beauty Secret powder, which appears to have a handwritten date of March 30, 2017. It contains a list of 14 ingredients, the first of which is client-supplied Chaga powder. Under “Lot No.” for that powder, a handwritten note says “Chaga residue”. Under “Manufacturing Instructions”, the form states:

> 1. Mix all powder for 40 minutes.
> 2. Package per instructions.

[150] It appears that the next event with respect to the Beauty Secret powder was that it was processed in late June 2017. The supervisor responsible for the production work was Kevin Ma, who was supervisor for the Tablet production group. Mr. Ma’s evidence is that, when he received the production order, he went to the warehouse to get the Chaga residue. He noticed that the residue was sticking to the wall of the plastic bag, the powder was wet to the touch, and that when it was fed into the high-speed grinder, the grinder became very hot. As a result, he reported the situation to the QC department to seek instructions.

[151] Mr. Ma’s evidence was that when he phoned the QC department, he ended up speaking with Dr. Cai, who came down to look at the Chaga residue, then went back upstairs to study the situation, and then came back down with instructions to use the hot air drying machine to dry out the Chaga residue. As a result, his crew

spread out the Chaga residue on a tray and put it in the air dryer. His recollection was that, because they could only dry a small amount at a time, it took something like two to three days to dry all of it.

[152] Dr. Cai did not recall any discussions with Kevin Ma about moisture on the Chaga residue. When asked if she went downstairs to meet with him, her answer was that there were other QC staff members who worked on the production floor and that she herself would not particularly go downstairs to the production workshop. Dr. Cai denied having given Kevin Ma any directions about drying Chaga powder, and said that any production issues would have been taken care of by the production manager. She said she was not aware of any mould concerns when the Chaga residue was being prepared for the Beauty Secret powder.

[153] I have difficulty with the suggestion that concerns like those raised by Kevin Ma would not be of significance to the QC department, and be left to the production staff to deal with.

[154] On June 29, 2017, one of the QC staff members conducted various testing for mould on the Beauty Secret powder that had been prepared. The results of the testing were recorded on paperwork that would eventually be reviewed by more senior staff.

[155] There was an exchange of emails in early July between CPC staff and Ms. Liou, with staff advising on July 5, 2017, that they were unable to fit 450 g of the Beauty Secret powder into a 750-cc bottle, so instead they would be using 1,000 cc bottles for which the cost was an additional 30 cents each. Ms. Liou responded by email at 12:49 p.m. on July 7, 2017. Her email dealt, in part, with a different, capsule product; with respect to Beauty Secret Powder, it stated:

> By the way, I have confirmed with [Dr. Cai] that I will pay for the different size of the bottle for our Beauty Secret Powder. Please make sure there's no more reason to delay our orders.

[156] The copy of this email produced by CPC includes among its attachments the Contract Manufacturing Terms and Conditions cited above. While the specific

attachments to this email relate to a different product, these are relied on by CPC to indicate that Ms. Liou was aware that these terms and conditions were part of CPC's contract terms under the new management.

[157] The documents include a sheet titled "Micro Test Records" with respect to the Beauty Secret powder. The document is dated July 13, 2017, although it has a handwritten note on it stating "tested on June 29, 2017". Mr. Wang said that the handwritten notation is his. He said that June 29 is the date that the testing was started, and that for micro testing for such matters as yeast and mould, it takes five to seven days for incubation. The date of July 13 shown on the report was likely the day the report was generated. It is signed by one of the QC technicians.

[158] Dr. Cai explained that this is a document that is prepared in the ordinary course by QC staff who are conducting testing for microorganisms, and that the report is then reviewed by her and by the QA manager and, if everything is in place, they would then issue a COA. Dr. Cai's evidence is that the usual process does not involve a discussion with the staff member who performed the testing; rather, her role was to review the documentary results of the testing and determine from that record whether a COA could be signed.

[159] A COA was signed on July 14, 2017, confirming that the product "conforms" with respect to various tests, including yeast and mould. It was signed by both Dr. Cai as Senior Scientist, QC, and by Dr. Peudru, Senior Scientist, QA.

[160] On July 14, 2017, CPC invoiced RO $13,839.32 for production of 991 bottles of Beauty Secret Powder. The invoice in CPC's records was marked "Paid". The accounting records that were produced indicate that the invoice was subsequently reversed on August 30, 2019.

[161] On July 19, 2017, Ms. Liou picked up the 991 bottles of Beauty Secret Powder. She had heard through Mr. Li that there were concerns about how the Chaga residue had been stored, and of the possibility of mould, and so she decided to have it tested by Silliker. Product samples were dropped off on July 21, 2017, and

Silliker issued a COA on July 31, 2017, stating that mould content was far beyond acceptable.

Dispute, Litigation and the Regulatory Complaint

[162] As noted above, it was the morning of Wednesday, July 26, 2017, that Ms. Liou and her staff members were at CPC to review production records.

[163] There were various discussions following that review, which led to negotiations about how to proceed with the Chaga capsule project. On the afternoon of Friday, July 28, 2017, Mr. Lim emailed Ms. Liou stating:

> Regarding your Chaga product we talked about yesterday afternoon: I have discussed it with our team. Enclosed please find following the two options we can offer for you to consider:
>
> Option 1
>
> Due to our busy production schedule and the quality dispute on the Chaga Powder Extract produced by CPC for RO, CPC can not take any further new orders of Chaga processing from RO. So please cancel the previous order of Chaga project (extraction, concentration and spray drying). CPC will provide the same grade and same amount of Chaga mushroom raw material to RO for replacement.
>
> Option 2
>
> If you insist that CPC process the Chaga for you, we need to review the processing and re-calculate our actual cost. After review and recalculation, the revised processing fee (extraction, evaporation and spray drying) will be Cdn $227 per kg of powder extract (2.5:1). The new processing fee is in view of higher costs on experienced labour and more stringent monitoring procedure to meet your demanding standard. If RO agrees and accepts this new price, CPC will provide 1000 kg of same grade of Canadian Chaga mushroom from market and turn it into 400 kg of powder extract with ratio of 2.5:1 for RO in a staged delivery as we have to reschedule our production.
>
> Please kindly review & consider above options, and let us know your decisions.

[164] Ms. Liou said that these options were not satisfactory to her. Option 1 was problematic because she did not trust CPC to get the proper raw material, while Option 2 involved a significant increase in price.

[165] On Thursday, August 3, 2017, Mr. Lim sent a further email to Ms. Liou, at 4:54 p.m. stating:

> After discussion with our directors and management in regards to the Chaga project (PO# 070716-271 & 080816-266). We are offering the following option #3 for your consideration:
>
> - As per claims from our previous conversations, RO is confidently able to source a good quality supply of Chaga raw materials. So we suggest that RO organizes and supplies 1000 kg of Chaga raw material for this project. CPC, in return, will perform the processing of raw materials into powder extract according to the procedure provided by RO with no charges.
>
> Please kindly discuss and consider above option with your partners and get back to us.

[166] Meanwhile, there were also discussions ongoing about the results of the mould testing on the Beauty Secret powder. Ms. Liou had advised Dr. Cai about the Silliker test result on either July 31 or August 1, 2017, and on August 3, 2017 at 5:05 p.m. (just 10 minutes after the above email from Mr. Lim), Dr. Cai emailed Ms. Liou to advise:

> We carried the Micro Test in house in July before the release of product of Beauty Secret … and the testing result past with the Yeast and Mould < 10^3. However, after we received your email, we immediately started with the new Micro Test using our retained sample to double confirm.
>
> Based on this situation, the current batch of Beauty Secret … are strongly suggested to be quarantined before the confirmation of the new Micro Test results.

[167] RO retained legal counsel, a Ms. Yan, who submitted a complaint to Health Canada using an online portal. As noted above, CPC is a Health Canada-licensed facility. The complaint alleged that:

a) CPC had failed to follow the contracted-for methods for production of the Chaga capsules, then prepared new internal records to suggest that it had in fact followed the process; and

b) CPC had improperly handled the Chaga materials, leading to significant mould growth, and then incorrectly reported the mould levels in the Beauty Secret powder.

[168] CPC conducted its own test of a retained sample, which also showed a high content of mould. CPC's records show that the test result was generated late in the day on Friday, August 4, 2017. It is not entirely clear when this test was initiated, as some of the documents seem to suggest that it takes about five days to conduct a test for mould. While neither Dr. Cai nor Mr. Wang were completely certain, they believed that it was possible for a test looking solely at mould content to be done within three days.

[169] The following Tuesday, August 8, 2017, Mr. Lim emailed Ms. Liou stating:

> Despite our sincere offerings to settle the issue of your Chaga project (PO #RHO-070716), you do stand firm continuously on your unreasonable requests. I conclude that we cannot compromise to a mutually accepted agreement in view of our huge gap. Therefore, I am compelled to decide that this kind of fruitless and time-consuming private negotiations have to stop.
>
> Moreover, you complained to our staff member that CPC fabricated its processing documents amount to libel and you are legally liable for unfounded accusations and making up complaints to Health Canada.
>
> I will hand over this case to our lawyer and let the court to hand down a fair judgment if we cannot settle this case. From now on, CPC will only attend to the communications from the lawyer acting on behalf of Real Organics and Natural House Ltd. By way of this buffer, we will avoid these emotional communications.

[170] In its response to Health Canada, CPC asserted that after a staff review of the Beauty Secret Powder issue, CPC had concluded the only possible reason for the mould contamination of the Beauty Secret powder was that "there were almost two weeks waiting time after the powder had been blended before bottling due to the packer size issue". Mr. Wang confirmed that this was the conclusion he and his colleagues had come to on August 8, 2017.

[171] Ms. Liou and Mr. Wang exchanged emails on August 10, 2017. Ms. Liou demanded that CPC take back all of the Beauty Secret powder. Mr. Wang responded that once the product was ready, CPC would arrange for it to be picked up and destroyed.

[172] Later on August 10, Ms. Liou advised that RO had reviewed the situation with its lawyer and decided to take legal action. On August 18, 2017, the present action was commenced.

[173] In the meantime, Health Canada had initiated plans for a “compliance verification” of CPC. That process involved two inspections at CPC’s office and a review of its production records, as well as discussions with Ms. Liou. The first inspection took place on September 8, 2017. Ms. Cheng, the Health Canada inspector who coordinated the effort, gave evidence at trial and confirmed various items reflected in her notes. She recorded having been advised by CPC that the blended powder had picked up moisture while it was being stored in the warehouse for two weeks while CPC awaited instructions with respect to the bottle size. The second inspection took place on November 28, 2017, and included more detailed discussion about the Chaga capsule project. CPC staff advised that the work done in the fall of 2016 was overseen by the previous management team and that CPC could not find some of the processing records after the previous management left. Mr. Wang’s evidence was that CPC did not provide Health Canada with the production records that were prepared in mid-2017.

