

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Talius Group Inc. v. Portlan Inc.*,
2026 BCSC 1570

Date: 20260820
Docket: S246309
Registry: Vancouver

Between:

Talius Group Inc.

Plaintiff

And

**Portlan Inc., Lilyway Enterprises Incorporated dba Seaton Sunrooms,
Jason Watorek and Brooke Watorek**

Defendants

Before: The Honourable Justice E. Sigurdson

Reasons for Judgment

Counsel for the Plaintiff:

D.M. Palaschuk

Counsel for the Defendant, Portlan Inc.:

J.V. Payne
V. Li

No other appearances

Place and Dates of Trial:

Vancouver, B.C.
January 5–9, 12–15, 2026
March 9–11, 2026

Place and Date of Judgment:

Vancouver, B.C.
August 20, 2026

Table of Contents

I. OVERVIEW	4
A. Issues.....	5
II. BACKGROUND	5
A. Talius Group's Business History	6
B. The Licensing Agreement	6
C. Change in Ownership of Top Rollshutters and Conclusion of the Licensing Agreement.....	8
D. Alleged Breaches of the Licensing Agreement After its Conclusion	9
III. PRINCIPLES OF CONTRACT INTERPRETATION.....	15
IV. WHICH PROVISIONS OF THE LICENSING AGREEMENT APPLY	18
A. Talius Group's Arguments on Application of the Licensing Agreement	20
B. Portlan's Arguments on Application of the Licensing Agreement	22
C. The Meaning of "Termination" in the Licensing Agreement	24
1. Article 4 and Termination.....	24
2. Article 5 and Termination.....	27
D. Is the Non-Competition Provision (Article 5) unenforceable because it is an Unreasonable Restraint on Trade?	28
1. Level of Scrutiny	32
2. Proprietary Interest	34
3. Adequate Protection	35
4. Breadth of the Restriction	36
E. Alternative Plea of Unjust Enrichment.....	38
V. UNPAID INVOICE CLAIMS	39
A. Invoices and Amounts Claimed	40
1. Tariffs.....	42
a) Conclusion on Tariffs	45
2. Components	46
3. Currency Fluctuation and Shipping Fees.....	46
4. Interest.....	48
a) Conclusion on Interest	50
5. Royalties.....	51
6. Conclusion on Invoices and Amounts Claimed.....	52
VI. CONCLUSION	54

VII. APPENDIX: EXTRACTS OF LICENSING AGREEMENT 55

I. OVERVIEW

[1] The Habitat Screen is a custom patio and exterior retractable screen used to keep out insects, provide shade, and assist with temperature control. Talius Group Inc. (“Talius” or “Talius Group”) manufactures and distributes the product and owns the Habitat Screen brand. Portlan Inc. (“Portlan”) had an exclusive time-limited licensing agreement with Talius Group permitting Portlan to sell the Habitat Screen in Ontario (the “Licensing Agreement” or “Agreement”).

[2] Talius Group claims that after the Licensing Agreement ended on its expiration, Portlan continued to sell Habitat Screens and breached other terms of the Agreement that applied on its termination and seeks damages for those breaches. Talius further claims that Portlan has failed to pay outstanding invoices to Talius for components, tariffs, shipping and interest.

[3] I must determine whether the provisions under which Talius’ breach of contract claims are raised apply to a situation in which the contract ended because of anticipated passage of time, as opposed to upon termination by a party for cause. I also consider whether the non-competition clause in the Licensing Agreement is enforceable.

[4] I must further determine whether the categories of invoices said to be outstanding are charges that can be claimed by Talius when they were not expressly set out in the Licensing Agreement.

[5] I have concluded that the provisions under which Talius has brought its claim for breaches of the Agreement, being the requirements to return materials and components, and the limits imposed by the non-competition clause, are not applicable as the end of the Agreement was not a “termination” within the meaning of the contract.

[6] I further conclude that Portlan is liable to Talius Group for certain invoices related to tariff and shipping charges, royalty charges, and for components for their wholesale price.

A. Issues

[7] The questions I must determine are as follows, and I address them in this order:

- a) Does Talius have a claim in breach of contract under provisions of the Licensing Agreement, in particular:
 - i. Does Talius have a claim in breach of contract for Portlan's failure to return unused components or any materials contemplated in the Agreement, when the relevant provisions apply in the event of "termination"?
 - ii. Does Talius have a claim in breach of contract under provisions of the Agreement that impose non-competition obligations, when those provisions apply following "termination"? Alternatively, can Talius rely on the non-competition clause given the nature of that clause or does it represent an unreasonable restraint on trade?
- b) If Talius cannot advance a claim in breach of contract, does Talius nevertheless have a claim in unjust enrichment?
- c) Is Portlan liable for unpaid invoices, and in particular is Portlan liable to pay invoices for royalties, tariffs, currency fluctuations, or interest?

II. BACKGROUND

[8] The parties agree that the Habitat Screen is an effective and high-quality product in the exterior window covering market in Canada. The plaintiff, Talius Group, is the manufacturer and distributor of Habitat Screens and also makes other products such as rollshutters. Talius products are made from specialized components ordered from other manufacturers and are typically customized to fit a customer's particular needs. The defendant, Portlan, is an Ontario company which sells and installs custom retractable screens.

A. Talius Group's Business History

[9] Top Rollshutters Inc. ("Top Rollshutters") was Talius Group's predecessor company. Top Rollshutters was a manufacturer of rollshutters (which predominantly provide security) and exterior screens (which provide light, heat and insect protection). Top Rollshutters had a manufacturing facility located in Salmon Arm, BC.

[10] Top Rollshutters was purchased around October 2022 by Upper Stage Capital in a leveraged buyout transaction. In early 2024, Top Rollshutters entered into a receivership through which its assets were assigned to Talius Group. These assets included the Licensing Agreement that is central to this litigation. Talius Group took over the operations of Top Rollshutters and since that time has done business under the name "Talius."

[11] Portlan is owned by Brooke and Jason Watorek, who are both directors and shareholders, and are a married couple. Ms. Watorek is the CEO of Portlan. The two are also principals of an Ontario company that does business as Seaton Sunrooms ("Seaton") and are both shareholders and directors of Seaton. Seaton was established by Ms. Watorek's parents in 1974, and Ms. Watorek purchased it from them in around 2014. Seaton has a head office and manufacturing facility in Windsor, Ontario, and shares space with Portlan at this facility. Seaton sold Talius-brand products to customers starting around 2006, and became the largest retailer of those products in Ontario.

B. The Licensing Agreement

[12] Around 2016, Ms. Watorek and Kelly Cahill, the director of Top Rollshutters at the time, decided to enter into the Licensing Agreement, so that Portlan could manufacture, distribute and sell Top Rollshutters' exterior screens in Ontario, particularly the Habitat Screen. Portlan was incorporated in order to enter into the Agreement with Top Rollshutters.

[13] Top Rollshutters and Portlan entered into the Licensing Agreement on October 26, 2016. Extracted text of the Agreement is attached as Schedule “A” to this judgment, to permit the reader to understand the relevant provisions of the Agreement in their context.

[14] The Agreement provides that Portlan would have the exclusive right to manufacture, distribute and sell the Habitat Screen product (Article 2.1) in specific provinces and states, including Ontario (Article 1(k)), during the life of the Agreement. The Agreement required Portlan to purchase components for Habitat Screens through Top Rollshutters (Article 3.1).

[15] With the execution of the Licensing Agreement, Top Rollshutters provided guides, standards, specifications, and techniques for manufacturing Habitat Screens, and provided Portlan with a list of Ontario dealers. Top Rollshutters dealers became Portlan dealers. Portlan representatives received training on manufacturing Habitat Screens, and began using the Top Rollshutters software system (DBox) to input and manage customer orders. From there, they proceeded to manufacture and sell Habitat Screens in Ontario.

[16] Throughout the term of the Licensing Agreement, Portlan purchased components from Top Rollshutters. During the Agreement, the parties agreed that Portlan could purchase motors and fabric directly from the suppliers of those components. Top Rollshutters always supplied the aluminum components which made up the frame of the screen; they were produced by a company called Allutech, which custom-made those components in Belarus.

[17] There was no static price list for the Allutech components. Top Rollshutters would obtain the components based on Portlan’s orders and would inform Portlan of the wholesale price for them. Freight was sometimes charged in addition, and sometimes it was included. Taxes were added to component invoices. There is no dispute that Portlan paid all of Top Rollshutters’ components invoices prior to June 30, 2023.

[18] By all accounts, the arrangement between Portlan and Top Rollshutters was successful, and Portlan profited from the sale of Habitat Screens through the Agreement.

[19] The Licensing Agreement was amended three times:

- a) On March 14, 2018, the Agreement was amended to remove Portlan's obligation to pay Top Rollshutters royalties with respect to two dealers, Rollmatic 2000 and Jan's Awning Products.
- b) On September 16, 2018, the Agreement was amended to extend its term to December 31, 2023 ("September 2018 Amendment").
- c) On May 26, 2023, the Agreement was amended to remove Portlan's obligation to pay Top Rollshutters any royalties as of that date.

C. Change in Ownership of Top Rollshutters and Conclusion of the Licensing Agreement

[20] In around October 2021, a venture capital firm called Upper Stage Capital purchased Top Rollshutters in a leveraged buyout. In December 2022, Frank Christiaens became the CEO of Top Rollshutters.

[21] On October 31, 2023, Top Rollshutters wrote to Portlan and advised that the Licensing Agreement would not be further extended and would conclude at the end of the agreed term, being December 31, 2023.

[22] On March 25, 2024, Grant Thornton Ltd. was appointed as receiver for Top Rollshutters, and a sales agreement was approved, allowing the assets of Top Rollshutters to be conveyed to purchasers Maywood Street Investments Ltd ("Maywood") and DFI COMMV ("DFI") (the "Sales Agreement").

[23] On April 13, 2024, a numbered company—which became Talius Group on April 29, 2024—took assignment of the Sales Agreement from Maywood and DFI.

[24] On April 24, 2024, Mr. Christiaens emailed the Watoreks to advise that Top Rollshutters was entering bankruptcy and that all employees, assets and receivables were transferred to Talius Group. At that time, Mr. Christiaens advised Portlan he had instructions to clear up accounts receivable.

[25] On April 29, 2024, the receiver acknowledged the assignment and certified the transaction had been completed to the receiver's satisfaction.

[26] On April 30, 2024, Talius Group sent a demand to Portlan, including a demand alleging that Portlan owes \$229,620.81 to Top Rollshutters for unpaid invoices.

D. Alleged Breaches of the Licensing Agreement After its Conclusion

[27] Essentially all of the foregoing was not controversial at trial. Much of the disputed evidence relates to matters following the end of the Licensing Agreement, and I turn to those matters now and in doing so address the following issues:

- a) Whether, as a matter of fact on a balance of probabilities, did Portlan continued to produce and sell Habitat Screens after the conclusion of the Licensing Agreement, inconsistent with Article 2 which provides a licence to do so for a set term.
- b) Whether the pleaded clauses of the Licensing Agreement are applicable or enforceable after conclusion of the Agreement, given the answers to the following questions:
 - i. What does "termination" mean in the Agreement?
 - ii. Is this a case in which termination has occurred?
 - iii. Which provisions of the Agreement apply?