[174] Ms. Cheng’s evidence was that, while the specific complaints provided a context for the investigation, Health Canada was also interested in reviewing CPC’s compliance with Health Canada’s GMP as a whole. A Health Canada inspector also attended the RO store.

[175] On September 22, 2017, Health Canada wrote to RO confirming that the Beauty Secret powder contained mould above the acceptable tolerance level and that it should not be sold. Ms. Cheng’s evidence was that she had been told right from the start that RO was not selling the product, but that this letter was issued to provide written confirmation that it should not be sold.

[176] On November 10, 2017, CPC filed its Response to Civil Claim in this action. In it, CPC denied that it had forged any documents, and said:

> 29. … Rather, the original batch records from the manufacture of the Chaga could not be located. CPC prepared new batch records based on information provided by employees involved with the processing.

[177] Ms. Liou's evidence was that this was the first time CPC had told her that the original production records had been lost.

[178] On January 16, 2018, Health Canada completed its investigation. It concluded at that time that deficiencies in the records had been addressed through a process with respect to renewal of CPC's site license from Health Canada (which was renewed effective January 5, 2018). Ms. Cheng said that CPC had provided her team with all of the reports that were requested, and that after full review, they did not find anything in them that was not reasonable.

[179] Ms. Liou reached out in late 2017 and early 2018 to another contract manufacturer, Mazza Innovation, to explore whether it could process Chaga. Her evidence was that Mazza Innovation did not have the capacity to perform dual extraction, but that she sent a sample of Chaga to be extracted by it in any event. In January 2018, the test results came back indicating polysaccharide concentration of only 5.1%.

[180] In May and June of 2018, the various other RO directors all ceased to be directors. Ms. Liou's evidence is that, because sales had decreased and the promised products had not been delivered, her shareholders all lost faith in her and left the company.

[181] With respect to sales, Ms. Liou's evidence is that the 679 bottles of Chaga capsules produced from the original 50 kg Chaga batch were all sold over time. Of those, approximately 31 were sold in 2016, about 361 were sold in 2017 and 197 were sold in 2018. Her evidence was that the demand was much greater than that, but that she limited sales so as to ensure that some was available while she tried to figure out how to get it produced reliably.

The Summary Trial

[182] In August 2018, RO filed a summary trial application, seeking judgment on its breach of contract claims. The materials filed by the plaintiffs included the two affidavits of Mr. Li that have already been described. The application was initially adjourned by Master McDiarmid in order to permit various pre-trial steps to take place.

[183] On January 18, 2019, Ms. Liou filed a complaint with the RCMP, alleging fraud on the part of CPC. Her evidence was that in late 2018 she had received Health Canada's files by way of an access to information request, and that upon reviewing those files she had concluded that CPC's actions were fraudulent. She withdrew the complaint in October 2020.

[184] The summary trial application was heard on February 7-8, 2019, by Justice Voith, who gave reasons for judgment on March 20, 2019. Those reasons are indexed at 2019 BCSC 394. He concluded that the matter was inappropriate for summary trial. His judgment notes (para. 18) that CPC had admitted in its evidence that it did not follow the written procedures that RO had provided to it. At para. 28, he said:

> [28] Furthermore, notwithstanding the foregoing admissions and evidence, counsel for CPC sought to argue that it was open to CPC to use its expertise and to deviate, if it thought necessary or appropriate, from the written Procedures that it had received. None of CPC's pleadings or its affidavits advance any such entitlement, either by way of implied term or otherwise.

[185] Ultimately, however, Justice Voith concluded (para. 51) that he was unable to find the facts necessary to decide the issues of fact or law that were raised, and that in addition, it would be unfair to decide the issues. He ordered that the trial judge at the eventual trial should also deal with the costs of the summary trial application.

[186] Dr. Cai had ceased working at CPC in February 2019. Two days after the summary trial judgment was released, Ms. Liou wrote to Dr. Cai's new employer, alleging that Dr. Cai had "deliberately conspired with her professional colleagues to provide us with contaminated products that would endanger public health", and

suggesting that they reconsider their decision to hire her. The new employer discussed the letter with Dr. Cai, accepted her explanation of what had happened, and her employment with the new company continued.

[187] In early 2019, RO laid off its remaining employees and negotiated a termination of its lease at Lansdowne Centre. It received back $8,000 of the security deposit it had paid of $21,600.

[188] On August 23, 2019, RO's lawyer wrote to CPC's lawyer, advising that RO intended to return all but one box of the Beauty Secret powder. CPC's lawyer responded, advising that CPC was not interested in receiving the product, and asking that RO not send it. On October 7, 2019, Ms. Liou delivered all but one box of the Beauty Secret powder to CPC's office.

[189] In October 2020, CPC obtained an order for leave to amend its response to civil claim. The amendment added language to its pleading in respect of the contract for processing the raw Chaga to state that the processing protocol provided by RO could be "modified as necessary and as deemed appropriate by CPC in the exercise of CPC's judgment". This amendment addressed the issue identified by Justice Voith.

[190] Ms. Liou's evidence was that she continued to explore approaches to processing Chaga, including doing research in China. In the spring of 2018, she retained a patent agent and submitted a further application to patent the process for Chaga extraction. That application was rejected in October 2018. In June 29, 2019, she submitted an amendment to the 2018 application. Then in August 2021, she filed a further patent application. None of her patent applications have been successful to date.

Variations in the Production Sheets

[191] A set of production sheets for the fall 2016 processing of the Chaga was in evidence. These production sheets were the ones that had been attached to an

affidavit made by Mr. Ying on November 9, 2018, as part of CPC's response to the summary trial application.

[192] Also in evidence were a number of the photographs taken by Mr. Beggs when he and other RO employees reviewed production records at CPC's office on July 26, 2017.

[193] The documents are similar but not identical. In particular, the documents indicate that the two 523 kg batches of Chaga were processed as sets, with eight sets of 60 kg of Chaga and one of 20 kg of Chaga. [The production sheets say that a total of 500 kg was processed, although CPC's records indicate that each batch was actually 523 kg.] On the 60 kg production days, the documents indicate that generally 6 or 7 kg of maltodextrin would be added prior to the drying process. In the photographs taken by Mr. Beggs, the documents show 6 or 7 kg of maltodextrin as well for the 20 kg batches, while the version attached to Mr. Ying's affidavit indicated that only 2 or 2.3 kg of maltodextrin was added on those days. Mr. Ying said that he believed the 2 kg amount would be more accurate, given the smaller batch size. In addition, for the November 8, 2016 summary, which shows the two batches of 100 kg of extract each being mixed together, the version in photographs has a number of handwritten notes on the bottom which were not on the version attached to Mr. Ying's affidavit.

[194] Of greater significance is the departure of these production sheets from the evidence of the three witnesses who participated in the work. While the production sheets show that 60 kg was used per batch, Mr. Cheung believed it was actually 80 kg per batch and Mr. Ying's recollection was that each pallet contained 172 kg of Chaga and they would divide the pallets between the two tanks, meaning 86 kg of Chaga was put into each tank.

[195] As well, Mr. Ying was quite certain of his recollection as to both the start and end of the production run. The production sheets clearly match his start date, but the end date is much later. If Mr. Ying is correct that the production run ended by October 22 (rather than November 8 as per the production sheets), then it is difficult

to see how they could have completed processing of 1,046 kg if each batch contained only 60 kg.

Expert Evidence

[196] Each of the parties relied on an expert report.

Dr. Wang

[197] The plaintiffs tendered the report of Dr. Martin Wang which is dated May 22, 2018. It was obtained by RO's then-counsel in preparation for the summary trial application.

[198] Dr. Wang has an extensive background in natural products chemistry. He was educated in China but has been working in Canada for many years in the areas of research and development, regulatory affairs, quality assurance and quality control at a laboratory, and most recently as Vice President, Regulatory Affairs at a natural health products manufacturer. He has published a number of peer-reviewed articles.

[199] There were issues with the manner in which Dr. Wang was retained. He was not paid for his work and the extent of the effort he put into the report reflected his compensation. He was unfortunately provided some of Ms. Liou's more inflammatory submissions to Health Canada, and RO's counsel had an unfortunately large role in the drafting of the report. CPC challenged the threshold admissibility of the report. I accepted the report in evidence, commenting that Dr. Wang's careful and limited responses to the questions he was posed, and the thoughtful answers he gave in cross-examination, left me with confidence that the report reflected his own opinion.

[200] Although the report was admitted in evidence, Dr. Wang was limited in his responses and they are of limited assistance in determining the issues as they were left with the Court at the end of trial. His response to several of the questions was that he would have to do further research – something he was never asked to do.

[201] There are two pieces of evidence that are arguably opinions, which were very general in nature given the extent of the research performed:

a) Dr. Wang identified a risk that if raw Chaga is stored in sealed plastic bags in unventilated spaces, it will develop mould.

b) He also expressed a general opinion that it is key in the extraction of a product like Chaga to maintain the same ratio of solvent to raw material

[202] I note with respect to the first of these points (the risk of mould) that it is arguably factual evidence, somewhat comparable to the cell phone evidence considered in *R. v. Hamilton*, 2011 ONCA 399 at paras. 274-277.

[203] The second of these points was effectively confirmed through the more detailed report of Dr. Fatehi, which I discuss below.

[204] Dr. Wang suggested that if there is a significant difference in polysaccharide content between successive batches of Chaga extract, then it should be considered "Out of Specification" and a GMP-registered manufacturer would be expected to do an "OOS" investigation.

[205] This latter point was of minimal assistance, as (a) there was never a contractual "specification" as to polysaccharide content in this case, and (b) in any event, when CPC learned of Ms. Liou's concerns in January 2017, it did conduct an investigation. The real issue in this case is not so much whether CPC investigated the situation – it is more a question of what they did with what they learned.

Dr. Fatehi

[206] Dr. Pedram Fatehi is a professor of Chemical Engineering at Lakehead University in Thunder Bay, Ontario, and director of its Biorefining Research Institute. His research areas include biomass characterization, extraction and modification.

[207] He was retained by CPC in about December 2019 to conduct investigations with respect to the extraction process. He purchased four different Chaga samples from RO's Quebec supplier – one bag of Chaga powder, one bag of Chaga chunks, and two bags of Chaga nuggets. A sample from each bag was ground using a laboratory grinder. Dr. Fatehi then used ion chromatography to analyze the sugar

content of each sample. That testing showed the samples had polysaccharide concentrations between 23.04% and 28.66% by weight.

[208] Dr. Fatehi noted in his report that the concentration of polysaccharides in raw Chaga will depend on the quality of the Chaga itself as well as the method and duration of storage. The quality of the Chaga will depend on the environment in which it grows, including the nutrition in the soil, the amounts of sun and water, the growing temperatures and other environmental factors. Even the same harvesting plant may provide samples of different quality over time depending on these factors.