- 1) If Article 4.4 applies, was there a breach by Portlan's failure to return components and/or materials; and if so, what damages have been caused?
- 2) If Article 4.5 applies, was there a breach by Portlan when it continued to use trademarks or intellectual property; and if so, what damages have been caused?
- 3) If Article 5.1 applies, was there a breach by Portlan when it remained in the exterior retractable screen business in Ontario in 2024 and/or by hiring a former Top Rollshutters employee Bronwyn deJong; and
- 4) if so, what damages have been caused?

[28] The plaintiff seeks the following orders:

- a) That Portlan is liable to Talius for a total of \$1,111,021, arising from breaches of the Licensing Agreement and from unpaid accounts receivable. This amount claimed is comprised of:
 - i. \$292,848 in unpaid invoices for components: including \$117,356 in unpaid tariffs; \$93,593 in unpaid interest; and \$4,298 for unpaid royalties.
 - ii. \$540,000 in lost profit arising from the defendant's breaches of Articles 4.4 and 4.5, being the failure to return components and materials.
 - iii. \$278,173 in lost profit arising from the defendant's breach of Article 5.1, being the non-competition requirements.
 - iv. Double costs in relation to admissions that ought to have been made pursuant to notices to admit.

[29] Talius asserts that after the end of the Licensing Agreement, Portlan continued to use the Talius components in its possession to manufacture and sell Habitat Screens in Ontario, contrary to the Agreement. Talius asserts that when the

Licensing Agreement ended with its expiry on December 31, 2023, Portlan was obliged, pursuant to Articles 4.4 and 4.5, to return all components and materials, and their failure to do so was a breach of the Agreement. They further assert that this failure put Portlan in a position to continue to produce and sell Habitat Screens, and that Portlan did so contrary to the Agreement which granted that right only during its term. Talius seeks damages representing the sales they allege Portlan made from continuing to produce Habitat Screens. Finally, Talius argues that Portlan has breached the non-competition clause in a number of respects and seeks lost profit arising from those breaches.

[30] Talius submits that the Court should accept a series of facts and inferences to find that Portlan continued to manufacture and sell Habitat Screens after the conclusion of the Agreement.

[31] Portlan argues that Talius has not proven these allegations, and that the credible evidence of Ms. Watorek is that following the end of the Licensing Agreement, Portlan transitioned its exterior window-coverings business into a new product called Heroal. After the conclusion of the Agreement, Portlan's evidence was, any new orders it produced were Heroal brand products, not Talius brand Habitat Screens. Portlan further submits the Court should find that the burden is on Talius to prove any breaches of the Agreement, and it has not done so.

[32] Talius called the evidence of an Ontario dealer of Habitat Screens, Matt Bootsma, who testified that he continued to receive Habitat Screens, priced according to the Top Rollshutters price book, after December 31, 2023, and up to May 2024. He testified that he could identify the specific distinguishing features of the screens and photographed them in their installation. He referred to nine invoices in which orders placed after December 31, 2023, refer to Habitat Screens. He testified that Portlan did not tell his company (Vastek) that the products purchased were not Habitat Screens, or that the order forms or invoices contained clerical errors.

[33] Ms. Watorek on behalf of Portlan gave evidence that the use of “Habitat Screens” on invoices following December 31, 2023, was a clerical error, being a carry-over generated by autofill or pre-existing forms. Talius says that after Mr. Bootsma’s testimony, this evidence changed, and Ms. Watorek testified that Portlan had produced a number of screens in December 2023 in order to fulfil orders received prior to December 31, 2023; although she was not able to identify how many screens Vastek received that had been ordered prior to December 31, 2023. Ms. Watorek testified that the timing around the end of the Agreement was a personally challenging time, as it coincided with the unexpected death of a family member. Portlan emphasizes that the photographs provided by Mr. Bootsma of screen installations do not show any logos or marks identifying the Habitat Screens or the Talius brand.

[34] Talius argues there was no evidence that Portlan offered screens in early 2024 from Heroal, the supplier Portlan testified they had used since January 2024. Portlan was unable to produce an announcement email that they asserted had advised dealers of the details of Heroal retractable screens. The announcement by Portlan that they were rebranding from Talius Ontario to Portlan Inc. in December 2023 did not include information about Heroal. Talius suggests that Portlan’s failure to produce documentary evidence of a transition to Heroal products at that time permits an inference that they had not in fact done so.

[35] Talius references Portlan sales invoices to dealers in 2024 that used “Habitat Screen” in the job description. They submit this indicates that they used the brand, knowhow, technology and materials for those products after the Licencing Agreement. Portlan says that the job description field was not changed on their template and was auto-filled in some cases, and in others the job description reflects an order made prior to the conclusion of the Agreement, but which was filled in 2024.

[36] Talius argues that Portlan cannot account for the number of components in its possession and where these were used or disposed of at the end of the Licensing

Agreement. Portlan does not deny that Portlan did not return any components to Talius. Talius suggests that because Portlan did not lead evidence to show how the components were consumed, returned or disposed of, the Court may draw an inference that Portlan would not have disposed of their components inventory. Instead, the Court should infer the inventory of components was used to manufacture and sell Habitat Screens after the end of the Agreement. Talius argues that Ms. Watorek's testimony that Portlan had used up the components prior to December 31, 2023, should not be accepted because, as of that date, Portlan had sufficient inventory to produce 500 screens, and did not provide an account of how it was possible to use up that amount. Talius says the Court should draw an inference that Portlan continued to manufacture Habitat Screens and conclude that they sold 500 of them in 2024.

[37] The evidence was that Portlan did not return or offer to return any materials, whether in print or digital form, such as cut sheets or price books. Talius says the only reasonable inference is that the materials continued to be used in manufacturing Habitat Screens after the end of the Licensing Agreement. Portlan's evidence was that any guides relevant to the Habitat Screens had no utility once they were no longer licensed to produce that product.

[38] Talius says that Portlan hired Top Rollshutters' only Ontario salesperson to facilitate the continued sale of Habitat screens. Ms. Bronwyn De Jong was one of three Top Rollshutters employees who did not transfer to Talius Group in 2024 with the transition to the new company.

[39] Talius further relies on evidence that Portlan had used Talius and Habitat Screen images on its website in 2024. They say that this indicates that Portlan continued to sell Habitat Screens and use its imagery in marketing after the Licensing Agreement's expiry.

[40] The burden is not on Portlan to show that they *did not* sell new orders of Habitat Screens after December 31, 2023. The burden is on Talius to show that they did. I find on a balance of probabilities that Talius has not done so. The case they

have advanced is built on a suite of inferences. I find, without more, these are not sufficient to rise to the level of overcoming Ms. Watorek's sworn evidence that Portlan had moved on from the Talius product once they were required to do so, and adopted the Heroal product in 2024. My reasoning for this conclusion is, first, I found Ms. Watorek to be credible and forthright, she was candid about when she did not know or recall something. Talius argues that Ms. Watorek's evidence changed over time. I found that her evidence merely clarified or expanded her understanding of the situation. Her understanding of why the term "Habitat Screen" continued to be used in invoices admitted that her administrative processes had not kept up to date and admitted that this had led to confusion and was incorrect, but also was an understandable error in the context of transitioning out of a long arrangement with Talius and Top Rollshutters at a difficult time.

[41] Where there is a lack of documentation, I am not inclined to draw an inference in Talius' favour without more: the burden is on Talius to positively prove the fact on a balance of probabilities or demonstrate that the conclusion they seek is one that should follow from the evidence. The fact that Ms. Watorek did not produce certain communications or records does not allow me to draw the inference Talius asks this Court to draw.

[42] I did not find Ms. Watorek's evidence difficult to reconcile with the other evidence at trial. Mr. Bootsma stated that he believed that he received Talius products. Other than the job descriptions using the brand name "Habitat Screen", Mr. Bootsma also testified that he recognized the product. I believe that Mr. Bootsma thought he had received Habitat Screens, and he was never disabused of that understanding. However, he did not provide any images or information showing that in the relevant time period the products he ordered, received, and installed were in fact Habitat Screens. Ms. Watorek was equally unclear about the number of back-ordered screens delivered to Vastek that were Habitat Screen products.

[43] Talius claims that it is commercially implausible that Portlan simply discarded components rather than using, selling, or requiring Talius to repurchase them. Talius

led evidence of shipments of components inventory sent in October and December 2023, which it says were sufficient to produce hundreds of Habitat Screens (the “Components Shipments”). Ms. Watorek testified that by December 31, 2023, Portlan had used up its inventory from Talius, but that the Components Shipments were not part of that inventory. She says that in January 2024, the first order of components was destroyed, and after January 2024 the second shipment was destroyed. Ms. Watorek testified that she did not have a clear inventory of what was left over, but that they were disposed of. I am unwilling to draw an inference to the benefit of the plaintiff on this basis without more.

[44] My factual conclusions arising from the post-Agreement evidence are that Talius has not proven on a balance of probabilities that Portlan continued to fill new orders for Habitat Screens after the end of 2023.

[45] Talius’ claim for damages depends on proof that Portlan was in fact selling Habitat Screens in 2024, in breach of the Agreement. The damages sought also depend on a conclusion that the screens Portlan did sell took Talius’ place in the Ontario market, and by displacing their sales, Portlan profited at Talius’ expense. Talius’ claim however is based on a series of inferential conclusions which I am not, on a balance of probabilities, prepared to accept as making out their claims for breaches or damages. While my conclusion on the asserted breach of contract does not turn on this conclusion, my conclusion respecting unjust enrichment does, as I express below.

III. PRINCIPLES OF CONTRACT INTERPRETATION

[46] A contract is interpreted on the basis of words and context. The court must view 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 the formation of the contract.”: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] at para. 47. The purpose of this exercise is to determine “the intent of the parties and the scope of their understanding”: *Sattva* at para. 47.

[47] Finding the intention of the parties requires the court to examine the context. The meaning of words in a contract 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”: *Sattva* at para. 48.

[48] I adopt Justice Riley’s helpful and concise summary of the interpretation principles set out in *H.R.S. Resources Corp. v. Thompson Creek Metals Company Inc.*, 2024 BCSC 1847 at paras. 129–139:

[129] The court’s goal in the interpretation of a contract is to ascertain the objectively discernible intention of the contracting parties based on the words the parties chose to use in their agreement: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47, 57. The intention of the parties is determined on an objective basis. The question is how a reasonable person would understand the contract based on its text and in light of the surrounding circumstances: *Prairiesky Royalty Ltd. v. Yangarra Resources Ltd.*, 2023 ABKB 11 at para. 60.

[130] To achieve the goal of discerning contractual intent, one 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”, and also consistent with the relevant commercial realities and good business sense: *Sattva* at paras. 47; *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326 at para. 16(ii). I find it helpful to break down this succinct summary of the proper approach by focusing on four discrete but overlapping points of interpretation.

[131] First, the interpretive exercise should always start with the text of the contract itself. In the case of a written contract, the contracting parties have chosen to express their agreement in particular terms. The starting point should be that the parties “intended what they said in the written document”: *Prism* at para. 16(i).

[132] Second, it is “a fundamental principle of contractual interpretation that a contract must be construed as a whole”: *Sattva* at paras. 47, 64. This means that interpretation of a particular contractual provision must always be “grounded in the text and read in light of the entire contract”: *Sattva* at para. 57. The court must adopt an interpretation that “gives meaning to the terms” of the agreement, in a manner that does not render any of those terms “ineffective”: *Prism* at para. 16(ii); *Prairiesky* at paras. 59-60.

[133] Third, courts have acknowledged the difficulty in ascertaining contractual intent based on the words in the contract alone. Words on a page do not necessarily have a singular or immutable meaning, and they often take on shape based on the context in which those words are used: *Sattva* at para. 47. For this reason, it is necessary for the court to consider the surrounding circumstances – sometimes referred to as the factual matrix – in which the agreement was made as part of the interpretive exercise: *Sattva* at paras. 46, 50, 58; *Prairiesky* at paras. 60-61; *Prism* at para. 16(iii); see also

St. Andrew Goldfields Ltd. v. Newmont Canada Limited, 2009 CanLII 40549 (ON. S.C.) at para. 15, aff'd 2011 ONCA 377; *Lake Louise Limited Partnership v. Canada Corp. of Manitoba Ltd.*, 2014 MBCA 61 at para. 33.

[134] Fourth, courts must also strive to interpret the text of the contract in a manner that accords with “sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed”: *Prism* at para. 16(iv); see also *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888 at para. 26. In the particular context of agreements concerning natural resource extraction, “[c]ourts must interpret royalty agreements according to sound commercial principles and business sense to avoid results that are unrealistic, absurd, or unreasonable with respect to the commercial realities of the industry”: *Prairiesky* at para. 61.

[135] Many of the leading cases acknowledge the importance of the surrounding circumstances to the interpretive exercise. In this regard, a few further points must be noted.

[136] The goal in considering evidence of the surrounding circumstances is to “deepen a decision maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract”: *Sattva* at para. 57. As Madam Justice L.B. Roberts put it in *St. Andrew Goldfields* at para. 15, “even when the terms of an agreement are not ambiguous, the evidence of surrounding circumstances and of custom or usage may be admitted as an aid in interpreting and giving business efficacy to those terms”.

[137] It is important to bear in mind that the factual matrix is limited to facts that were “known or ought reasonably to have been known to the parties” at the time the contract was formed: *Prairiesky* at para. 61, citing *Sattva* at paras. 58, 60, and *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing*, 2017 ABCA 157 at para. 83; see also *Prism* at para. 16(iii). This “necessarily includes” the “genesis of the agreement”, “its aim or purpose”, the “nature of the relationship created by the agreement”, and the “nature” and “customs” of the industry: *Prairiesky* at para. 61, citing *Sattva* at para. 47 and *IPF* at para. 83; see also *Prism* at para. 16(iii). The surrounding circumstances can also include the degree of sophistication of the parties, and the nature of the risks considered by those parties in negotiating the contract: *Sattva* at para. 66.

[138] The factual matrix does not include evidence of “the subjective intention of the parties”, “negotiations”, or the “subsequent conduct of the parties” after the execution of the contract: *Lake Louise* at para. 34. Indeed, evidence as to the subjective intentions of the parties, along with evidence of their post-contract conduct, is presumptively inadmissible. Such evidence is only admissible to resolve ambiguity, where the words of the written contract read in the context of the surrounding circumstances are genuinely ambiguous in the sense that they could reasonably support multiple, equally plausible meanings: *Prairiesky* at para. 62.

[139] Finally, the factual matrix cannot be allowed to “overwhelm” the words of the contract, or change the words so as to undermine the obligations and rights that the parties assumed when they entered the contract. Thus, while

the surrounding circumstances are a relevant and important part of the interpretive process, courts “cannot use them to deviate from the text such that the court effectively creates a new agreement”: *Sattva* at para. 57; *Prism* at para. 17.

See also: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed. (Toronto: LexisNexis Canada Inc., 2020), ch. 2.1.1

[49] The guidance I take from these principles of contractual interpretation includes the following:

- a) Look to the words first, and do not ignore words used by the parties.
- b) Use the time of the formation of the contract as the relevant time to interpret the parties’ intentions.
- c) Consider context, including:
 - i. the entirety of the contract, because words are not understood in isolation;
 - ii. the surrounding circumstances that gave rise to the contract and within which the contract exists;
 - iii. that context is always relevant, not just with ambiguity; and
 - iv. that context shall not overwhelm the words or introduce inadmissible evidence of subjective intention. The factual matrix for doing so is assessed objectively.
- d) Consider the commercial efficacy of a contract and whether an interpretation is commercially reasonable. A commercially reasonable interpretation is more likely to be consistent with the intention of the parties and the contract’s proper interpretation.

IV. WHICH PROVISIONS OF THE LICENSING AGREEMENT APPLY

[50] I first consider which provisions of the Licensing Agreement apply in the circumstances of this case.

[51] Talius Group's case is, in effect, that Portlan's breaches of Articles 4.4 and 4.5 prove that they were in a position to continue to sell Habitat Screens following the end of the Agreement, and were in fact doing so contrary to the time limited nature of the Licensing Agreement, and in breach of the Agreement's non-competition provisions in Article 5.1.

[52] The parties disagree on whether certain clauses apply to the circumstances following the end of the Licensing Agreement because these provisions are engaged "upon termination" of the Agreement by either party or "after the termination" of the Agreement. The word "termination" itself is not included in the definitions section of the Agreement.

[53] Portlan submits Articles 4.4 and 4.5 (return of materials and components, use of intellectual property) as well as Article 5.1 (non-competition) do not apply as the Agreement *expired*, it was not pro-actively terminated. Portlan further argues that Article 5.1 should be found not to be enforceable due to it being an unreasonable restraint on trade. Talius Group submits the Agreement, read as a whole, suggests that termination should mean *the end* of the Agreement, however that occurs. Talius Group further argues that Article 5.1 is reasonable and enforceable.

[54] Portlan does not argue that no liabilities (such as invoices) may be outstanding after the end of the Agreement, so interpretation of "termination" in Article 4.6 is not critical to this decision.

[55] The "Term and Termination" provisions of the Agreement are as follows:

4. TERM AND TERMINATION

4.1 The rights and obligations of the parties under this Agreement shall remain in force and effect for a period of five (5) years, commencing on the Effective Date.

4.2 Provided Portlan has not breached any of the provisions of this Agreement, this Agreement may be extended for an additional twenty-four (24) months, commencing on the anniversary of the Effective Date, upon mutual agreement in writing between the parties.

4.3 Either party may terminate this Agreement prior to the expiry of this Agreement for cause only, as follows:

(i) by Talius, for breach of its Obligations, Representations and Warranties; or

(ii) by Portlan, for breach of sections 3 of this Agreement, or its Obligations, Representations and Warranties;

by providing sixty (60) days written notice of a desire to terminate this Agreement, provided that the party does not cure its default.

4.4 Upon termination by either party, Portlan will deliver to Talius all Components, Materials, and Products in their possession or in the possession of an agent, distributor; or other Person affiliated with Portlan. Talius will refund Portlan for all Components returned to Talius. For the purpose of this section, the Components and the products shall both be valued at the Wholesale Price.

4.5 Upon termination by either party, Portlan shall immediately cease to use, sell, promote, or in any way deal with the Trademarks, the Intellectual Property, the Materials, the Components, and the Products, except for in fulfilling their obligation under section 4.4 to return these same to Talius.

4.6 Any termination of this Agreement will not affect the liability of one party to the other with respect to amounts already owed by one party to the other upon the date of termination. Any amounts owing on the date of termination, as well as any other obligation arising upon termination in this Agreement, shall survive the termination of this Agreement.

A. Talius Group's Arguments on Application of the Licensing Agreement

[56] Talius Group argues that Portlan remained bound by the provisions in Articles 4.4, 4.5 and 5.1 following the end of the Agreement on December 31, 2023.

[57] In support of their position, Talius Group relies on general principles of contractual interpretation, and submits that 'termination' must be interpreted according to its ordinary dictionary meaning. They submit that it does not have a special legal meaning: *Hendy Holdings Ltd. v. Camrose Lutheran College Corp.*, 2002 ABQB 76 [*Hendy*] at para. 30. Talius Group argues that the ordinary meaning of "expire" includes the synonym "terminate" and refers to *MFI Ag Service Ltd. v. Farm Credit Canada*, 2023 SKCA 30 at para. 32, where the Court held that "from these definitions, it seems that the plain meaning of expire simply means that something that was once in effect has now come to an end."

[58] In *Hendy*, the provision did not include "by either party" but instead where termination is "not the fault of ...". In that case, the Court concluded that while there

may have been doubt about whether the project was “terminated,” it was clear it was abandoned. The Court held the result was the same and provided for compensation up to that date. That case, Talius Group argues, illustrates that the meaning of “termination” can include termination with notice, or by other means such as abandonment.

[59] Talius Group relies on case law which considers the distinction between termination and expiry. The British Columbia Supreme Court in *Brackenridge (c.o.b. Scotia Developments) v. Leslee Farrell and Associates (c.o.b. Remax Ports West)*, [1997] B.C.J. No. 3176 [*Brackenridge*], overturned a Provincial Court decision which had held that there was no distinction between the terms “cancellation” and “expiry” in a real estate listing contract. The judge disagreed and concluded there was a distinction. Talius distinguishes *Brackenridge* because it involved a mutual cancellation of a contract and the purpose of the clause in question was distinct. Here, the Court is tasked with interpreting distinct terminology from the Licensing Agreement. I agree. This case does not provide assistance.

[60] Talius Group also refers to *Orange National v. Big Orange*, 2010 BCPC 53, which it says presents somewhat analogous facts. In that case, the Provincial Court held that it was purely semantics to distinguish between cancellation or termination. That case dealt with the wording of a clause which contemplated a surviving right to fees for work performed under the agreement regardless of who terminated the agreement. This case is not of specific assistance either, in my view, as the provision in question had a different purpose from that in the *Brackenridge* case, and there the interpretation of the parties’ intentions did not rely on “semantics.”

[61] These cases support the fundamental principle that each contract must be understood on its own words, and in its own context. As Talius Group rightly submitted, the ratio of the authorities is that “a surviving clause must be interpreted on its express language and the surrounding circumstances.”

[62] Talius Group argues that the language of the Agreement as a whole should be understood to mean that Articles 4.4, 4.5, 4.6, and 5.1 apply at the end of the

Licensing Agreement, however it ends—by expiry or termination for cause. Talius Group says the words do not suggest “expiry” and “termination” are distinct legal concepts but instead indicate the timing of the end of the Agreement. They say that the text does not draw a distinction between “expiry” and “termination” nor define them specifically, so their ordinary meanings should be applied. Talius Group argues that “expiry” and “termination” describe the same event, being the end of the Agreement.