[209] Dr. Fatehi explained that he used ion chromatography to measure polysaccharide concentration. His view is that ion chromatography is more accurate than high pressure liquid chromatography (HPLC). He said that he had purchased HPLC equipment for his laboratory in about 2012 or 2013, but then was able to obtain grants in order to acquire equipment for ion chromatography which is much more expensive but more accurate. [HPLC was the process used by Silliker.]

[210] Dr. Fatehi then conducted an extraction procedure in a manner similar to that contained in RO's 2016 purchase orders, as well as eight different variations of that procedure. The eight variations included changes to the water/Chaga ratio, to the temperature, to the pressure, to the alcohol concentration, to the alcohol/Chaga ratio, and to the time used for each step of the extraction. With respect to each extracted product, he again used ion chromatography to test the polysaccharide concentration.

[211] Dr. Fatehi concluded that when he followed the process specified in the RO purchase orders of July 2016, the resulting product had 18.85% polysaccharides by weight. He noted that the extraction process recovered 70% of the polysaccharides in the material – leaving 30% of the polysaccharides in the residue. The eight variations all led to different polysaccharide concentrations – one as low as 3.82%; with others closer to the 18.85% obtained using the initial method. None were significantly higher.

[212] On cross-examination, Dr. Fatehi confirmed that in his testing he had used heat drying to convert the liquid extract to powder. He was asked whether spray-drying or freeze-drying would affect the polysaccharide concentration. His answer was that polysaccharides will degrade at high temperature, but that it depends on the temperature and the time of exposure. His view was that given the short time of exposure, the method he used would not have degraded the polysaccharides significantly. At best, freeze-drying (which would have the least degradation) might give rise to a 1-2% higher concentration, while spray-drying is at a higher temperature so would not me much different than heat-drying.

Pleadings

[213] The Amended Notice of Civil Claim (“ANOCC”) pleads breach of contract with respect to both the failure to properly extract Chaga for the capsules and with respect to the mould in the Beauty Secret powder. It seeks as a remedy specific performance of the contract to manufacture these products or, alternatively, loss of profit, punitive and aggravated damages. The plaintiffs advised that they are not pursuing the claim for specific performance, and seek only damages.

[214] The ANOCC also alleges breach of fiduciary duty – the fiduciary duties are said to include duties to act in a skilful and prudent manner, protect and preserve the raw Chaga in a prudent and professional manner, notify RO when mould was found on the raw materials, honestly answer RO’s requests and follow RO’s lawful instructions, and to protect the public interest by not allowing defective products to be released to market. However, at trial no authorities were presented by which a fiduciary duty would arise in circumstances like this – either to the plaintiffs or to the public at large.

[215] The ANOCC pleads that CPC instructed or permitted its employees to forge documents and participate in unlawful schemes. It alleges that the defendants gave evasive, incomplete or false answers in response to RO’s inquiries, and participated in or facilitated fraudulent actions. RO alleges that these pleadings ground the claims advanced at trial of conspiracy and fraud/deceit.

[216] Finally, the ANOCC claims disgorgement of any fees CPC has collected on the basis the services provided to RO were worthless or were not performed as agreed.

[217] RO provided three different responses to demands for particulars. In those, it clarified that the purchase orders said to contain the contractual procedure for processing the Chaga are those found in the email of July 6, 2016. The third response specifies that:

> Amended Notice of Civil Claim does not make specific claim for breach of contract on the basis of CPC's failure to produce processed Chaga of a certain concentration level. The breach of contract being put forward is CPC's failure to follow the procedures that Real Organics provided and contracted for. Rather, the concentration, we posit, is the consequence of failure to adhere to the procedures specifically mentioned and conveyed.

[218] In the Amended Response to Civil Claim, CPC acknowledges that it entered into agreements on about July 6 and August 8, 2016, to process raw Chaga for a fee. It says, however, that the agreement was that CPC would use "a processing protocol that had been provided by [RO], modified as necessary and as deemed appropriate by CPC in the exercise of CPC's judgment". It says that it complied with its contractual obligations in this regard.

[219] CPC pleads that the contract does not contain any terms with respect to the polysaccharide concentrations of the processed Chaga powdered extract.

[220] With respect to the Beauty Secret powder, CPC pleads the limitation of liability clauses in the terms and conditions. It pleads RO's delays in providing instructions to use the 1,000 cc bottles. It denies causing or being responsible for the mould content.

[221] The defendants deny having forged any records. They say that when the original batch records could not be located, CPC simply prepared new batch records based on information provided by employees involved with the processing. The defendants also say that neither CPC nor any of the individual defendants ever owed a fiduciary duty to RO or to the general public.

[222] Finally, CPC pleads that it has never been paid for either of the two large Chaga capsule orders or for the Beauty Secret powder, so there is nothing to disgorge.

Positions of the Parties

The Plaintiffs

[223] The plaintiffs submit that RO entered into contracts with CPC for the manufacturing of two products – Dual Extracted Chaga Capsules and Beauty Secret Powder, both of which contracts were breached by CPC.

[224] With respect to the Dual Extracted Chaga Capsules, the plaintiffs say that CPC's obligation was to follow the extraction process specified in the contractual documents, which CPC failed to do.

[225] With respect to the Beauty Secret Powder, the plaintiffs say that CPC's obligation was to ensure that it stored the raw ingredients – including the residue from the Chaga extraction process – in a safe manner, and to ensure that mouldy products were not used for the manufacturing process. CPC was also required to comply with Health Canada's GMP.

[226] With respect to the individual defendants, the plaintiffs submit that the individual defendants arranged for CPC employees to create new production records, made to look like they were properly kept, but not accurately reflecting the actual process undertaken. This was done in an effort to cover up CPC's breaches.

[227] The plaintiffs rely as well on the principles in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 and *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, and in particular, the duty of honest performance which, as explained in those judgments, requires that a party must not lie or otherwise knowingly mislead the other about matters directly linked to the performance of the contract.

[228] The plaintiffs also say that Dr. Cai signed COAs for the Beauty Secret powder wrongly showing that the product complied with health standards governing mould content.

[229] RO argues that when CPC's senior management learned that the processed Chaga was not satisfactory to RO, those senior employees (primarily among them, the three individual defendants) embarked on a strategy to delay and ignore the situation, then when pressed, they produced new production records that reflected not what had actually been done, but what the contract said was supposed to be done, then failed to tell RO that these were not the actual production records, then refused to take responsibility. RO says that this was, in effect, a conspiracy amongst those individuals and the company.

[230] The plaintiffs say that the defendants have destroyed RO's planned business enterprise, which included:

a) A well-planned business plan;

b) Financial and business support from now-former shareholders;

c) A well-connected supplier who provided a cost-controlled steady supply of raw Chaga materials;

d) The loss of the retail store and of trained employees; and

e) Most importantly, the lost opportunity to become a market leader in Chaga products using wild Canadian Chaga.

[231] The plaintiffs also note their loss of the monies paid to purchase the Chaga that was improperly processed, the $10,000 paid to the Chaga supplier as an interest-free loan to secure its relationship (which was never repaid), and the over $100,000 they paid to CPC.

[232] RO says it made substantial efforts to try to mitigate. It says that it looked for a new manufacturer after it had discovered "CPC's deception", but that it concluded

that no other manufacturer had the ability to perform dual extraction in British Columbia. It says that it was reasonable for RO not to accept CPC's three proposals in early August 2017, because it was not possible to trust CPC. RO noted that by the time those offers came in, RO's new store had been open for two months and it was doing its best to operate without its flagship product.

[233] In terms of damages, the plaintiffs claim that they have lost profits that they calculate as $1,733,271.71. They say that the Chaga processed in the fall of 2016 should have generated 14,814 bottles of Chaga extract capsules, which they could have sold at $128 per bottle, for a total of $1,896,192. Similarly, they assert that the 991 bottles of Beauty Secret Powder would have sold for $69.99 each, for a total of $69,360.09. They say the costs of raw Chaga were $39,800 and the processing fees from CPC were $92,047.31 and $13,839.32 respectively, and a market video specific to the Chaga products cost $50,000. In terms of marketing and administrative costs, the plaintiffs say that their overhead costs were just over $1 million, but those costs were for a total of 99 products. They say that those overhead costs should be allocated equally amongst the 99 products, meaning just over $10,000 for each product. These numbers combine to generate the claim of $1,733,271.71.

[234] Alternatively, RO seeks an order for CPC to disgorge its unlawful gain. It says that this would lead to CPC being required to repay the total $106,700 that RO paid to CPC in 2016. RO argues that, even though it appears that the bulk of those funds were applied to invoices in respect of other products that were produced and resold by RO, CPC should have to refund the full amount in any event because the funds paid were intended for the Chaga production and due to CPC's misconduct.

[235] Finally, RO seeks punitive, exemplary and aggravating damages. It claims that CPC's dishonesty and callous disregard for the health of the public was egregious, and that the court should make an award that will deter manufacturers like CPC that do not take proper care and pose risks to consumers. It also seeks costs.

The Defendants

[236] The defendants say that the manufacturing process set out in the July 2016 emails was one of several different preliminary iterations of a manufacturing process that RO was hoping to develop and patent, and it was not something that CPC was required to follow exactly. They say that any deviations were minor and immaterial in light of the parties' arrangements and understandings. Thus, the defendants say there was no breach of contract.

[237] CPC says that even if there was a breach, RO must prove that its claimed loss was caused by the breach in question. It argues that RO has failed to establish a causal connection between the extraction process used by CPC and RO's inability to market Chaga capsules. It says that, based on the evidence including that of Dr. Fatehi, there is no basis for the court to conclude that had the process been followed as specified, the end product would have achieved a 50% polysaccharide concentration.

[238] With respect to CPC's alleged damages, CPC says that RO has not established the existence of a market or demand for the quantity of product it claims it would have sold, or that it would have been able to achieve the price of $128 per bottle. It notes that it took CPC three years to sell approximately 670 bottles from the trial batch, and that many of those bottles were sold at a discount.

[239] Finally, the defendants argued that RO failed to mitigate its losses. It says that RO was unreasonable in refusing CPC's offer to reprocess 1,000 kg of raw Chaga at no further cost to RO, and that RO did not arrange to have its Chaga product produced elsewhere but rather appears to have simply given up on the product.

[240] With respect to the individual parties:

a) The defendants say that no claim has been stated on behalf of the individual plaintiff, Ms. Liou, and that no relief can be granted to her; and

b) They say that the individual parties were not parties to any contract between RO and CPC, and cannot be sued for breach of contract.

[241] The defendants say that although the plaintiffs made assertions of conspiracy during the trial, no claim of conspiracy was actually pleaded or properly advanced.

[242] The defendants say that, to the extent fraud or deceit was pleaded, the only arguable misrepresentations are the creation of production records after the breach, which were created in good faith and without any intent to influence RO, but that in any event:

a) They were created after the alleged breach, and did not contribute to any contractual loss; and

b) There is no evidence that Ms. Liou acted in reliance on those production records, given that she made it clear she considered them inaccurate from the day they were shown to her and started a lawsuit a few days later.

[243] The defendants say that the action should be dismissed. They ask that the parties be able to make submissions as to costs of the action after the case has been decided on the merits.

Reliability and Credibility

[244] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (C.A.), cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible

> cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[245] In considering these matters, the evidence of a witness must be assessed for "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).

[246] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. It includes:

a) The ability and opportunity of the witness to observe events;

b) The firmness of their memory;

c) Their ability to resist the influence of interest to modify their recollection;

d) Whether their evidence harmonizes with independent evidence that has been accepted;

e) Whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;

f) Whether their evidence seems generally unreasonable, impossible or unlikely;

g) Whether the witness has a motive to lie; and

h) The demeanour of the witness generally.

[247] A trier of fact may accept none, part or all of a witness' evidence and may attach different weight to different parts of a witness' evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[248] Many of the key facts in this case are not matters of serious dispute and are established by contemporaneous documents.

[249] However, there are significant questions – including the question of exactly what process CPC undertook when it processed the two 513 kg batches of Chaga – in which the *viva voce* evidence is important.

[250] I begin with consideration of Ms. Liou's evidence. RO's claim is largely based on an implicit assertion that, had CPC properly processed the two large batches of Chaga, the product generated by that process would have contained an ideal quantity of polysaccharides. That most likely was her view at the time she entered into the contracts in the summer of 2016. However, it became clear that she has subsequently concluded that is not the case. She has made multiple patent applications with respect to dual extraction processing of Chaga, none of which have been successful, with various iterations of the many variables including processing temperatures, pressures, the time of processing, the order in which the Chaga is extracted in water and with alcohol, and the concentration of alcohol. She supported at least one such application with the July 2016 Silliker test result notwithstanding that the process contained in the application differed from that used to process the Chaga that generated the test result. While this evidence was led with respect to questions of causation (which I will discuss below), it impacted on Ms. Liou's credibility.

[251] I have difficulty with Ms. Liou's assertion that the various deposits she paid – totalling some $106,700 – were all related to the Chaga extraction project. She acknowledged that the deposits substantially exceeded the 30% deposits requested by each of the Chaga extraction sales confirmation forms. Her explanation was that she wanted to pay more than was sought in order to build a strong relationship with CPC. Yet she was receiving during the relevant time period a steady stream of other sales confirmations in respect of the other products that CPC was manufacturing for RO, each of which also requested a 30% deposit. She acknowledged that she did not pay any other funds to CPC in respect of those deposit requests, although she

did sign the documents to confirm those orders. It seems clear to me that the various deposits that were paid – and in particular the three large deposits of $20,000, $30,000 and $50,000 paid between June 16 and August 23, 2016 – were treated by both RO and CPC as constituting deposits for all of the work CPC was doing for RO.

[252] I also found Ms. Liou to be somewhat evasive in answering questions with respect to the Contract Manufacturing Terms and Conditions document that CPC said was attached to all of its contracts beginning at some point in early 2017, including the Beauty Secret Powder Sales Confirmation forms from March 2017. In my view, the emails indicate that there was such an attachment and it makes no sense that CPC would not include it as part of their contracting documents once the company had adopted it.

[253] Ms. Liou was a key player in most of the events underlying the claims in this action (other than internal matters at CPC). It is clear that this litigation has been a major focus of her activities since it was commenced in the summer of 2017. She has a significant financial interest in the outcome of the litigation, and it is clear that she feels that she was poorly treated by CPC as CPC's management realized what had happened and sought to deal with the consequences. I have some concern that her intensive focus over many years on those concerns may have led to a lack of objectivity. Thus, while much of Ms. Liou's evidence is confirmed by the substantial package of documents she had assembled to support the various elements of her claim, I conclude that I should exercise some caution with respect to the reliability of those aspects of her *viva voce* evidence that are not supported by the documents.

[254] There was important evidence from three former CPC employees involved in processing the Chaga in 2016: Mr. Ying, Mr. Cheung, and (by way of affidavits) Mr. Li.

[255] There was no suggestion that either Mr. Ying or Mr. Cheung departed CPC on anything but good terms. Thus, they would appear to have no animus towards CPC nor any ongoing obligation to it, although there certainly is a possibility of them feeling some loyalty towards a long-time employer. What was of more concern to me

with respect to their evidence – as well as the evidence of others – was what I discerned as an interest in diverting any possible blame that might be assigned to them personally, and more specifically of wanting to place their own role in the best light. It was clear that, by the summer of 2017 at the latest, they were aware that the client was unhappy with the results of their processing of the Chaga.

[256] Mr. Cheung, for example, gave evidence that he was never asked about how the processing had been done, yet Mr. Wang said he had spoken to all three of Messrs. Cheung, Ying and Li in the course of investigating what had happened. There was also clear resentment on Mr. Ying's part that he had been required to sign the production sheets when he believed Mr. Cheung to have been in charge for the project.

[257] Mr. Li's evidence is difficult to assess because he unfortunately had died prior to trial. When I admitted his two affidavits into evidence, I commented that the ultimate reliability of that evidence would be determined at the conclusion of the trial in the context of the evidence as a whole. The time has now come to make that determination.

[258] As I noted in my ruling admitting the affidavits into evidence, the two affidavits were made under oath. However, there are conflicts between the affidavits and the evidence given by both Mr. Ying and Mr. Cheung. In considering those conflicts, I note that on the one hand, Mr. Li's evidence was given much closer to the time of events. His affidavit as to the steps taken in processing the Chaga was made in April 2018, less than two years after the events, while his affidavit as to Mr. Ying being asked to sign documents was made in November 2017, within six months of the events he was describing. This compares with Mr. Ying and Mr. Cheung, whose evidence was originally made into affidavits in November 2018 and then given at trial in March 2023. However, Mr. Li was laid off from his employment with CPC not too long before his first affidavit was made, so there is some concern that his evidence might be tainted by concerns arising from his departure. That concern, of course, has never been explored through cross-examination.

[259] One of the areas of conflict in the evidence relates to the processing of the initial batch of Chaga in May 2016. Mr. Li's evidence differs from Mr. Ying's in that he suggests that the alcohol and water were both added at the same time, and that the tank was filled. While Mr. Li claims to have assisted Mr. Ying, Mr. Ying says that he worked primarily on his own. When I review the different evidence in context, it seems to me that Mr. Ying's evidence is more consistent with the instructions on the production sheets of the time, and that the production sheets are consistent with the instructions that had come from Ms. Liou as well as the email exchange of May 27, 2016 (quoted above). More generally, the whole reason for Ms. Liou to come to CPC was because it was able to use a dual extraction methodology, conducting separate water and alcohol extractions. I note that Mr. Ying described how, on the second day, he mixed water and 100% alcohol together to get 70% alcohol. It may be that that was the day that Mr. Li provided some assistance, and gave rise to his understanding that water and alcohol were used at the same time.

[260] I also have concerns about Mr. Li's evidence with respect to the processing work done in the fall of 2016. There is overlap between his evidence and that of Mr. Cheung and Mr. Ying, but as with the previous set of extractions, I am not confident of his evidence that there was only a single extraction with mixed water and alcohol. With respect to his evidence that the extraction was done with the perforated metal lid, rather than the solid lid, I suspect that what he was recalling is the early part of the process that Mr. Cheung referred to where that lid was used. It seems to me that if the material had been left boiling in the tank with an unsealed lid for several hours, the moisture within the facility would have been quite notable. I see all of this as consistent with Mr. Li having enough involvement in and opportunity to be able to make some observations of the work, but without observing it consistently enough to know exactly what was going on.

[261] I am concerned about the conflicts in the evidence about the signing of the newly created production sheets in May or June of 2017. Mr. Ying acknowledged that he told Dr. Ma that he had been told to sign false documents. I have difficulty accepting that he would have said this had there not been some truth to it. I note as

well his acknowledgement that (a) some of the information on the documents did not match his own recollection of what had happened, although he said he was told that the information had been confirmed by others, and (b) he acknowledged that some of his co-workers told him he should not have signed the documents in the circumstances. In my view, Mr. Ying's evidence in its entirety has much in common with Mr. Li's evidence with respect to the signing of the re-created production sheets.

[262] Overall, I conclude that Mr. Ying's evidence is the most reliable of the three witnesses as to the production process, although I approach even his evidence carefully – particularly when it comes to the circumstances surrounding the signing of the production sheets.

[263] Another former CPC employee, Kevin Ma, gave evidence with respect to the processing of the Beauty Secret powder. He was not cross-examined on that evidence, although his evidence that he spoke with Dr. Cai while processing the product was later disputed by Dr. Cai. Kevin Ma appeared to be giving his evidence in a direct and forthright manner and nothing was drawn to my attention at the time that caused me to doubt the reliability or credibility of his evidence.

[264] Three more senior CPC employees gave extensive evidence. Two of them – Daniel Wang and Alice Chen – continue to be employees of CPC. Dr. Cai, as noted above, left CPC in February 2019. Both Mr. Wang and Dr. Cai are personal defendants in the action. In my view, all three of theses witnesses sought to minimize their roles – Mr. Wang, for example, claimed not to have spoken with Ms. Liou until the summer of 2017, yet there is a photograph of him explaining the processing system to her in February 2017. Ms. Chen's evidence that she only prepared one set of replacement records is difficult to reconcile with the differences between what was photographed on July 26, 2017, and what eventually appeared in Mr. Ying's affidavit, and with Mr. Ying's own evidence. Dr. Cai was clearly a primary contact for Ms. Liou throughout yet sought to downplay her role. She was identified by Kevin Ma as the person who instructed him to dry out the Chaga residue before manufacture of the Beauty Secret powder; she denied this, even though Kevin Ma

was not challenged on this evidence. It seems clear to me having reviewed the entirety of the correspondence that CPC's senior employees were, throughout the first seven or eight months of 2017, trying to put off Ms. Liou while they tried to figure out a way to extricate CPC from the situation it found itself in. I approach the evidence of all three of these witnesses with caution.

[265] Although the evidence they gave was limited, I found the two former RO employees, Mr. Beggs and Ms. Wong, to be reliable and credible. The Health Canada inspector, Ms. Cheng, was a careful witness who also had a limited role to play but her evidence was reliable and credible. Mr. Brandl, who was brought in to verify the Silliker business records and ended up giving fairly extensive evidence on testing procedures, was a thoughtful and knowledgeable witness and I found his evidence very reliable.

[266] There was accounting evidence from Mr. Loh, a director of CPC who has his own accounting firm but also oversees the in-house accounting staff, and Ms. Liu, a current member of the CPC accounting staff. Each had very limited roles. Mr. Loh primarily confirmed his signature on the November 2016 CNDA, and Ms. Liu provided historical printouts from CPC's accounting records – but was not with CPC at the time the entries were made so had no personal knowledge. I had no concerns with the limited evidence they gave.