[63] Talius Group argues that to avoid a commercially unreasonable result, Articles 4.4, 4.5, 4.6, and 5.1, must survive the end of the Agreement. They submit that allowing these obligations to lapse with the end of the term (as opposed to an active termination) would mean that Portlan could avoid payment obligations, be free from any requirement to return or stop using Talius components and intellectual property and allow competition immediately post-Agreement. They say it would result in Talius Group having less post-expiry protection than it did if a party had terminated before the end of the term, and this must be a commercially absurd result.

[64] Talius Group argues that the surrounding circumstances indicate that the purpose of the Licensing Agreement was to grant Portlan a temporary and time-limited license to manufacture and sell Habitat Screens in the Territory. They say the objective commercial rationale for Articles 4.4, 4.5, 4.6, and 5.1, is to protect Talius’ intellectual property, goodwill and dealer relationships, and to provide a reasonable transition period after the end of the Agreement.

B. Portlan’s Arguments on Application of the Licensing Agreement

[65] Portlan argues that the obligations under Articles 4.4-4.5 and the restrictions under Article 5.1 apply only where termination for cause occurs under Article 4.3. Here the Agreement expired by mutual agreement, therefore, these Articles do not apply.

[66] Portlan does not apply their arguments respecting “termination” to Article 4.6 and specifically does not deny that Portlan is responsible for invoices incurred in the

life of the Agreement so long as the charges are legitimately issued and consistent with the Agreement in place at the time.

[67] Portlan submits that the language of Articles 4.4 and 4.5 is intentional and limits the application of these clauses to situations where one party has terminated the Agreement for cause under Article 4.3. They argue the plain meaning of “by either party” should be understood as a choice by one party to terminate the Agreement. They argue that the placement of Articles 4.4 and 4.5 immediately following Article 4.3 reveals the connection between these provisions. They say that expiry would not be brought about “by either party” but would be automatic with the passage of time.

[68] They further submit that the commercial sense of the contract is consistent with this interpretation because there would be few obligations outstanding if the Agreement expired without termination for cause. The parties would anticipate when the arrangement would end, Portlan would be unable to purchase components from Talius, and could not sell Habitat Screens due to existing intellectual property laws which apply whether or not the Agreement exists. Whether or not any terms of the Agreement survived, Talius would be required to find a new product to manufacture and sell, and they would not have any use for Portlan materials or intellectual property.

[69] Portlan argues it would be commercially absurd for the Agreement to operate such that Portlan is forced to breach contracts with clients who had ordered Habitat Screens prior to the natural expiry of the Agreement by requiring they return components and finished products immediately on conclusion of the Agreement. They submit this would affect Talius’ goodwill and the Habitat Screen brand.

[70] Portlan argues if the Agreement was terminated for cause, there may be good reason not to fulfill an existing order depending on the nature of the breaches and the relationship. By contrast, in a mutual expiry context, it is more likely an amicable relationship would still exist, and parties could agree on refunds for any returned components, to the benefit of both parties. Similarly, if the Agreement expired, the

parties would be likely to agree on the return of any materials, which Portlan would be prohibited from using to produce Habitat Screen products anyway.

[71] Portlan argues that termination is required for Article 5.1 to apply but acknowledges that the wording of 5.1 makes it difficult to interpret. There is ambiguity and inconsistency in the use of “termination” in Article 5.1 and it could be interpreted to apply on the end of the Agreement regardless of how the end came about. This is particularly so when considering the use of “terminating” in the September 2018 Amendment. Given that a conclusive unambiguous interpretation is not available, in their view, Portlan submits that 5.1 should be interpreted against the backdrop of the principles prohibiting unreasonable restraint of trade.

[72] Portlan submits that the provision may be interpreted in a manner that narrows its application in this case but otherwise saves it from invalidity.

C. The Meaning of “Termination” in the Licensing Agreement

[73] I refer first to the words of the Agreement. The section titled “Term and Termination” does not contain “termination” as a defined term. I find, however, that the section provides the Agreement’s understanding of the word. The title of the section itself presents a distinction between “term” and “termination”—or between the natural, time-bound conclusion of the Agreement, and a termination event.

1. Article 4 and Termination

[74] Article 4.1 sets out the term of the Agreement, being five years from the effective date. As discussed below, this term was amended on September 26, 2018. Article 4.2 provides for the potential of an extension of the Agreement for 24 months, which was achieved in the September 2018 Amendment.

[75] Article 4.3 provides for termination. I find that, read together with the balance of Article 4 and the rest of the Agreement, this provision provides the meaning of “termination” within the Licensing Agreement, in particular in respect of Article 4.4 and 4.5. It stipulates that “either party may terminate this Agreement prior to the

expiry of this Agreement for cause only...” and provides that breaches can give rise to cause, and that termination requires 60 days notice.

[76] In doing so, following the words of the Agreement, Article 4.3 identifies that “termination”:

- a) is effected by a party (either party), not the passage of time;
- b) is contemplated to occur prior to the time expiry of the Agreement, so is not linked to the term date concluding the Agreement;
- c) must be connected to cause, so is linked to a party’s assertion of a breach of obligation, representation, or warranty;
- d) is effected with notice; and
- e) can be undone by curing an asserted default.

[77] Absent these conditions in Article 4.3 that define “termination” within the entire context of the Licensing Agreement, I conclude that the end of the Agreement with simple or agreed expiry of the term is not a “termination.” I find this interpretation reflects the intentions of the parties at the time the Agreement was entered into in 2016.

[78] I find that the distinction between “term” and “termination” makes business sense too because different conditions arise in the planned conclusion of a commercial relationship as opposed to the disruption of that relationship in an unplanned manner due to breach or cause. These circumstances embody different expectations about the parties’ behaviour, and I find that it makes commercial sense to plan separately for each of these distinct scenarios.

[79] The amendment made on September 26, 2018, which extended the Licensing Agreement to December 31, 2023, creates confusion by using the language of

“terminating.” I nevertheless conclude that it does not transform the meaning of “termination” in the Agreement. The amendment reads as follows:

Paragraph 4.1 of the Licensing Agreement shall be deleted in its entirety and replaced with the following: “The rights and obligations of the parties under this Agreement shall remain in full force and effect commencing on the Effective Date and terminating on December 31, 2023.”

[80] I find based on the language of the whole amendment and the surrounding context that the September 2018 Amendment was put in place expressly to achieve the extension of the Agreement for an additional term. It uses the word “terminating” in the clause replacing Article 4.1. In doing so, I interpret it to mean “ending” as opposed to effecting a termination for cause in the manner described in Article 4.3. The language used in the Amendment describes the period in which the rights and obligations will continue and will end but does not supplant the process for “termination” which is set out in Article 4.3. While the use of this word causes friction in the Agreement and is arguably an awkward choice for that reason, it does not overwhelm the meaning of Article 4 or the intention of the parties, considering the Agreement as a whole.

[81] I find that, given that the September 2018 Amendment also expressly notes that the terms of the Licensing Agreement are otherwise unamended, the parties did not aim to use this clause to transform the meaning of the process set out in Article 4.3, which I have concluded provides the definition of “termination”.

[82] Interpretation of the Agreement must seek to respect the intentions of the parties, and commercial parties are presumed not to enter into agreements with commercially absurd results. I find that interpreting “termination” to have the parameters set out in Article 4.3, in reference to Articles 4.4 and 4.5, does not create an absurd result. The significance of my conclusion on the meaning of “termination” is that Articles 4.4 and 4.5 are inapplicable to the conclusion of the Licensing Agreement with Portlan, and Talius Group is not entitled to relief in relation to those provisions.

[83] Finding that termination has the same meaning in Article 4.6 as well would not mean that Portlan is free from any liabilities incurred in the course of the Agreement if the Agreement expired due to passage of time. Article 4.6 simply clarifies that in the event of termination under Article 4.3, any existing liabilities “already owed” *remain* owing despite that there was asserted cause for termination. It provides certainty where the commercial relationship has broken down. Since Portlan does not contest the ongoing liability for properly invoiced charges, I do not need to address this Article’s application in every scenario. In this one, the parties agree that existing liabilities are sustained after expiry of the Agreement.

2. Article 5 and Termination

[84] “Termination” in Article 5.1 is not modified by the words “by either party” as it is in Article 4 of the Agreement. I understand Talius Group’s argument that “termination” should be read in Article 5 to include its general dictionary meaning of “ending.” I also understand Portlan’s argument that there is ambiguity in this provision in its use of “termination” without reference to “either party” or “any.” However, I depart from both parties’ arguments in my interpretation.

[85] The relevant text of Article 5.1 reads as follows:

During the Term of this Agreement, and for a period of 1 year after the termination of this Agreement, neither Portlan, nor any Director or shareholder of Portlan, shall [engage in the competing activities].

[86] I read this provision in its full context and in light of the immediately preceding section, Article 4, that defines a “termination.” In doing so, I conclude that the provision means that for the life of the Agreement, and one year after termination (if that occurs), Portlan is not to engage in the applicable competing activities.

[87] Article 5.1 refers to “the termination” which, read immediately following Article 4, I find refers to termination within the meaning of Article 4.3 when viewed in the entire context of the Agreement. I interpret Article 5.1 in this manner rather than conclude, as Portlan proposes, that it is excessive and unenforceable more generally, or read it down in another manner.

[88] I acknowledge that the September 2018 Amendment terminology causes interpretive friction in this section as well, by describing the expiry of the obligations between the parties as “terminating” on a particular date. Again, that amendment was not made with the intention of altering the architecture of the Agreement more generally; its purpose was the extension of the living term of the Agreement. Accordingly, I do not give that language undue significance in my interpretation of Article 5.1, which pre-existed and was expressly not altered by the September 2018 Amendment.

[89] Interpreting the Agreement with an internally consistent meaning of “termination” gives primacy to the words of the Agreement made between the parties. It respects the internal context of the Agreement, being the placement of the term and the surrounding provisions. It also considers the surrounding factual circumstances, being that a termination for cause would call for non-competition measures as it would represent the breakdown of the commercial relationship, and accordingly this interpretation has a stronger business rationale in the circumstances.

[90] I find Article 5.1 only applies where there has been a termination for cause pursuant to Article 4.3. I conclude on a balance of probabilities that this meaning of “termination” is most consistent with the intention of the parties at the time they entered into the Licensing Agreement.

D. Is the Non-Competition Provision (Article 5) unenforceable because it is an Unreasonable Restraint on Trade?

[91] As both parties advanced detailed and careful arguments about the enforceability of the provision generally, I address these arguments in the alternative. If I am wrong about the interpretation of “termination” in Article 4.3 and its bearings on the applicability of Article 5.1, the following conclusions represent my decision on the enforceability of Article 5.1.