[267] Dr. Ma gave brief evidence and was not cross-examined on the evidence he gave. He frankly acknowledged that he has his own ongoing litigation with CPC, of which he also continues to be a shareholder. Nothing in his evidence gave rise to any concerns about his reliability or credibility.

Breach of Contract Claim

Legal Context

[268] There is no doubt that the parties entered into a series of contracts, including with respect to both the Chaga extraction and the Beauty Secret powder. There are disputes as to the terms of those contracts. In resolving those disputes, the

principles set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 47-48, are of assistance:

> [47] … the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" … To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> …
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement …:
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean …
>
> [Citations omitted.]

[269] The court may also consider, in appropriate cases, contractual duties arising from the organizing principle of good faith. In *Callow*, the Court confirmed principles previously recognized in *Bhasin*, including a duty of honest performance that applies to all contracts and requires that parties must not lie or otherwise knowingly mislead each other about matters directly related to the performance of a contract. As explained in *Callow* at paras. 50-51:

> [50] The duty of honest performance is a contract law doctrine, setting it apart from other areas of the law that address the legal consequences of deceit with which it may share certain similarities. One could imagine analyzing the facts giving rise to a duty of honest performance claim through the lens of other existing legal doctrines, such as fraudulent misrepresentation giving rise to rescission of the contract or the tort of civil fraud (see, e.g., B. MacDougall, *Misrepresentation* (2016), at §§1.144-1.145). However, in *Bhasin*, Cromwell J. wrote explicitly that while the duty of honest

> performance has similarities with civil fraud and estoppel "it is not subsumed by them" (para. 88). For instance, unlike estoppel and civil fraud, the duty of honest performance does not require a defendant to intend that the plaintiff rely on their representation or false statement. Cromwell J. explicitly defined the duty as a new and distinct doctrine of contract law, not giving rise to tort liability or tort damages but rather resulting in a breach of contract when violated (paras. 72-74, 90, 93 and 103). We are not asked by the parties to depart from this approach.
>
> [51] In light of *Bhasin*, then, how is the duty of honest performance appropriately limited? The breach must be directly linked to the performance of the contract. Cromwell J. observed a contractual breach because Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause" (para. 94). He pointed, in particular, to the trial judge's conclusion that Can-Am "acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause" (para. 98; see also para. 103). Accordingly, it is a link to the performance of obligations under a contract, or to the exercise of rights set forth therein, that controls the scope of the duty.
> …

[270] The Court in *Callow* also considered the nature of conduct that would amount to dishonesty for purposes of this duty. As noted at paras. 77, 81 and 83:

> [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*.
>
> …
>
> [81] One might well understand that courts would shy away from imposing a free-standing positive duty to disclose information to a counterparty where it would serve to upset the corrective justice orientation of contract law. Whether or not a positive duty to cooperate of this character should be associated with the principle of good faith performance in the common law, a party to a contract has no general duty to subordinate their interests to that of the other party in the law as it now stands (see *Bhasin*, at para. 86). Requiring a party to speak up in service of the requirements of good faith where nothing in the parties' contractual relationship brings a duty to do so could be understood to confer an unbargained-for benefit on the other that would stand outside the usual compass of contractual justice. Yet where the failure to speak out amounts to active dishonesty in a manner directly related to the performance of the contract, a wrong has been committed and correcting it does not serve to confer a benefit on the party who has been wronged. To this end, Cromwell J. clarified that the "situation is quite different . . . when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87). In such circumstances, contractual parties should be mindful to correct misapprehensions, lest a contractual breach of the *Bhasin* duty be found.

…

> [83] This emphasis on the corrective justice foundation of the duty to act honestly in performance is, in my view, helpful to understanding why a facially unfettered right is nonetheless constrained by the imperative requirement of good faith explained in *Bhasin*. I recall that Cromwell J. sought to reassure those who feared commercial uncertainty resulting from the recognition of this new duty by explaining that the requirement of honest performance "interferes very little with freedom of contract" (para. 76). After all, the expectation that a contract would be performed without lies or deception can already be thought of as a minimum standard that is part of the bargain. I agree with the sentiment expressed by the Chief Justice of Alberta in a case that relied on *Bhasin* and *Potter*: "Companies are entitled to expect that the parties with whom they contract will be honest" in their contractual dealings (*IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta. L.R. (6th) 96, at para.4). In that sense, while the duty is one of mandatory law, in most cases it can be thought of as leaving the agreement and both parties' expectations — the first source of justice between the parties — in place. By extension, requiring that a party exercise a right under the contract in keeping with this minimum standard only precludes the commission of a wrong and thus repairing that breach, where damage resulted, may be thought of as consonant with the principles of corrective justice. Where a party has lied or otherwise knowingly misled the other contracting party in respect of a matter that is directly linked to the performance of the contract, it amounts to breach of contract that must be set right, but the benefits of the bargain need not be otherwise reallocated between the parties involved.

[271] Once the terms of the contract are established, the court must consider whether there has been a breach.

[272] If a breach is established, then the court must consider what losses, if any, are caused by the breach. While proof of loss is not an essential element of an action for breach of contract, if it is not proven that a breach of contract caused a loss, then only nominal damages will be available to a plaintiff: *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at paras. 111 and 114.

[273] To establish losses, there must be a causative link. As noted in *Sharp* at paras. 115-118:

> [115] Causation in contract has been considered most extensively as either a component of the issue of remoteness, or more precisely as a related principle that precedes the question of remoteness. The author of *Chitty on Contracts*, 33rd ed, vol 1 (London: Thomson Reuters, 2018) at 1841 explains:

> Although the issue of remoteness—whether a particular loss was within the reasonable contemplation of the parties—tends to [be] the prominent one in cases of liability for damage in the law of contract, before any issue of remoteness can arise causation must first be proved: there must be a causal connection between the defendant's breach of contract and the claimant's loss. The claimant may recover damages for a loss only where the breach of contract was the "effective" or "dominant" cause of that loss.
>
> [Footnotes omitted.]

[116] The relationship between causation and remoteness is more fully considered by Fridman. Importantly, at 678, Fridman describes two distinct issues that can arise whenever a contract is breached and the issue of damages arises:

> Whenever a contract is broken, so as to give rise to the common-law remedy of damages, two distinct issues can arise. One is whether the damage incurred by the plaintiff is properly remediable by, or recoverable in, an action for breach of contract or was too remote a consequence of the event to entitle the plaintiff to recover damages in respect thereof. The second issue is how to measure the loss incurred by the plaintiff, in respect of which it has been determined that the defendant is liable. This is a matter of quantification. Each of these issues involves complex questions and is resolved by the application of different rules which require separate considerations.
>
> [Emphasis added, footnotes omitted.]

[117] For the first issue, remoteness, Fridman refers to *Hadley v. Baxendale*, [1854] E.W.H.C. Exch. J70, 9 Ex. Ch. 341, and he states, at 683, under the broader heading of "Remoteness of Damage":

> Before damage is properly treated as recoverable under *Hadley v. Baxendale*, it must have been the direct, physical result or consequence of the breach of contract that is in question.[119] The question of causation must be separated from the question of loss.[120]
>
> [119] Hence, it would have to be shown that if the defendant had not broken his contract the plaintiff would have acted in a different way so as to avoid the loss which he claims resulted from the defendant's breach: *Major v. Buchanan* (1975), 9 O.R. (2d) 491 (Ont. H.C.).
>
> [120] *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 100 D.L.R. (4th) 469 at 484 (Ont. C.A.); leave to appeal refused (1993), 34 R.P.R. (2d) 90 (note) (S.C.C.).
>
> [Emphasis added.]

[118] Fridman also states, at 703:

> Once it has been determined that the defendant has breached a contract and is to be held liable for its harmful consequences, in accordance with what has been discussed earlier with respect to causation and remoteness, the court is faced with the issue of deciding the amount to be awarded the plaintiff by way of damages for breach of contract.

[274] In the event causation is established, the next stage is to determine damages. Damages for breach of contract aim to put the plaintiff in the position they would have been in had the wrong not been done. That in turn requires an assessment of what the plaintiff's position would have been had the defendant fulfilled its side of the bargain. As noted in *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319 at paras. 39-40:

> [39] … [W]hereas in tort, damages are generally intended to place the plaintiff in the position he or she would have been in had the wrong not been committed (i.e., 'reliance' damages), damages in contract are generally intended to place the innocent party in the position he or she would have occupied had the contract been carried out by both parties (i.e., 'expectation' damages). (See H.D. Pitch and R.M. Snyder, *Damages for Breach of Contract* (looseleaf) at 1-1; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* [1991] 3 S.C.R. 3 at 14; *Fidler v. Sun Life Assurance Company of Canada* 2006 SCC 30 at para. 27.) Pitch and Snyder observe:
>
> > The difference between these two tests is significant. In a contract action, the court considers what benefits the plaintiff would have achieved had the contract been carried out. In a tort action the court considers what losses the plaintiff would have avoided had the incident not occurred. Thus, in a sale of goods action, the court awards the plaintiff the profit that would have been earned had the transaction been completed. In a personal injury action the court attempts to compensate the plaintiff for injuries and losses. Fuller and Perdue [see (1936-7) 46 *Yale L.J*. 52 at 373] the authors of the leading article on the subject of the quantification of damages for breach of contract, have explained that the reason the courts have awarded the "loss of bargain" as damages is to encourage contracting parties to carry out their obligations, by making it prohibitively expensive, if they fail to carry out those obligations. As they explained:
> >
> > > [It] encourages people to perform their side of a bargain thereby upholding the working of the market economy … if parties could only recover their reliance interest (expenses) there would be no incentive to perform – in fact, this principle encourages people to enter into contract. [At §1.1; footnotes omitted.]
>
> [40] In contract, the test is in my view most conveniently enunciated as an 'even if' one: would a purchaser of widgets have been unable to sell them 'even if' the products had complied with the specifications in the contract? Would a disgruntled client of a broker have suffered the losses he claims 'even if' the broker had sold his securities when instructed? The task of resolving this type of question is inherently more uncertain than the task before the court in most tort cases. Still, it may be possible to express the test as a 'but for' one even in contract: would the purchaser of widgets have made the profits it claims 'but for' the failure of the defendant to meet the specifications? Or, in the case at bar, would Water's Edge still have its interest in the Lease 'but for' the assumed breach of the *Bhasin* duties by the Ministry?

[275] Where the duty of honest performance is breached, the following comments of Justice Kasirer in *Callow* are of assistance with respect to the judgment in *Bhasin*:

> [113] … Damages were awarded using the ordinary measure of contractual expectation damages, namely to put Mr. Bhasin in the position he would have been in had Can-Am not breached its obligation to behave honestly in the exercise of the non-renewal clause (*Bhasin*, at paras. 88 and 108). This resulted in Mr. Bhasin being compensated for the value of his business that eroded (paras. 108-10). As Professors O'Byrne and Cohen helpfully explain, "if Can-Am had dealt with Bhasin honestly on all fronts (though without requiring it to disclose its intention not to renew), Bhasin would have realized much sooner that his relationship with Can-Am was in tremendous jeopardy and reaching a breaking point. He could have taken proactive steps to protect his business, instead of seeing it 'in effect, expropriated and turned over to Mr. Hrynew'" ("The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015), 2017 ABCA 164, 53 *Alta. L.R.* 1, at p. 8 (footnotes omitted)).

[276] In *Callow* itself:

> [116] As the trial judge found, Baycrest "failed to provide a fair opportunity for [Callow] to protect its interests" (para. 67). Had Baycrest acted honestly in exercising its right of termination, and thus corrected Mr. Callow's false impression, Callow would have taken proactive steps to bid on other contracts for the upcoming winter (A.F., at paras. 91-95). Indeed, there was ample evidence before the trial judge that Callow had opportunities to bid on other winter maintenance contracts in the summer of 2013, but chose to forego those opportunities due to Mr. Callow's misapprehension as to the status of the contract with Baycrest. In any event, even if I were to conclude that the trial judge did not make an explicit finding as to whether Callow lost an opportunity, it may be presumed as a matter of law that it did, since it was Baycrest's own dishonesty that now precludes Callow from conclusively proving what would have happened if Baycrest had been honest (see *Lamb v. Kincaid* (1907), 1907 CanLII 38, 38 S.C.R. 516, at pp. 539-40).

[277] A plaintiff is obligated to take all reasonable steps to mitigate the loss suffered as a result of the defendant's wrong, and cannot recover damages for any such loss which could have been reasonably avoided: *Webb v. Attewell* (1993), 88 B.C.L.R. (2d) 1, 1993 CanLII 6873 at para. 34, citing McGregor on Damages, 15th ed., para. 275.

[278] There are several British Columbia authorities suggesting that it is generally considered to be reasonable to accept an offer from the party in default to deal with the consequences of the breach: *Husky Crane Service Inc. v. Danco Equipment*

Inc., 2009 BCSC 906 at para. 68; *Absolute Industries Ltd. v. Harris*, 2014 BCSC 287 at paras. 110-112; *Westland Investment Corp. v. Carswell Collins Ltd*. (1996), 179 A.R. 272, 1996 CanLII 19986 (Q.B.) at paras. 44-50.

[279] With respect to the claims for aggravated and punitive damages, the applicable principles were recently summarized (albeit in the context of a claim by an individual for *Charter* damages) in *Johnson v. British Columbia (Attorney General)*, 2022 BCCA 82:

> [83] … Aggravated damages are compensatory in nature, and their primary aim is to compensate the plaintiff while recognizing the egregious nature of the behaviour in response to which they are awarded: *Norberg v. Wynrib*, , [1992] 2 S.C.R. 226 at 264; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 116. Secondarily, they may also serve to satisfy the objectives of retribution, deterrence and denunciation. Where they are insufficient to achieve those objectives, however, the court may turn to punitive damages: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 87.
>
> [84] The purpose of punitive damages, as the name suggests, is to punish the defendant rather than to compensate the plaintiff: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196. The objectives of punitive damages are retribution, deterrence and denunciation. They may be awarded where there has been "highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour" and are assessed "in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant": *Whiten* at paras. 74, 94.

[280] In the context of breach of an employment contract, the following principles were set out in *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189:

> [72] Aggravated damages and punitive damages are discrete sets of damages potentially available for wrongful dismissal. In *Honda Canada Inc. v. Keays,* 2008 SCC 39, the Court set out the distinction between aggravated and punitive damages as follows:
>
> > [62] … Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.
>
> [73] As punitive and aggravated damages are independently available, the Court in *Honda* noted the danger of duplicative awards that result in double damages or double compensation: *Honda* at para. 60. However, the same

> underlying conduct can ground both aggravated and punitive damages without being duplicative. The danger is awarding punitive damages to condemn behaviour that has already been adequately rebuked by the compensatory damage awards: *Kelly v. Norsemont Mining Inc.,* 2013 BCSC 147 at para. 116.
>
> …
>
> [75] The combined general, aggravated, and punitive damages should not exceed the amount necessary for the purposes of denunciation, deterrence, and retribution. Given that compensatory damages are awarded first, punitive damages would only be necessary if the total award is not yet sufficient to achieve these three goals.
>
> …
>
> [77] … Punitive damages awards should be approached with caution and restraint and resorted to only in exceptional circumstances: *Whiten* at para. 69. Punitive damages awards are rational only when compensatory damages do not adequately achieve the objectives of retribution, deterrence, and denunciation: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.,* 2002 SCC 19 at para. 87.

Analysis

[281] The plaintiffs claim that CPC breached the contract for processing of the Chaga nuggets into powder.

[282] The first issue is to identify the terms of the contract. In my view, the terms are found in three key documents:

a) The emails of July 6 and August 6, 2016, which set out the procedure to be followed in processing the Chaga nuggets, which the parties clearly treated as the purchase orders;

b) The sales confirmation forms sent to Ms. Liou on July 7 and August 10, 2016, which Ms. Liou signed and returned on July 26 and August 10, 2016; and

c) The product specification confirmation forms sent on July 18 and August 10, 2016.

[283] There are two earlier documents that deal with the processing method: the April 17, 2016 email with respect to the initial 50 kg batch, and the attachment to the

June CNDA. In my view, those documents reflect the state of discussions between the parties at the respective times and do not take away from the certainty as to process that is found in the two purchase order emails.

[284] I do not accept CPC's assertion that there was an unwritten term in the parties' agreement that allowed CPC to vary the processing method as it sees fit. That proposition is simply incompatible with the nature of the contract documents – which set out a specific process and say nothing about variations. To the extent there was *viva voce* evidence with respect to RO relying on CPC's – and in particular Dr. Ma's – expertise, the evidence indicates that that related to discussions at the very early stages leading up to the trial batch. The very purpose of the trial batch was to finalize the appropriate procedure. I accept Ms. Liou's evidence that the process set out in her email reflected her understanding of the process that led to the successful trial batch. The written documents forming the contract make clear that that is the process to be followed. In my view, CPC departed from that process at its own risk.

[285] Similarly, there was evidence as to Ms. Liou preparing patent applications which reflected variations as to the process. All but one of them were prepared after this action was commenced. Those were not communications exchanged between the parties, and in my view could not affect the process. They may be material to other issues in this action, but they are of no import in determining the terms of the contract.

[286] None of the documents comprising the contract made any provision for any particular concentration of polysaccharides. It is my view that the contract between RO and CPC contained no term specifying any concentration of any nutrient. The contract was one by which CPC agreed to follow a specific process, not to produce a specific result.

[287] I turn now to the contract with respect to the Beauty Secret powder. As noted above, there was an initial quotation for this production, which specified the contents of the product, and a Sales Confirmation form dated August 24, 2016, and accepted

by Ms. Liou on behalf of RO on August 26, 2016. However, it was clear from the documents that the intention was to use as raw material the Chaga residue, so production would clearly have to await completion of the dual extraction processing of the Chaga, as well as the obtaining of an NPN for the production (which occurred in November 2016).

[288] There was no evidence to indicate why production of the Beauty Secret powder did not go ahead once the NPN had been obtained. It seems clear from the evidence that the residue had been accumulating in CPC's warehouse since production began in mid-September. Although there was no direct evidence of this, it may be that CPC read the January 25, 2017 email – which instructed CPC "not to powder the residue" and to "hold all the process of the Chaga" for the time being – as an instruction to put the Beauty Secret Powder work on hold as well.

[289] CPC provided a Sales Confirmation form on March 22, 2017. The cover email included an apology for the delay – although this was one of several quotations provided that day and it is not clear whether the delay referenced in the cover email related to the Beauty Secret powder quote or to others that were in the package. There were two differences between this quotation and the one in August 2016: the price was increased, and there was a set of Contract Terms and Specifications attached to it.

[290] This was followed by further negotiations as to price, a new Sales Confirmation form on March 28, 2017, which was signed by Ms. Liou and returned, then further negotiations as to an extra 30 cents per bottle charge which was requested by RO and confirmed in Ms. Liou's July 7, 2017 email.

[291] In my view, the contract between RO and CPC with respect to the Beauty Secret powder consists of the original August 18, 2016 quotation (which sets out the components) and the March 28, 2017 quotation, signed by Ms. Liou, and as subsequently amended by the July 7, 2017 email. I accept that the Contract Manufacturing Terms and Conditions were part of this contract.

[292] The contract contemplated that a key ingredient of the Beauty Secret powder would be the residue of the Chaga after the dual extraction process had occurred. It was contemplated by the parties that the residue would remain with CPC between the completion of the dual extraction processing and the start of manufacture of the Beauty Secret powder. Nothing in the parties' arrangements contemplated that RO would have access to the residue in the interim. It was clear in the circumstances that the CPC was intended to keep the residue until it was used to produce the Beauty Secret powder. In my view, in these circumstances, and given CPC's status as a health products manufacturer regulated by Health Canada, it was an implied term of the parties' agreement that CPC would store the residue in a safe manner between these processes.

[293] I turn now to the question of whether these contracts have been breached.

[294] In my view, CPC breached the contract with respect to the dual extraction processing. It did not follow the process specified in the purchase order emails. Rather, accepting Mr. Ying's evidence as the best evidence available, it processed the Chaga in much larger batches than contemplated, and as a result, the ratios of water to Chaga were much lower. It used a higher temperature and a lower concentration of alcohol. I accept Mr. Ying's evidence that the production was complete by the time Mr. Cheung left on holiday on October 22, 2016 – and it seems clear that in order for that to have occurred, the amount processed each day must have been higher than provided for in the purchase order emails.

[295] With respect to the Beauty Secret powder, I accept Kevin Ma's evidence as to his observations of the moisture in the residue when it was processed, and that as a result of instructions received, he performed heat drying before the residue was processed and mixed with the other ingredients to create the powder.

[296] There is no clear evidence establishing the cause of the mould in the Beauty Secret powder product. One possibility is the mould had its genesis in the eight or nine months that CPC stored it in its warehouse in wet conditions – those wet conditions being confirmed by Kevin Ma's evidence. The other is that the mould was

somehow generated in the two weeks between the time it was processed and the time it was bottled – notwithstanding that the previously wet Chaga residue had been heat-dried before being processed. In my view, having accepted Kevin Ma's evidence, the obvious inference in the circumstances is that the first of the two possibilities is far more likely and that responsibility for the mould is attributable to CPC.

[297] There was also an issue with the COA that CPC produced in respect of the Beauty Secret powder. In my view, there are two possible causes for this. One is that the technician who did the mould testing on June 29, 2017, made some sort of mistake. The other is that whatever mould was inherent in the Chaga residue had either not fully formed or had been stopped by the heat-drying work that Kevin Ma gave evidence about and then bloomed in the days following completion of the production. The evidence does not allow me to determine which is the case.