[92] The text of Article 5 is as follows:

5. NON-COMPETITION

5.1 During the Term of this Agreement, and for a period of 1 year after the termination of this Agreement, neither Portlan, nor any Director or shareholder of Portlan, shall:

(a) carry on or be engaged in or be concerned with or interested in or advise, lend money to, guarantee the debts or obligations of or permit Portlan's name to be used or employed by any individual, firm, syndicate, corporation or other business enterprise engaged in or concerned with any business which is competitive to the business of manufacturing and/or selling the Products, or similar goods within the Territory;

(b) attempt to solicit any business, Dealers, or customers away from Talius; or (c) do any act the probable effect of which would be detrimental to the business of Talius or would be to impair relations between Talius and its customers, Dealers or employees, either individually or in partnership, whether by way of trust, agency or otherwise, jointly or in connection with any Person or persons, including without limitation any individual, firm, association, syndicate, company, corporation or other business enterprise, as principal, agent, shareholder, director, officer, employee or in any other manner whatsoever.

5.2 During the Term of this Agreement, Talius shall not sell the Products within the Territory.

[93] The Court of Appeal in *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301 [IRIS] sets out the framework to be applied in the challenge of a provision on non-competition. The starting point, as noted by the Court is that a “covenant not to compete is a restraint of trade and presumptively unenforceable” but this presumption can be rebutted “if it is reasonable as between the parties and with [respect] to the public interest”: *IRIS* at para. 16. The Court goes on to state the burdens of proof on this question:

[17] Where the enforceability of a non-competition clause is put in issue, the burden to establish that it is reasonable as between the parties is on the party seeking to enforce the clause. If the clause meets that requirement, the burden of establishing that the clause is unreasonable by reference to the public interest falls on the party resisting enforcement: *Green v. Stanton* (1969), 1969 CanLII 793 (BC CA), 6 D.L.R. (3d) 680 (B.C.C.A.).

[94] The Court sets out the following analysis, which is in two stages, the second of which has three steps.

[95] The first step is to determine the degree of scrutiny to be applied to the clause. This depends on the context. Courts distinguish “between non-competition clauses found in agreements to sell a business and those in employment contracts”: *IRIS* at para. 19. The reason for this is quoted at para. 20 of *IRIS*, from *Shafron v. KRG Insurance brokers (Western) Inc.*, 2009 SCC 6:

[20] ...

[21] The sale of a business often involves a payment to the vendor for goodwill. In consideration of the goodwill payment, the custom of the business being sold is intended to remain and reside with the purchaser. ... And as stated by Dickson J. (as he then was) in *Elsley v. J. G. Collins Insurance Agencies Ltd.*, 1978 CanLII 7 (SCC), [1978] 2 S.C.R. 916, at p. 924:

A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition.

See also *Burgess v. Industrial Frictions & Supply Co.* (1987), 1987 CanLII 2722 (BC CA), 12 B.C.L.R. (2d) 85 (C.A.), *per* McLachlin J.A. (as she then was), at p. 95.

[22] The same considerations will not apply in the employer/employee context. No doubt an employee may build up a relationship with customers of the employer, but there is normally no payment for goodwill upon the employee leaving the employment of the employer. It is also accepted that there is generally an imbalance in power between employee and employer. For example, an employee may be at an economic disadvantage when litigating the reasonableness of a restrictive covenant because the employer may have access to greater resources (see, for example, *Elsley*, at p. 924, and *Mason v. Provident Clothing and Supply Co.*, [1913] A.C. 724 (H.L.), *per* Lord Moulton, at p. 745, quoted below at para. 33).

[96] These approaches address the distinct nature of different transactions. An employer/employee negotiation will generally involve an imbalance of power, whereas a purchase/sale of a business will typically involve more balanced parties: *IRIS* at paras. 21–25. The Court will apply heightened scrutiny in the prior case and lesser in the latter.

[97] I note that no other examples of non-competition clauses other than employment and purchase/sale of a business were provided, so only these two poles are described in the authorities presented to me.

[98] Once the degree of scrutiny is established, the second stage asks three questions:

- a) Was there a legitimate proprietary interest to be protected?
- b) Was there a less restrictive means of protecting that interest, or is the clause necessary?
- c) Is the scope of the non-competition clause no broader than necessary to protect the interest of the party seeking to enforce it (with reference to the prohibited activity, the geographic area of the prohibition, and duration of prohibition)?

IRIS at paras. 26–35.

[99] A restriction that exceeds what is adequate to protect the interest of the party is not reasonable and will not be enforced: *IRIS* at para. 36.

[100] Portlan argues that the non-competition clause in Article 5.1 is too broad and destructive to the public interest to be a valid and enforceable non-competition clause. By way of context, Portlan submits that the effect of compliance with Article 5.1 would be that after the agreed expiry of the Agreement, Portlan would have to cease operations and go out of business for an entire year. Portlan argues for a business of their size this is a potentially fatal blow to their viability. Portlan says that the effect would be to eliminate Portlan as a competitor, and the public and marketplace would suffer. Talius Group argues that the provision is reasonable and enforceable.

1. Level of Scrutiny

[101] Talius Group argues that since Article 5.1 does not arise in an employment agreement, and is part of a sophisticated commercial licencing agreement, it does not attract heightened scrutiny. They rely on a number of factors in making this argument:

- First, that Seaton Sunrooms, predecessor to Portlan, did not manufacture its own retractable screens, and all of its knowledge of doing so came from Top Rollshutters.
- Second, Talius Group argues that the Agreement included trade secrets, which supports the reasonableness of the non-competition clause.
- Third, Portlan itself was established as a special purpose vehicle for the Licensing Agreement, and this vehicle should be seen as having the same 'shelf-life' as the Agreement.
- Fourth, Talius Group argues that Portlan was highly profitable.
- Fifth, they submit that the Agreement gave special rights to Portlan exclusively, including that it would be the manufacturer.
- Sixth, Talius Group argues that there was no imbalance of bargaining power.

[102] In these circumstances, Talius Group submits that the rationale for heightened scrutiny applicable to employment agreements is absent and it should be assessed under the principles governing commercial agreements between independent parties, where reasonable restraints designed to protect proprietary interests are routinely enforced.

[103] Portlan argues that the Licensing Agreement is neither an employment agreement (heightened scrutiny) nor a contract for sale of a business (less scrutiny). Unlike in the sale of a business, where the courts have a less interventionist approach because of the sale of goodwill being part of the bargain, this case does

not involve the sale of goodwill. Here, Portlan borrowed Talius' goodwill and contributed to it. At the end of the Agreement, that goodwill went back to Talius and Portlan could no longer benefit from it. In that sense, they argue, it is the opposite of the sale of a business: here, the goodwill was borrowed not transferred and is given back.

[104] The parties were in a relatively similar bargaining position, so it is not akin to an employment agreement. As such, Portlan argues, there should be scrutiny, but not as much as in the employment context.

[105] I conclude that in all of the circumstances the non-competition provision in question attracts a less demanding degree of scrutiny than an employment agreement. It is not an agreement with an innate imbalance of power like in an employment agreement. Nor is it an agreement for sale of a business where a critical factor is the transfer of goodwill that occurs in the process of the sale. Instead, it is a time limited agreement in which both parties benefit from the goodwill of the brand and product at different times, during and after the agreement. Accordingly, the concerns are somewhat different, and I would neither closely examine the clause in the interest of a weaker party avoiding exploitation, nor give strict deference to the parties' choices around protecting their goodwill.

[106] Here the *IRIS* factors can be applied in a manner consistent with a moderate level of scrutiny. In *Payette v. Guay inc.*, 2013 SCC 45 at para. 58, the Court concluded that the commercial context attracts a less demanding standard than the employment context, and that is generally the case here. There, the Court held that "a non-competition covenant will be found to be reasonable and lawful provided that it is limited, as to its term and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted": at para. 61. In the spirit of that conclusion, I view my task requiring an examination of the reasonableness and lawfulness of the specific constraints imposed by Article 5, and the specific interests they are said to be aimed to protect. The approach to be taken on a review that is at neither end of the

spectrum described in *IRIS*, I conclude, is more in the nature of a balancing of interests.

2. Proprietary Interest

[107] Talius Group argues that Top Rollshutters possessed a proprietary interest entitled to protection under the non-competition clause in Article 5.1. Talius Group submits that the proprietary interests included: valuable know-how, manufacturing processes, specifications and business systems; confidential commercial information including pricing structures, dealer arrangements and operational systems; and trade connections and goodwill. Talius Group submits that its proprietary interests in trade secrets, confidential information and trade connections were legitimate and substantial, and were interests to be protected through Article 5.1. Talius Group describes the proprietary interest as a “business system”, and that the Licensing Agreement provided “a structured transfer of an operating business model”.

[108] In reference to the *IRIS* framework, Portlan agrees that there is a proprietary interest in the goodwill in Talius, but that was transferred temporarily. There may have been proprietary interest in a customer list, but not in general knowledge of the market.

[109] In respect of whether there was a legitimate proprietary interest to be protected, I consider the examples referenced in *IRIS*. There, the Court notes that in *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916, 1978 CanLII 7 at 924, the Court identifies interests worthy of protection in an employment contract, being trade secrets, confidential information, and trade connections of the employer. These are susceptible to protection through a non-competition provision because such a provision would limit the ability to benefit from the use of these interests.

[110] The usual proprietary interests in trade secrets or confidential information are not conveyed to Portlan by the Licensing Agreement. There was a proprietary interest in the lists of names and contact information for current and prospective clients or dealers initially transferred to Portlan with the Licensing Agreement. I note that the British Columbia Court of Appeal in *IRIS* recognizes the existing trade

connections of a business to be a legitimate interest worthy of protection. However, in this case that transfer was limited to clients of Top Rollshutters in Ontario prior to the Agreement, and a proprietary interest to be protected by the Agreement would not capture clients or dealers subsequently secured by Portlan. I am not persuaded that the general know-how conveyed through the materials given to Portlan is a proprietary interest amounting to trade secrets.

[111] In the Licensing Agreement, there was a proprietary interest conveyed from Talius to Portlan in the form of the goodwill of the Talius brand, but temporarily. Once the Agreement concluded, the goodwill, including any that had been accrued through Portlan's efforts, would be returned to Talius. I am persuaded by Portlan's argument that after the conclusion of the Agreement and the return of the goodwill, there was no longer any proprietary interest in the goodwill that would need to be protected by a non-competition clause. Portlan could no longer utilize that goodwill and was otherwise precluded from using Talius trademarks following the end of the Agreement. Similarly, there may be a proprietary interest in other guides and instructional materials that were disclosed as a part of the Licensing Agreement, but those materials are of use only to a party who can produce the Habitat Screen product, and Portlan was foreclosed from doing so.

[112] Accordingly, I would find that the first question posed by *IRIS* is met in a limited sense, in that there are elements of proprietary interest engaged, in the form of a client list and manufacturing guides, and temporary transfer of goodwill. However, in the balance and in light of the other *IRIS* factors, these are not proprietary interests weighing heavily in favour of the need for a stringent non-competition provision.

3. Adequate Protection

[113] Talius Group submits that the interests in question could not have been adequately protected by a less restrictive provision such as a non-solicitation clause. They say that such a clause would not protect Talius Group's competitive advantage, which arises from comprehensive access to proprietary know-how,

manufacturing processes, materials, components, systems and dealer relationships transferred under the Licensing Agreement. Talius Group says a non-competition clause would not have prevented Portlan from competing in the same market with the same know-how and goodwill it acquired under the Agreement.