[298] I do not see that as a significant issue, because given how quickly this issue was discovered by Ms. Liou, even if there was an independent breach of contract in respect of the testing, it would not in my view give rise to any additional damages (other than the cost of the testing that RO did in August 2017).

[299] Finally, it is my view that there has been a breach of the duty of honest performance. In my view, it is perhaps not surprising that issues arose in the days and weeks following the dramatic management change that occurred in mid-September 2016 – just as the Chaga extraction project was getting underway. CPC went suddenly from years of hands-on management by its founder to direction by a group of directors with little previous involvement in the business. The evidence indicated that CPC operated without a production manager through the entirety of the production run of the Chaga extraction (other than the first two days). Ms. Chen, who was assistant to the production manager leading up to mid-September 2016, said that she had no involvement in the project. It seems doubtful that anyone was managing the project, reviewing compliance with the product specifications, or

ensuring that important documents like the production sheets were being properly managed.

[300] By the spring of 2017, Mr. Wang must have realized that there were significant issues with RO's Chaga project. He would have first had those issues drawn to his attention when he learned of the test results that were unsatisfactory to the client, then realized there were significant problems when the production records could not be located, then when he talked to Mr. Cheung, Mr. Ying and Mr. Li, he would have learned that each of them had a different recollection of how the processing was undertaken – and that none of their recollections matched the contract that CPC had entered into.

[301] Rather than own up to the problems and seek a reasonable solution, CPC created new production records. While it may well be that part of the purpose of creating these documents was to satisfy regulatory requirements, it seems clear that the immediate pressure to create the production records came from Ms. Liou's requests to see them. Importantly, and key to my conclusion as to a breach of the duty of honest performance, CPC provided both the three-page "batch record" and the newly recreated production records to Ms. Liou without telling her that these were recreated after the fact and were – at best – an attempt to reconcile what the technicians had to say with what Ms. Liou had specified in the contract documents.

[302] I am highly skeptical of the assertion CPC made that the company's policy was that clients could not be given copies of production records. No document was produced reflecting such a policy, nor was any explanation given as to why it was necessary. It seems most likely to me that this was simply a means of attempting to put off Ms. Liou.

[303] The recreated production records appear to reflect some sort of effort to reconcile the contractual requirements (including the purchase order emails) with what Messrs. Cheung, Ying and Li recalled of the actual production process. I can accept that to some degree, it might be reasonable to think that whoever created the original production sheets used by the production staff would have done so with a

view to the contract. However, it is my view that given the discrepancies between what Mr. Ying and Mr. Cheung actually had to say and what was in those production records, and given the unsatisfactory result that Ms. Liou was trying to understand and that was key to her business prospects moving forward, it was a breach of the duty of honest performance to provide those documents to Ms. Liou without advising her that there was significant uncertainty as to whether they were in fact accurate. The provision of the production sheets to Ms. Liou in the circumstances is exactly the sort of half-truth disclosure of information discussed in *Callow*.

[304] I turn now to questions of causation.

[305] RO advances a claim for damages based on the assertion that CPC's breaches caused the destruction of its business. Implicit in that is the suggestion that, had CPC simply processed the Chaga in accordance with RO's instructions, RO would have had a marketable Chaga capsule product. RO's damages claim is based primarily on the loss of profit from that product.

[306] In my view, that proposition is not established on the evidence. While I accept as a basic proposition that variations in such things as the liquid to Chaga ratio, the processing temperature and pressure, and the alcohol concentration can all impact the composition of the processed product, on the whole of the evidence before me, I do not see a basis to conclude that changing the processing method to match what was in the RO instruction emails would have led to a polysaccharide concentration in the range of 50%. The evidence of Dr. Fatehi suggests the concentration would be less than 20% and Ms. Liou's own research, as reflected in the various patent applications she made over time, seems to suggest that she herself has concluded that what was in her July 2016 emails may not actually be the ideal process.

[307] That said, had CPC processed the large batches of Chaga in accordance with RO's instructions, then RO would at the very least have had a starting point for ongoing investigations into creating a marketable product. Instead, what it received from CPC was a mess of uncertainty that was of no benefit to it whatsoever. The impact of that uncertainty was clearly exacerbated by CPC's failure to maintain real

and accurate records as to the processing, and by its failure to report honestly and accurately as to what had happened.

[308] One of the mysteries of this case, unresolved by the evidence placed before the Court, is how the 50 kg batch generated a dual extracted product with a 50.2% polysaccharide content, while the two large batches generated a 6% content, while Dr. Fatehi's work generated a polysaccharide content of just under 19%. Counsel for the defendants posited – admittedly without any evidentiary support – that the initial Silliker test might have been in error. I have doubts about that suggestion. It was clear to me from hearing from Silliker's representative, Mr. Brandl, that Silliker is a major, reputable commercial laboratory, part of an international group of such laboratories, with significant experience in doing this sort of testing. While there may not be an internationally recognized standard for testing of organic compounds like this, Silliker used its own standard process involving HPLC analysis to test organic materials for sugars like polysaccharides. This is the same method that Dr. Fatehi said he used before he was able to secure funds for an even more accurate ion chromatography unit. Silliker used the same testing methodology for both the July 2016 and December 2016 tests.

[309] There may well be other explanations. It might, for example, be that the different batches of raw Chaga had different initial polysaccharide concentrations. This is something that was not tested for with each individual batch.

[310] Given the evidence before me, I am unable to resolve the question as to why the test results for the 50 kg batch were so much higher.

[311] I turn to the assessment of damages. This is a breach of contract case. The measure of damages will generally be the amount of money that is required to put the party in the position it would have been in had the contract been performed in accordance with its terms. In the circumstances, however, I am unable to say with any certainty what would have happened had CPC performed the contract in accordance with its terms. Given Ms. Liou's evidence as to the importance of polysaccharide content to the marketability of the Chaga capsules, the best I can

say is that RO would have had the opportunity to perform further development work with the benefit of any learnings from the processing of the two large batches.

[312] That said, I can see no reason why the Beauty Secret Powder could not have been completed and sold. In my view, as explained above, CPC is responsible for the mould that rendered the Beauty Secret Powder unsaleable. RO claims just over $44,000 in damages in respect of Beauty Secret Powder (sales of 991 bottles for a total of $69,369.09, less CPC fees of $13,839.32, less labelling fee of $584.69, less $10,594.43 representing 1/99 of RO's marketing and management costs). While the evidence as to RO's ability to sell the product at $69.99 is somewhat thin, given that damages are assessed rather than calculated, it is my view that in the absence of the limiting clause in the Contract Manufacturing Terms and Conditions, an appropriately conservative award for loss of the anticipated profit from the Beauty Secret powder would be $30,000.

[313] In addition, RO should not have had to incur the costs of testing the Beauty Secret powder for mould. There were three tests at a cost of just over $300 each. An appropriate award in this respect is $950.

[314] Clause 8.1 of the Contract Manufacturing Terms and Conditions provides three options for CPC to deal with a breach of the contract. Its choice amongst those remedies is to occur after consultation with the client and is to be made "reasonably". In the circumstances, any consultation was cut off by Mr. Lim's email of August 8, 2017, where he put an end to negotiations and advised that he was handing the matter over to CPC's lawyers for resolution in court. In my view, given the nature of the breach, the only reasonable option among the three set out in clause 8.1 would have been for CPC to provide replacement products. Given the time that has passed, that is no longer feasible and damages in lieu are the only appropriate remedy. Pursuant to clause 8.3, the maximum amount of any liability is measured by the cost of replacing client-supplied raw materials. Thus, it is my view that any award for damages with respect to the Beauty Secret powder is constrained by an upper limit of $39,600 (the amount RO paid for the raw Chaga). Given that the

damages award I have identified is less than that, I conclude that the $30,950 award is not constrained by the Contract Manufacturing Terms and Conditions.

[315] I return to the assessment of damages for the breach of the contract for dual extraction of the Chaga. In my view, given that I am unable to make an appropriate award on the basis of loss of profits, the next most appropriate award is to recognize that as a result of CPC's breach of the Chaga dual extraction contract, the money RO spent on the two large orders of raw Chaga was wasted. In my view, it is appropriate that CPC reimburse RO for those costs, which total $39,600. I note that this more or less reflects the first of the options presented by Mr. Lim in his email of July 28, 2017.

[316] RO seeks return of the $106,700 in deposits that it paid to CPC. For the reasons set out above, I do not accept that the deposits were only for the Chaga products. CPC is entitled to keep those funds it properly charged for the initial 50 kg batch and for the other products it manufactured. By my calculation, that includes a total of $102,830, made up of:

a) June 2016 – NPN fees - $3,885.00

b) July 2016 – 50 kg batch - $5,135.37

c) August 2016 – bottling of 50 kg batch and micro-testing - $2,560.14

d) September 2016 – NPN fees - $1,260.00

e) September 2016 – label printing - $33.55

f) September 2016 – other products - $5,071.50

g) October 2016 – other products - $5,966.27

h) November 2016 – other products - $5,775.00 and $4,699.42

i) January 2017 – other products - $4,852.27

j) February 2017 – more NPN fees and other products - $420.00, $157.50 and $14,791.84

k) March 2017 – NPN amendment - $105.00

l) April 2017 – other products - $16,556.55

m) May 2017 – other products - $4,628.99

n) June 2017 – other products - $5,217.91 and $7,023.71

o) July 2017 – other products - $14,689.50.

[317] By my calculation, the amount that should be refunded to RO is $3,870 ($106,700 less $102,830).

[318] I note that CPC purported to issue an invoice to RO in October 2019 for disposal of the mouldy Beauty Secret Powder product. In my view, disposal of that product should be CPC's responsibility.

[319] RO sought to claim for the $10,000 it paid to its Chaga supplier in respect of its original contract and in order to secure a long-term relationship. That was characterized as an interest free loan but also secured RO's obligations, and was never repaid. In my view, that is an expenditure that was committed to well in advance of the contracts that were breached. Given the uncertainty as to when and if RO would have ultimately pursued its Chaga capsule product, it is my view that this is not an expense that should properly be part of the present damages award.

[320] I come finally to the breach of the duty of honest performance. Given the causation issues I have identified, it is difficult to identify something that could have been done differently at the time the duty of honest performance was breached. I am of the view that, at the very least, nominal damages should be payable. In my view, however, the nominal damages should be of some significance given the impact CPC's conduct had on RO and its operations in the summer of 2017, including

significant amounts of staff time that should not have been necessary. I would assess damages under this head as $10,000.

[321] I appreciate that there were significant submissions about failure to mitigate, including arguments about whether RO should have accepted the offers communicated by Mr. Lim on July 28 and August 3, 2017. Those offers were focused on the Chaga dual extraction project and, in particular, on RO's claim for lost profits. In my view, given my conclusion with respect to causation, and the limited award of damages I have made in respect of that contract, any failure to mitigate has no impact on that award. The award I have made is probably less than the cost that CPC would have incurred had RO accepted one of those offers.