[114] Portlan submits that any proprietary interest in initial client lists could have been protected by a clause requiring Portlan to refrain from business after the end of the contract with the names on the lists provided. Portlan further argues that Talius' interest in guides or instructional materials is already protected because the materials would have been specific to Habitat Screens, which Portlan may not produce without the Licensing Agreement. Pricing information is non-confidential and does not require a non-competition clause to protect any of Talius Group's interests. Portlan submits it would have been sufficient to protect Talius Group's interests to require that Portlan not solicit business from existing Talius customers.

[115] I would answer the second question, whether there was a less restrictive means of protecting the interests, in the affirmative. If the concern with ongoing access to a client list which included clients of Talius that pre-existed the Licensing Agreement was that Portlan should not be able to take Talius business away from those initial clients, this is a clear case calling for a non-solicitation clause.

[116] It is not clear to me what a non-competition clause serves in terms of a proprietary interest in other instructional materials or guides, as these Habitat-Screen-specific materials would not be able to be used by Portlan following the Licensing Agreement's conclusion. I would not conclude that pricing information is confidential, as it could be obtained through any customer or dealer. Therefore, I would not conclude that the clause is necessary.

4. Breadth of the Restriction

[117] Talius Group submits that Article 5.1 is no broader than necessary to afford the required protection. They argue that one year is modest and proportionate in the context of a seven-year exclusive license and provides a reasonable transition period. They argue the geographic scope is confined, to the "Territory" (as defined in

the Agreement) only, and practically applies to Ontario only. They submit that the Supreme Court of Canada's decision in *Payette* at para. 56 provides the basis for concluding that a non-competition clause that applies outside the territory in which the business operates is contrary to public order; but where limited to the territory in which the business carries on trade, it may be reasonable.

[118] Talius Group further argues that the scope of restricted activities is limited and tailored to the specific mischief it is intended to prevent, being the immediate competitive exploitation of Talius Group's proprietary business, goodwill and trade connections made under the Agreement. Talius Group submits that the relevant commercial context is that Article 5.1 was negotiated as part of an arm's-length commercial arrangement and not imposed in circumstances of unequal bargaining power.

[119] Talius Group argues that Article 5.1 is not ambiguous. They say the clear terms do not require speculation about the nature of prohibited activities. In terms of the public interest factor, Talius submits that Article 5.1 is limited and does not restrict competition generally within the market.

[120] Portlan says that the third part of the *IRIS* framework indicates that the scope of Article 5.1 was too vague and broad to be reasonable. The prohibited activities under Article 5.1 are so broad that they encompass far more than the interests sought to be protected. They are also ambiguous and would not permit a party to know what would be included. Portlan also argues that the application of the non-competition provision for a full year was too excessive to be enforceable; they submit that forcing Portlan to cease any related kind of business for a year would be likely to force them out of business.

[121] Given my conclusions in respect of the first two inquiries, the Court in *IRIS* makes clear it is not necessary for me to make further findings about whether the scope of the non-competition clause is reasonable. I would simply comment that the clause appears to have an excessive scope in terms of the activities prohibited and its duration, given the expectation that such a clause would afford no more than

adequate protection to the party in whose favour it is imposed. Instead, the clause is so broad and vague that it could be interpreted to require Portlan, and possibly any enterprises with which Portlan directors are affiliated, to cease business entirely in the exterior window-coverings field for a year. The clause has excessive breadth in who it captures, what activities are contemplated, what types of goods are implicated, where these limits exist, and the time period in which these restraints apply. This exceeds what is commercially reasonable in all of the circumstances of these parties and particularly in view of the proprietary interest sought to be protected, which is modest.

[122] In the result, I have concluded that Articles 4.4, 4.5 and 5.1 do not apply in the case of a time-based expiry rather than a termination. As such, I do not need to turn to the question of the nature and extent of damages. The claims under these provisions are dismissed.

E. Alternative Plea of Unjust Enrichment

[123] Talius argues in the alternative, if Articles 4.4, 4.5 and 5.1 are inapplicable, Portlan was nevertheless unjustly enriched by continuing to manufacture and sell Habitat Screens in 2024 using Talius Group's designs, know-how and components, and that Talius was correspondingly deprived without juristic reason: *Kerr v. Baranow*, 2011 SCC 10 at para. 32. Talius argues:

- a) Portlan was enriched by the continued manufacture and sale of Habitat Screens;
- b) Talius suffered a corresponding deprivation through loss of opportunity to manufacture and sell Habitat Screens in the Ontario Market; and
- c) there is no juristic reason to retain the benefit of the sales after the end of the Licensing Agreement.

[124] I have concluded on a balance of probabilities that Talius Group has not proven that Portlan continued to sell Habitat Screens. I am unwilling to draw the

inferences proposed without more. I accept Ms. Watorek's sworn testimony, despite some of its flaws or gaps, and I do not find that her testimony is internally irreconcilable. I conclude that Portlan understood the Agreement expired and it could no longer sell Habitat Screens; Portlan completed its last orders of those products; it established a new relationship with Heroal and moved to selling a new product in the market; and Portlan further destroyed whatever components of Habitat Screens remained. While I accept Talius Group's argument that it was unusual and financially imprudent for Portlan not to return the components and require that Talius refund them, this does not tip the balance of probabilities in favour of a conclusion that Portlan went and used those components to sell Habitat Screens. I also note that Portlan's failure to return the balance of components meant that Talius was not required to refund them under the Agreement and was not put to that expense.

[125] I do not need to address the balance of the analysis of unjust enrichment given my finding on the first factor, and I dismiss the alternative relief accordingly.

V. UNPAID INVOICE CLAIMS

[126] I must determine whether invoices issued by Talius Group to Portlan are owing pursuant to the Licensing Agreement, and in particular whether charges related to international tariffs, currency fluctuations, shipping, interest, royalties and components are owing.

[127] There can be no question in this case that properly invoiced orders that remain unpaid are owing, regardless of the mechanism for ending the Agreement. I must determine whether all or some of the invoices claimed are payable by Portlan.

[128] Portlan submits that if Talius Group satisfies the Court that the unpaid invoices are legally permitted under the terms of the Licensing Agreement, and that the charges are accurate, Portlan will pay those amounts. Portlan has objected to paying the invoices for a number of reasons, including that Talius Group failed to correct clear errors in its claims to royalties owing until shortly before trial. Portlan submits that Talius Group should be held to strict proof of each invoice, and challenges certain of the invoices on various grounds.

[129] Portlan objects to paying certain remaining unpaid invoice claims with respect to charges for tariffs (charged to Top Rollshutters), interest on invoices, currency fluctuation amounts, royalties, and shipping fees unilaterally imposed. Portlan submits that the Licensing Agreement does not include terms that would permit Talius to charge Portlan for these amounts. Portlan says that Talius' argument that they may charge for these amounts cannot be accepted because the invoices are governed by the Licensing Agreement and the Agreement has a strict entire agreement clause, written amendment clause, and no waiver clause which exhaust any external avenues for Talius to require Portlan to pay anything not explicitly agreed to between the parties. They further argue that even if Portlan had not objected to the payment of one of these charges in the past, it would be free to object to paying them later because of the no waiver clause.

[130] I reproduce here a table summarizing the outstanding invoices claimed and the claims to interest on these invoices, including those that have been paid, but paid after their due date. These are organized by type of invoice as different issues arise in respect of the categories of invoice.

A. Invoices and Amounts Claimed

Invoice Number	Invoice type	Invoice date	Amount of invoice	Due date	Paid	Unpaid	Interest claimed
2400320	Tariff	2024-02-29	60,300.62	2024-03-30		45,880.32	19,488
2400321	Tariff	2024-02-29	37,958.93	2024-03-30		37,958.93	16,197

240032 2	Tariff	2024- 02-29	35,990.8 8	2024 -03- 30		33,343.5 6	14,163
230267 9	Component s	2023- 12-18	30,779.7 6	2024 -01- 17		30,779.7 6	14,552
240002 4	Component s	2024- 01-04	5,376.79	2024 -02- 03	5,376.7 9		2,287
240022 9	Component s	2024- 02-12	3,117.07	2024 -03- 13	3,117.0 7		1,246
240034 2	Component s	2024- 03-06	23.551.5 0			23.551.5 0	9,911
230225 9	Component s/ Currency Fluctuation	2023- 10-13	16,969.5 5	2023 -11- 12		16,969.4 5	8,759
230266 9	Component s/ Shipping	2023- 12-18	13,589.8 1	2024 -01- 17	7,289.8 1	6,300	6,161
240013 4	Dbox Software charge	2023- 12-31	1,932.00	2024 -01- 30	1,932.0 0		827
Various	Royalties	2022				4,298	

1. Tariffs

[131] After March 2022, the Canada Border Services Agency (the “CBSA”) began charging tariffs on shipments of Allutech components produced in Belarus. The evidence is that these amounts were not invoiced to Portlan as part of the wholesale price until February 29, 2024, at which time Top Rollshutters was certain that its request for exemption from those tariffs would not be granted. Talius indicated that the approach to invoicing the tariff costs was communicated to Portlan, explaining that the tariffs would be payable when they were later assessed.

[132] Talius says that the tariffs were assessed on Top Rollshutters’ imported shipments, and Top Rollshutters paid them. When invoicing Portlan, Talius did not mark up the tariffs but passed on the tariff amounts only, despite the cost they had incurred in retaining legal and other advisors to seek a remission order from the Canadian government. There was no practical alternative to obtaining the components from Allutech, which were necessary for the production of Habitat Screens.

[133] Ms. Watorek was aware that Allutech was the supplier for certain components, that these were manufactured in Belarus, and that because of the war in Ukraine there was a possibility that the Canadian government could charge a tariff of 35% on those components, because Talius had informed her of this potential by e-mail, and she had responded to say that if it were charged, she would pay the tariff cost. Talius says that accordingly, Portlan agreed to pay these tariffs, which have been invoiced.

[134] Talius further argues that the tariffs form part of the “Wholesale Price” (as defined in the Agreement) of the Allutech components. In the Licensing Agreement, the relevant provisions include:

“Wholesale Price” ... for each item, the price upon which a component of product is sold by the manufacturer of said product or component.

3.1 ... The Components shall be sold by Talius to Portlan at a price no greater than Wholesale Price or a price upon which Portlan could acquire same directly from the supplier...

[135] Talius argues that nothing in the Agreement limits the “Wholesale Price” to a base price, nor does it exclude government charges that are inseparable from the price at which the manufacturer sells the product into Canada.

[136] Talius submits that proper contractual interpretation requires an interpretation that avoids commercial absurdity and instead provides consistency. They say that the Wholesale Price must be interpreted in a commercially realistic manner. Where a manufacturer cannot lawfully sell and deliver goods into Canada without payment of tariffs, those tariffs form part of the price upon which the goods are sold. These are not discretionary costs but a mandatory component of the landed Wholesale Price.

[137] This position, Talius argues, is supported by the fact that other charges also form part of the Wholesale Price, such as freight and GST. It is also supported by the fact that there was no fixed price for the components, and these would be variable and contingent, and would necessarily be responsive to supplier costs. Talius submits that the parties’ course of dealing confirms that variable, post-order charges were understood to be part of the wholesale pricing mechanism.

[138] Given that Portlan could not obtain the components at a lower price from any supplier, Article 3.1 applies, in that when Talius charged Portlan the tariffs, it did not charge more than what Portlan would have paid if it were able to obtain the materials directly.

[139] Talius argues that the entire scheme of the agreement, understood correctly, does not contemplate Talius absorbing a 35% government-imposed tariff on behalf of Portlan.

[140] Talius claims that the amount owing by Portlan for tariff payments is \$117,356, plus accrued interest of \$49,849 from the invoice date.

[141] Portlan argues in response that the Licensing Agreement does not allow Talius to charge for tariffs. The term “Wholesale Price” within the Agreement must be interpreted to determine what was contemplated by the parties, and Talius argues that the plain meaning of the provision means the price set by the

manufacturer (in this case Allutech). That price would not include tariffs which are set by the Canadian government. They say when the contract was formed, there were no applicable tariffs in play at the time, so they were not within the parties' contemplation.

[142] Portlan says that the fact that Ms. Watorek wrote that Portlan would pay tariffs if they were charged does not change Portlan's liability under the Agreement because of the entire agreement clause, no waiver clause, and written amendment clause.

[143] Portlan further argues that the plaintiff has not proven Talius Group purchased the right to be paid for these tariff charges from Top Rollshutters in the receivership. They say if Top Rollshutters never paid the tariff charges before the receivership, the receivable never became an asset capable of being sold to Talius Group. Portlan argues that Talius Group has not tendered evidence that Top Rollshutters actually paid charges to CBSA before the receivership sale. If they had not been paid, the debt to CBSA would have remained unpaid on Top Rollshutters books' and would have been wiped out when Top Rollshutters went bankrupt. Portlan says Talius should be held to strict proof on this account.

[144] Talius' response to this argument is that Portlan's obligations to pay the invoices are fixed at the point of sale and invoicing. Nothing in the Licensing Agreement requires that Top Rollshutters first pay the government charges or suppliers before invoicing the anticipated amount. Talius says the unpaid invoices were valid and enforceable accounts receivable at the time of the receivership. In the receivership, Justice Brongers expressly approved the sale agreement and ordered that accounts receivable be vested in the purchaser. With that, the accounts receivable became the property of Talius Group. Talius submits that Portlan's position on the requirement that the charged tariff be paid is inconsistent with the receivership framework, and unfounded in any legal authority. Instead, a receivership routinely transfers unpaid accounts receivable, disputed receivables, and receivables associated with unpaid supplier invoices. The fact a supplier or

other charge underlying the receivable has not been paid is immaterial to the existence of the asset. Mr. Christiaens testified that the tariff charges were in fact paid by Talius.

a) Conclusion on Tariffs

[145] I accept Talius' argument that Talius Group is not required to show that the tariff underlying the invoice for that amount was in fact paid. I am satisfied that the accounts receivable vested in Talius Group in the receivership and that these included invoices that had been issued by Top Rollshutters for amounts payable (or according to Mr. Christiaen's testimony, paid) to CBSA in satisfaction of tariff charges on Allutech components produce in Belarus.

[146] The receivership model does not require that every invoice that creates an account receivable be an undisputed invoice or one for which each underlying charge has already been paid. It would not be proportionate to require, for example, that Top Rollshutters had paid all of the GST it owed in order to conclude that invoices in which GST were included were included as accounts receivable. It has not been demonstrated to me that the receivership in this specific case required that either.

[147] In any event, I believe the testimony of Mr. Christiaens that under his supervision tariff invoices owing to CBSA were paid by Talius Group.

[148] Accordingly, I find that Talius has standing to seek payment of the accounts that include tariff charges. As such, the issue turns on whether the Wholesale Price includes amounts in addition to the component price which are necessarily incurred in order to obtain the components. While the language of the Licensing Agreement is not specific on this fact, I find that the Wholesale Price and Article 3.1 reveal that the Wholesale Price of the components ordered by Portlan is the cost they would incur if they had to obtain them themselves.

[149] It is a commercially reasonable interpretation of Article 3.1 that "a price upon which Portlan could acquire same directly from the supplier" would include the

ancillary costs incurred to acquire the same from the supplier. This would include the tariffs charged on those components making it impossible to receive the items without incurring those charges. I agree with Talius that such charges come to form part of the payment price set out in Article 3.1.

[150] Given my conclusion that Article 3.1 permits Talius to invoice Portlan for the amount it would have cost Talius to obtain the components from the supplier, Portlan is liable for invoices ending in numbers **320**, **321**, and **322** listed above.

2. Components

[151] Portlan does not dispute that if proven, invoices for components only are payable, but there are a number of sub-areas of dispute.

[152] In respect of the invoice ending in **679** issued December 18, 2023, for the unpaid balance of \$30,780, I find based on the records before me in evidence that Talius Group provided the requested components and properly invoiced the amounts due.

[153] In respect of the invoice ending in **342**, issued March 6, 2024, for the unpaid balance of \$23,551.50, I find based on the records before me in evidence that Talius Group provided the requested components, and properly invoiced the amounts due.

3. Currency Fluctuation and Shipping Fees

[154] Portlan disputes the invoice ending in **259** because they say that the invoice charges them an amount reflecting a change in the currency exchange rate, which affected the amount Talius had to pay for the components it ordered on Portlan's behalf.

[155] Portlan argues that fluctuations in currency are not contemplated in the pricing features of the Licensing Agreement and are not recoverable. They say "Wholesale Price" does not say anything about currency or currency fluctuations or shipping or handling fees. Portlan submits that the currency in which Top Rollshutters or Talius does business is a risk that is borne by Talius Group only.

[156] Talius Group submits that in respect of invoice ending in **259**, Portlan misapprehends the nature of the invoice. Talius says that the balance outstanding on that invoice resulted from the final calculation on the amount of the Wholesale Price for components that were obtained by Talius on Portlan's behalf but also included additional components that had to be included to complete a container's worth for shipping, and which Portlan received and accepted.

[157] Portlan had paid a previous invoice as a deposit toward that shipment, which Talius had advised it had to prepay. In requesting Portlan's deposit for prepayment of the Allutech components, Talius Group provided a 2% prepayment discount.

[158] In the particular components order in question, unusually, Talius Group asked for prepayment, and treated this as a deposit toward the final amount owing for Allutech components. It seems to me that there are two issues that arose with this particular invoice. One is that it revealed that there was a lack of clarity about how the Wholesale Price of the components was set. In previous orders, as prepayment had not been required, Talius was able to invoice for the cost of the order once it had been priced and received. With this order, because of pre-payment being required by Allutech, the final price for obtaining the components was not able to be known before invoicing. The conversion of currency was a variable. But the other is that in order to make the shipment economical and possible, the container had to be filled. The additional components used to fill the container were ones accepted by Portlan and that material was invoiced to them.

[159] While there lacked clarity in Talius' explanation of how the Wholesale Price had been generated up until this time (i.e. including the cost to obtain the product in Euros), this is a valid means of establishing the Wholesale Price, being the price upon which Portlan or Talius could acquire the component from the supplier.

[160] I accept Talius's explanation that the order confirmed by Portlan (for \$272,084), less a 2% discount, and their prepayment of \$253,945 resulted in a balance of \$12,697, and that additional quantities of certain items, valued at \$4,272,

were added to make a full packing unit. The amount unpaid after the deposit on the shipment is \$16,969 and is owing to Talius.

[161] Portlan disputes the invoice ending in **669** because it charges for a shipping fee that Talius was not obliged to pay.

[162] Portlan argued that it often used its own accounts for shipping and handling. Portlan could have agreed to particular shipping charges where they asked Talius to provide shipping. In this instance, Portlan did not agree to pay the amount that Talius attempted to charge. Portlan suggested that the freight cost being charged was disproportionate, as the related components invoice was approximately equal in value to the shipping charge. However, Ms. Watorek confirmed in evidence that the shipping charge in fact related to a larger shipment of December 18, 2023, and not only the portion of that shipment reflected on the invoice in question. The misapprehension about the proportionality of the cost of shipping was corrected. I do note that this could have been avoided with clearer invoicing practices. It appears that in 2023, with this invoice and with invoice ending in **259**, a great deal of confusion could have been avoided with clearer and more transparent communication of the amounts charged.

[163] I find that Portlan made the order for the components delivered, and the shipping fee in invoice ending in **669** was charged as the cost of delivering the components. Portlan did not, for this shipment, arrange its own freight. They obtained the benefit of the shipping and the goods, and I conclude that Portlan is responsible for the charges in Invoice **669**.

4. Interest

[164] Portlan disputes Talius' entitlement to charge interest on late payment of invoices because the Licensing Agreement does not provide for the right to charge interest. Portlan argues that the Licensing Agreement was one that must be understood in a long-term supplier relationship. Portlan did not purchase goods on a one-off basis, where an invoice might stand as the main contract. Instead, the Licensing Agreement governed all purchases from Portlan, and all financial terms

formed part of the Agreement. A contract can be formed by invoicing, and interest is an enforcement mechanism; but here there is a master contract with an entire agreement clause. Additional imposition of an interest clause would have little commercial purpose.

[165] In this context, if Portlan did not pay, Top Rollshutters could refuse to sell them components or could terminate the contract. In such a long-term relationship, it is not surprising the parties would not require a late payment term. New terms cannot be inserted into a contract which is an entire agreement.

[166] Talius argues that even if there is no express provision for interest on invoices, the question is whether the parties agreed as a matter of the Agreement's formation and its performance, that overdue balances would bear interest. They say this can arise through course of dealing, consistent invoicing, acceptance without objection and reciprocal conduct.

[167] Talius submits that in this case, the evidence establishes express, bilateral and repeated assent to a 2% monthly interest term. Talius relies in particular on evidence in Portlan's own purchase order, which confirm a 2% monthly interest rate. In documents they created themselves, Portlan represented that their understanding of the Agreement was that it contained a term for 2% monthly interest on all past due accounts. Talius relies also on the fact that all invoices to Portlan from Talius contained the same interest provision and Portlan never objected.

[168] Talius further argues that Portlan imposed an identical term on its own customers. This, they say, decisively indicates that there was mutual assent to the provision, and that it was not unusual or inconsistent with standard business practices including in this particular industry.

[169] Talius relies on *Hardwoods Specialty Products LP v. Rite Style Manufacturing Ltd.*, 2006 BCCA 139 at paras. 14–19, where the Court concludes that “where there is no express agreement to pay interest, agreement may be inferred from a course

of conduct or an acknowledgement by the debtor subsequent to the contract being entered into.”