[322] Given the award I have made with respect to the breach of the duty of honest performance, it is my view that an award of punitive damages is unnecessary. The award of compensatory damages adequately reflects the goals that would otherwise be achieved by an award of punitive damages.

Other Claims

Fraud

[323] The law governing fraudulent misrepresentation was set out by Justice Bauman (as he then was), in the context of a case in which misrepresentations were said to have been made in the course of contractual performance, in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Company Ltd.*, 2009 BCCA 307 at paras. 55-60:

> [55] Counsel for UPE cited G.H.L. Fridman, *Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) at 309-310, where the learned author described a case of fraudulent misrepresentation as consisting of four elements:
>
> (a) the wrongdoer must make a representation of fact to the victim;
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> (b) the representation must be false in fact;
>
> (c) the party making the representation must have either known it was false or made it recklessly without knowing whether it was true or false; and

(d) the victim must have been induced by the representation to enter into the contract.

[56] Catalyst submits that the focus on finding an inducement to enter into the contract presents a too narrow view of the reliance aspect needed to found the tort of fraudulent misrepresentation. I agree. Fridman himself speaks to this in his text, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) at 749-751, where the learned author discusses the elements of the tort of deceit or fraudulent misrepresentation.

[57] On the intent to deceive element, the learned author states:

> The false statement must be made with the intent that the plaintiff, to whom it is made, should act upon it. It must be intended to deceive the person to whom it is made, in other words to cause that person to believe in the truth of the statement and act accordingly. Clearly if the defendant does not know his statement is false then he can not have the requisite intent to deceive.

[58] On the reliance element:

> Before a defendant can be liable for deceit it must be established, as a matter of fact, that the plaintiff relied on the defendant's misrepresentation. Such reliance was proved to have occurred in *Dixon v. Deacon Morgan McEwan Easson* where the plaintiff purchased the shares as a result of reading the press release containing the inaccurate financial statements about the company.
>
> Although in general it is for the plaintiff to prove the requisite reliance, it would seem that once the plaintiff establishes that the defendant made a misrepresentation calculated to induce the plaintiff to act to his detriment and loss consistent with the plaintiff's having acted on the misrepresentation, the onus then shifts to the defendant to prove that the plaintiff did not in fact rely on the misrepresentation in issue.
>
> [footnote references omitted]

[59] The thrust of the reliance ingredient is the resulting action by the plaintiff to his or her detriment: see also J.G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 694-695. This point is also made in G.S. Bower, Turner & K.R. Handley, *Actionable Misrepresentation*, 4th ed. (Butterworths: London, 2000) at 87:

> 140 Entry into a contract with the representor or a third person is the most common alteration of position. But there are other transactions involving economic loss, present or contingent, which the representee may be induced to undertake which constitute an alteration in position. They include unilateral acts such as payments, gifts, licences and consents, condonations of matrimonial offences, forbearances, and renunciations, and acts which render the representee civilly responsible to some third person, or in breach of the criminal law, which would not have done so if the statement had been true.
>
> [footnote references omitted]

[60] In *Kelemen v. El-Homeira* (1999), 1999 ABCA 315, 250 A.R. 67, the Alberta Court of Appeal discussed the tort of deceit and the "contract action

of fraudulent misrepresentation inducing a contract" (at para. 5). On the issue of reliance, the Court stated at para. 20:

> [20] A critical question is: What was the action taken? In a fraudulent misrepresentation action it must be entering into a contract. In a tort action, that may be, but need not be, the action. Here the intention of Kelemen was to divert El-Homeira from consulting Rudge. He succeeded because El-Homeira's action was to consult Runica, who was not an independent advisor, instead of the independent adviser he wanted and required, Rudge. While it is true that he also entered into the contract, that fact is irrelevant in the tort action, although it would be critical in the contract action.

[324] As I understood the plaintiffs' submissions, the claim of civil fraud was primarily advanced with respect to the initial Beauty Secret Powder mould test results. It was suggested that Dr. Cai signed the initial COA knowing that it falsely misrepresented the mould content of the powder. In my view, the evidence does not support that assertion. It seems clear on the evidence that Dr. Cai was simply certifying the results based on her review of documentation produced by the technician. There is nothing that would support any assertion that Dr. Cai had knowledge that the information was false.

[325] RO also claims fraud with respect to the production records. That claim is, to some degree, duplicative of the claim for breach of duty of honest performance, which I have already dealt with.

[326] In any event, it is my view that there is merit to the defendants' submission that RO has not established that it relied on the production sheets, given the short time between the sharing of the production records with Ms. Liou and her employees and Ms. Liou's assertion that they were inaccurate.

Conspiracy

[327] There is an issue between the parties as to whether conspiracy was properly pleaded. At trial, the plaintiffs relied on their Amended NOCC which has not changed since it was filed in August 2017. That document contained a general reference to CPC having instructed or permitted its employees to participate in unlawful schemes. In their Trial Brief, the plaintiffs included amongst the issues to be decided

whether the defendants conspired together “to provide falsified records” and “to cover up their wrongdoings” and did so by engaging in “quasi-criminal acts”, and whether the defendants made “knowingly false representations”. In its Trial Brief, the defendant made no reference to conspiracy. It was apparent in the plaintiffs’ opening statement at trial that they intended to advance claims in conspiracy, while the defendants throughout trial have asserted that conspiracy is not properly pleaded.

[328] Given my factual conclusions, it is my view that I can deal summarily with the conspiracy claim notwithstanding the concerns about pleadings.

[329] As noted in *Agribrands Purina Canada Inc. v. Kasameka*s, 2011 ONCA 460 at paras. 24-26, there are two categories of conspiracy in Canada: conduct by multiple defendants the predominant purpose of which is to cause injury to the plaintiff; and conduct by multiple defendants that is unlawful, where the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[330] I understood the plaintiffs to be advancing the tort of unlawful conduct conspiracy, which makes sense given the lack of evidence of an intent to injure the plaintiffs. The elements of unlawful conduct conspiracy (per *Agribrands* at para. 26) are:

> (a) they act in combination, that is, in concert, by agreement or with a common design; (b) their conduct is unlawful; (c) their conduct is directed towards the respondents; (d) the appellants should know that, in the circumstances, injury to the respondents is likely to result; and (e) their conduct causes injury to the respondents.

[331] In considering what sort of conduct is considered unlawful, the Court in *Agribrands* noted that it must be actionable and wrong in law (para. 33), and that:

> [37] … [Q]uasi-criminal conduct, when undertaken in concert, is sufficient to constitute unlawful conduct for the purposes of the conspiracy tort, even though that conduct is not actionable in a private law sense by a third party. The seminal case of *Canada Cement LaFarge* is an example. So too is conduct that is in breach of the *Criminal Code*, R.S.C. 1985, c. C-46. These examples of "unlawful conduct" are not actionable in themselves, but they have been held to constitute conduct that is wrongful in law and therefore sufficient to be considered "unlawful conduct" within the meaning of civil

> conspiracy. There are also many examples of conduct found to be unlawful for the purposes of this tort simply because the conduct is actionable as a matter of private law. …
>
> [38] What is required, therefore, to meet the "unlawful conduct" element of the conspiracy tort is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort.

[332] The plaintiffs advanced various sections of the *Criminal Code*, R.S.C. 1985, c. C-46, they suggest were breached, which deal primarily with production of false and forged documents. It appears that the main unlawful conduct they rely on is the same as that said to underlie the civil fraud claims: the production of the COA with respect to Beauty Secret Powder, and the sharing of the production records.

[333] For the reasons I have already discussed, I do not accept that either CPC or Dr. Cai can be said to have knowingly misrepresented the mould content of the Beauty Secret powder.

[334] With respect to the sharing of the production records, I have significant doubts as to whether this rises from the level of a normal contractual breach to constituting unlawful conduct for purposes of the tort of conspiracy. But in any event, I would not conclude that the evidence establishes that the various defendants engaged in concert with respect to that. Dr. Cai had no role in the production records. It is not clear on the evidence that Mr. Lim actually saw the production records prior to them being produced, or that he instructed Mr. Wang that the records were to be inaccurate or presented to RO in a particular way. The only defendant who is shown on the evidence to be involved at the material times with the production records is Mr. Wang, and I am not satisfied that the evidence establishes that he acted in combination even if his conduct might be wrongful in a private law sense.

[335] Thus, it is my view that there is no merit to the conspiracy claim.

Corporate Veil

[336] Finally, the plaintiffs argued that the court should pierce the corporate veil in the circumstances of this case, to make the individual defendants liable for the obligations of CPC. The two cases cited, *Century 21 Coastal Realty Ltd. v. 0863846 B.C. Ltd.*, 2017 BCSC 1498 at para. 44 and *Koltai v. Hauser*, 2017 BCSC 1675 at paras. 29-34, both reference the judgment of Sharpe J. (as he then was) in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.):

> [T]he courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently ...
>
> The second element relates to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights"? …
>
> [Citations omitted.]

[337] *Koltai* also referenced the comments of Justice Newbury in *XY, LLC v. Zhu*, 2013 BCCA 352, at para. 88, which are to similar effect.

[338] There is nothing to suggest that Mr. Wang and Dr. Cai were anything other than employees of CPC, while Mr. Lim was one of several shareholders and several directors. There is nothing to suggest that CPC was under domination of or being used as a shield by any of the individual defendants. The claim to pierce the corporate veil has no merit in the circumstances of this case.

[339] Finally, I note that Ms. Liou was named as a plaintiff in her individual capacity. It is not clear what if any claims were advanced in that personal capacity. She is a shareholder and director of RO and, pursuant to the longstanding rule in *Foss v Harbottle* (1843), 2 Hare 461, 67 ER 189, she has no right to personally advance claims that belong to RO.

Conclusion

[340] CPC is ordered to pay to RO damages for breach of contract totalling $84,420, made up of:

a) $30,000 in respect of the loss of the Beauty Secret Powder product;

b) $950 in respect of the mould testing costs for Beauty Secret Powder;

c) $39,600 in respect of the acquisition costs for the raw Chaga;

d) $3,870 as a refund of deposits paid; and

e) $10,000 in respect of the breach of the duty of honest performance.

[341] RO is entitled to any applicable court order interest.

[342] To the extent the Notice of Civil Claim asserts any claims on behalf of Ms. Liou, those claims are dismissed.

[343] The claims against the various individual defendants are also dismissed.

[344] The parties are at liberty to make submissions as to costs. Should either party seek an order of costs, they should provide their submission to me in writing through Supreme Court Scheduling within 60 days of the date of this judgment. The other party may reply within 30 days thereafter. I will advise whether I believe a hearing is necessary – although the parties are welcome to indicate in their submissions whether they believe a hearing would be appropriate.

[345] If the parties identify any mathematical errors, or if there is any issue that I have failed to deal with that was properly before me, then the parties may seek clarification of those matters, with the same schedule for submissions as in respect of costs.

"Veenstra J."