[170] Portlan argues that because the Licensing Agreement is silent on interest, the term of interest appearing on invoices is ineffective. They argue that the factual matrix of the Agreement explains why there was no interest term. The parties were in a long-term supplier relationship, and the Licensing Agreement governed all purchases, with all financial terms being part of that agreement. The contract does not provide for interest, and in a long-term relationship it would not be surprising that the parties would not require a late payment term because the contract contains other mechanisms for enforcement.

a) Conclusion on Interest

[171] I agree with Talius Group that the conduct of the parties can provide a factual foundation for a course of conduct or acknowledgement subsequent to the contract being entered into. In this case, however, the conduct of the parties did not give rise to an additional understanding about interest that had not been captured in the Agreement. Although Portlan was advised of the 2% interest on each invoice, the provision proved unnecessary until near the end of the parties’ relationship, as Portlan always paid its invoices. There was no evidence other than the standard invoices that suggest there was a subsequent agreement reached that could overcome the entire agreement clause of the Agreement.

[172] Unlike the charges for tariffs and shipping that should properly be understood as forming part of the Wholesale Price under the Licensing Agreement, interest is a separate charge that in my interpretation of the Agreement cannot be read-in. I come to this conclusion because there is no clause within the Licensing Agreement that contemplates interest. It cannot be read into a provision as being within the reasonable intentions of the parties, unlike the tariff and price variation charges based on currency and other issues, which describe how a price for components on a wholesale basis can be derived.

[173] I accept Portlan's argument that the 2% interest was not in the contemplation of the parties in preparing the Licensing Agreement, given their ongoing supplier/licensee relationship, and is not a recoverable charge.

5. Royalties

[174] The amounts initially claimed by Talius were admitted to be in error and were amended by the plaintiff. The initial calculation inadvertently included royalties on sales to Seaton, Rollmatic and Jans Awnings, which are excluded from that requirement. The remaining sum for royalties of \$4,182 from 2022 is calculated based on the initial tabulation of royalty charges, removing all of the clients and time periods for which no royalties were payable further to the Licensing Agreement and its amendments.

[175] Portlan argues that the royalties have not been adequately proven. In particular, they say that Talius Group has not identified through the evidence which specific sales form the basis for the remaining royalty claim which should be proven to provide the amount owing for outstanding royalties if any.

[176] I am satisfied on the evidence presented at trial that the amounts claimed as outstanding for royalties in 2022 are owing. The evidence presented by Talius Group was in the form of a global spreadsheet of Portlan's sales, originally relied on to generate a claim to nearly \$170,000 in royalties. Upon review by Talius Group in light of the Licensing Agreement and amendments, the calculation was revised a number of times to exclude all dealers and time periods for which royalties were not payable and Talius revised its claim accordingly. In doing this, Talius Group founds its ultimate claim for royalties on the assertion that the Licensing Agreement provides for royalties to be paid by Portlan on all sales, except when they are excluded. Having extracted all excluded sales from Portlan's ledger of sales for the relevant time period, the royalties are due only on what is remaining. In all of the circumstances, this is a proportionate manner in which to proceed, and I am satisfied with the reverse engineering of the modest royalties claim, and find that the amount calculated is due.

6. Conclusion on Invoices and Amounts Claimed

[177] I have found that Talius Group has proven the charges in bold in the table set out below. Talius demonstrated that Portlan owes tariff amounts which it agreed it would pay and which form part of the Wholesale Price of components. Talius demonstrated that the components invoices related to orders made and received by Portlan. Talius demonstrated that it was appropriate within the meaning of the Licensing Agreement to charge Portlan for components at a Wholesale Price including the costs of obtaining those goods, such as the cost of the currency in which they are sold at the time purchased, and shipping when appropriate. Talius has further demonstrated that the modest royalty charges outstanding are payable.

[178] I have not allowed the claimed interest as these amounts are not captured by the Agreement between the parties. The claimed amounts I have allowed are set out in bold in the table below.

Invoice Number	Invoice type	Invoice date	Amount of invoice	Due date	Paid	Unpaid	Interest claimed
2400320	Tariff	2024-02-29	60,300.62	2024-03-30		45,880.32	19,488
2400321	Tariff	2024-02-29	37,958.93	2024-03-30		37,958.93	16,197
2400322	Tariff	2024-02-29	35,990.88	2024-03-30		33,343.56	14,163

230267 9	Component s	2023- 12-18	30,779.7 6	2024 -01- 17		30,779.76	14,552
240002 4	Component s	2024- 01-04	5,376.79	2024 -02- 03	5,376.7 9		2,287
240022 9	Component s	2024- 02-12	3,117.07	2024 -03- 13	3,117.0 7		1,246
240034 2	Component s	2024- 03-06	23,551.5 0			23,551.50	9,911
230225 9	Component <i>s/ Currency Fluctuation</i>	2023- 10-13	16,969.5 5	2023 -11- 12		16,969.45	8,759
230266 9	Component <i>s/ Shipping</i>	2023- 12-18	13,589.8 1	2024 -01- 17	7,289.8 1	6,300	6,161
240013 4	Dbox Software charge	2023- 12-31	1,932.00	2024 -01- 30	1,932.0 0		827
	Royalties	2022				4,298	
					TOTAL OWING	199,081.5 2	

VI. CONCLUSION

[179] Talius Group's claims for breaches of contract and unjust enrichment are dismissed.

[180] Talius Group's claims for payment of unpaid invoices are allowed with the exception of late payment interest. The amount owing is \$199,081.52.

[181] Each party has had mixed success and will bear their own costs. My initial conclusion on costs is that there will be no order for costs to either party. The parties may seek to appear before me if further submissions on costs are required.

"E. Sigurdson J."

VII. APPENDIX: EXTRACTS OF LICENSING AGREEMENT**1. DEFINITIONS.**

In this Agreement:

...

(b) "Components" means all of the components, parts, hardware, fasteners, and any other objects manufactured or procured by Talius and used to create the Products;

...

(e) "Intellectual Property" means, collectively, the Trademarks, any trade secrets, any business methods, copyright in all of the Materials, and all patents, whether existing upon the Effective Date or subsequently coming into being;

(f) "Materials" means any written or verbal information provided by Talius to Portlan relating to the subject matter of this Agreement, including, but not limited to:

(i) guides setting out the standards, methods, procedures, techniques and specifications related to the Components, the Software, the Products, the Intellectual Property;

(ii) lists of names and contact information for current and prospective clients or Dealers;

(iii) any instructional materials relating to the Components, the Software, the Products, and the Intellectual Property; and

(iv) any other information, whether written or unwritten, given by Talius to Portlan and relating to the subject matter of this Agreement;

...

(h) "Products" means the fully-assembled Habitat Screen®, as described in Schedule B, and built entirely from the Components;

(i) "Royalty" " means the sum equal to 5% of the gross selling price of Products sold to Dealer(s) by Portlan but shall not include the sale of Components or Products sold through Portlan's own retail store;

(j) "Software" means Talius' proprietary software known as Talius Seredex Software, which is used to enter customer information, create quotes and orders, and create production work sheets;

(k) "Territory" means the entire Provinces of Ontario, Quebec, Prince Edward Island, Nova Scotia, and Newfoundland in Canada, and the entire state of Michigan in the United States of America;

(l) "Trademarks" means the trademarks as described in Schedule A;

(m) "Wholesale Price" means, for each item, the price upon which a component or product is sold by the manufacturer of said product or component.

2. GRANT OF LICENSE

2.1 Talius hereby grants to Portlan and Portlan hereby accepts the exclusive right and license, for the duration of the Term, to manufacture, promote, distribute, and sell the Products within the Territory, and to use the Trademarks in connection with the promotion and sale of the Products within the Territory.

2.2 During the Term of this Agreement, Talius shall not sell, or directly or indirectly grant to any Person the use of any right or license to sell the Products within the Territory, or to use the Trademarks, trade names, or likeness of the Products for any commercial use whatsoever within the Territory.

2.3 Notwithstanding section 2.2 and 5.2, Portlan and Talius both acknowledge the existence of, and agree to the continuation of, the commercial relationship between Talius and Mirage Screen Systems Inc. whereby Mirage Screen Systems purchases the Products from Talius and sells them under the brand "Mirage Screen".

2.4 The license granted herein shall not in any way impair or restrict the rights of Talius to sell goods, other than the Products, within the Territory. For greater clarity, the parties acknowledge that Talius may continue selling products, other than the Products, to customers within the Territory.

2.5 Talius hereby agrees to assign to Portlan, for the duration of the Term of this Agreement, the exclusive rights and license to manufacture, promote, and sell any patentable invention or Improvement that Talius subsequently creates in relation to the Products within the Territory.

2.6 The grant of license does not in any way transfer any ownership or title in the Trademarks, the Intellectual Property, or the Materials, and does not grant to Portlan any rights with regard to the Trademarks, the Intellectual Property, and the Materials other than what is specifically described in this agreement.

...

4. TERM AND TERMINATION

4.1 The rights and obligations of the parties under this Agreement shall remain in force and effect for a period of five (5) years, commencing on the Effective Date.

4.2 Provided Portlan has not breached any of the provisions of this Agreement, this Agreement may be extended for an additional twenty-four (24) months, commencing on the anniversary of the Effective Date, upon mutual agreement in writing between the parties.

4.3 Either party may terminate this Agreement prior to the expiry of this Agreement for cause only, as follows:

(i) by Talius, for breach of its Obligations, Representations and Warranties; or

(ii) by Portlan, for breach of sections 3 of this Agreement, or its Obligations, Representations and Warranties;

by providing sixty (60) days written notice of a desire to terminate this Agreement, provided that the party does not cure its default.

4.4 Upon termination by either party, Portlan will deliver to Talius all Components, Materials, and Products in their possession or in the possession of an agent, distributor; or other Person affiliated with Portlan. Talius will refund Portlan for all Components returned to Talius. For the purpose of this section, the Components and the products shall both be valued at the Wholesale Price.

4.5 Upon termination by either party, Portlan shall immediately cease to use, sell, promote, or in any way deal with the Trademarks, the Intellectual Property, the Materials, the Components, and the Products, except for in fulfilling their obligation under section 4.4 to return these same to Talius.

4.6 Any termination of this Agreement will not affect the liability of one party to the other with respect to amounts already owed by one party to the other upon the date of termination. Any amounts owing on the date of termination, as well as any other obligation arising upon termination in this Agreement, shall survive the termination of this Agreement.

5. NON-COMPETITION

5.1 During the Term of this Agreement, and for a period of 1 year after the termination of this Agreement, neither Portlan, nor any Director or shareholder of Portlan, shall:

(a) carry on or be engaged in or be concerned with or interested in or advise, lend money to, guarantee the debts or obligations of or permit Portlan's name to be used or employed by any individual, firm, syndicate, corporation or other business enterprise engaged in or concerned with any business which is competitive to the business of manufacturing and/or selling the Products, or similar goods within the Territory;

(b) attempt to solicit any business, Dealers, or customers away from Talius; or (c) do any act the probable effect of which would be detrimental to the business of Talius or would be to impair relations between Talius and its customers, Dealers or employees, either individually or in partnership, whether by way of trust, agency or otherwise, jointly or in connection with any Person or persons, including without limitation any individual, firm, association, syndicate, company, corporation or other business enterprise, as principal, agent, shareholder, director, officer, employee or in any other manner whatsoever.

5.2 During the Term of this Agreement, Talius shall not sell the Products within the Territory.